UNOFFICIAL GRIEVANCE GUIDE

A STEWARD'S GUIDE TO GRIEVANCES

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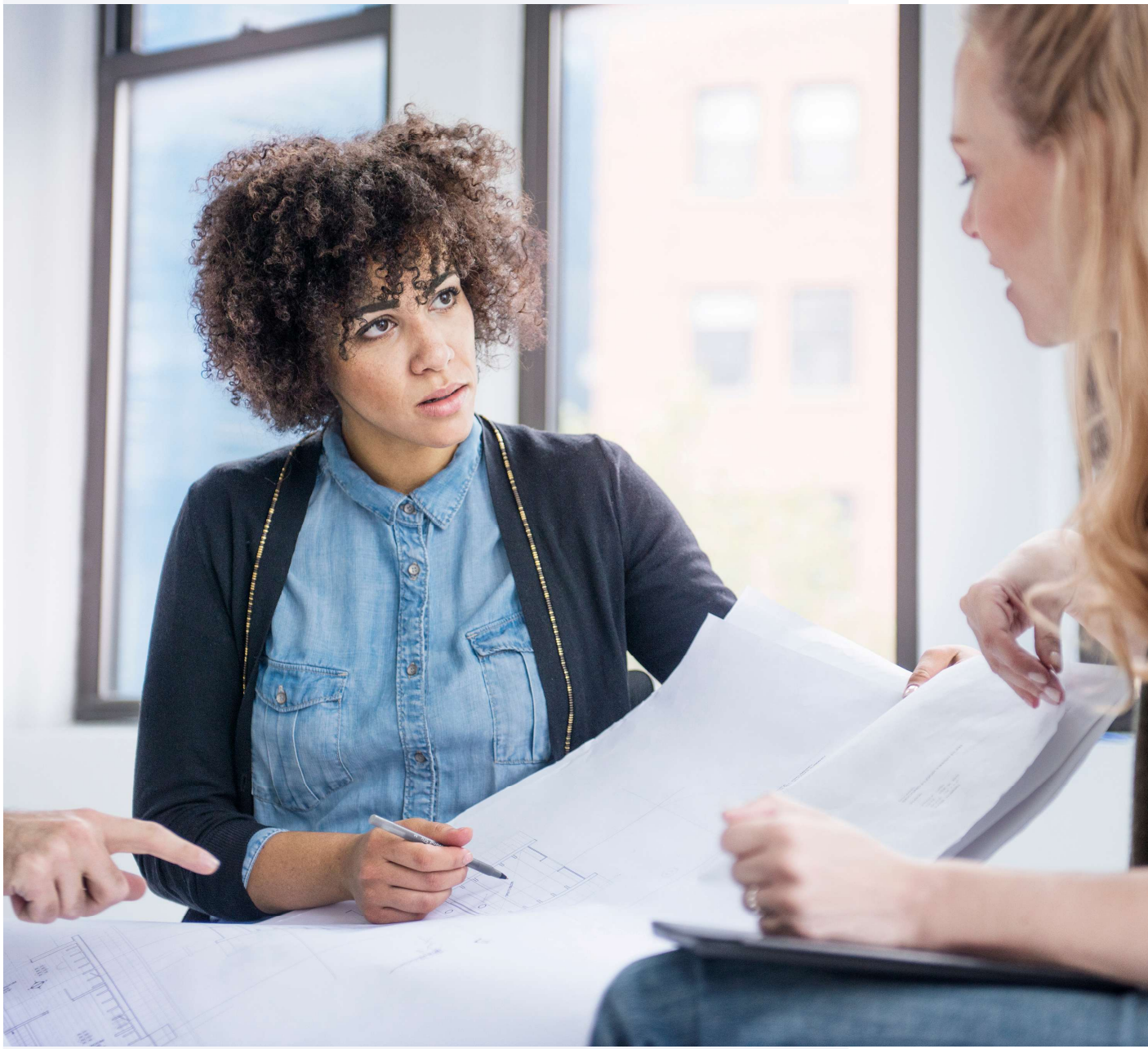

Disclaimer

Unfortunately it is 2025, and this book requires a Disclaimer.

"*This is the Unofficial Grievance Guide made by Eric Chornoby, Steward and Officer in the MPWU and 480-481 Area Local. This Guide is not affiliated with any APWU Local, State or Organization and the opinions expressed are not the opinion, views or belief of the MPWU or 480-481 Area Local. This Guide is designed for APWU Stewards and Officers. No individual Grievant I represent is listed in this guide and all examples are for the educational purposes only.*"

The APWU is full of bright, talented individuals who have molded the APWU and improved the wages, hours and working conditions of all members they represent. I am honored to be a member of the MPWU, and the 480-481 Area Local. If it were not for those excellent advocates who came before me, this guide would not be possible.

While we may have different opinions, LMOU's and JCAM's, this guide is designed to provide information that can be applied in any office, for Stewards and Officers of all levels.

Thank you for reading this long Guide and I hope it helps you.

Eric Chornoby

Executive Secretary MPWU, Editor 480-481 Area Local, National Young Member Committee, Inaugural Leadership Institute Attendee, Amazon Organizer and creator of APWUSteward.com

Forward & Acknowledgements

This book was born out of requests and convenience for the "author", Eric Chornoby. I use author liberally. This book is more of an accumulation and update of other books, guides and training I have used or taken over the years. While I expand on some topics due to my own expertise (Such as Procedural Due Process), I would be dishonest to not give credit where credit is due.

This book is heavily inspired (And blatantly plagiarized in parts) from a few primary sources including the Kehlert's Defense vs Discipline and the 2006 Mellen and Krueth Four State Training Guide. When I became a Steward, I found most of the Kehlert Strategy Guides on 21CPW, and the Krueth Guide through extensive google searches then bound and printed them at a large personal expense. For a solid year I thumbed through these guides as I developed as a Steward before switching to exclusively using Arbitrations and Court Cases as reference material.

No matter how much I learned, the problem became sharing that information. Over the years I have met Stewards and Officers from across the Country who needed help. Boiling down concepts in a brief email often leaves much to be desired. For a new Steward, an email which quotes Court Cases such as LaChance vs Erickson (1998) would add to the confusion.

I re-opened my old guides seeing highlighting, notes, sticky notes and originally, in January of 2024, attempted to make a guide. A new, substantive guide which would be the end-all, be all APWU Steward Resource. To not copy someone else, I spent several months researching, writing, and formatting. I read Arbitrations and reached out to others to fill in what I did not know. The problem became no matter how much I did, like this Forward, I continued to fall into over-explaining everything. My first draft was hundreds of pages on Due Process alone and was far too complicated. At that point I decided to shove pride away and borrow from those who came before me.

This book is the result. Designed to be a single, physical guide which covers several common grievance types in a readily accessible book. This is not designed to be overly complicated, or in great depth, but as a starting point. The interviews are borrowed, as are the Documentation from the original Training Manual, G.U.T.S. and some minor modifications from my experience. The information in Section One, Contractual Grievances, is highly inspired (Or copied) by the Mellen/Krueth Four State Guide, and the National APWU Training Manual. Section Two is highly inspired (Or copied) by Kehlerts Defense vs Discipline which appears in that same guide. Like all other guide makers have done in the APWU, we are updating and using what came before us.

This guide is not an alternative to Steward Training. A level of knowledge on standard forms, Article 15, and the Contract are assumed. Some writer quirks include capitalization of some random words, breaking some common Editorial practices, etc. This is a labor of love, done on my own time and dime. As much as this guide is for others, it is a way to consolidate the books, manuals, and terabytes of Court Cases / Arbitrations I have accumulated over the years.

It is important to note this is all advice and may not be consistent with local policies or other advice. As a DIY'er, the methodology is based on personal research and success. My opinions on the Grievance – Arbitration procedure is based on Legal Precedence to make sense of and strengthen the Grievances which we file. This approach is not flashy. Despite what you may see on TV (Law &

Order, Suits or Better Call Saul), our Grievance – Arbitration procedure is more like solving a puzzle rather than winning a flashy exchange in court.

Before I jump into the meat and bones of the guide, I must recognize those who made an impact on me as a Steward and helped me throughout the years.

The acknowledgements are in no order of importance or credit. I hope that if you meet someone mentioned here you thank them. In the APWU we stand on the shoulders of giants who fought for every word in our Contract. The approach to Grievances I teach and help other Stewards/Officers with is one of winning with documentation, outworking Management, and building solid case files. Everyone I mention has had an impact on the material in this guide or for me.

I must give credit to several NBAs (Or individuals who were NBAs at the time) who have released material or taught training I have learned from such as NBA's Kehlert, Krueth, Kessler, Akey, Mellen, etc. I must also give thanks to the Postal Labor Unions Sumer School and specifically instructors John Jackson Jr, Robert Romanowski, and Kenneth Prinz who, when I attended in 2019, answered questions which I now see as moronic.

When rounding out NBAs to thank, I must give special thanks to one of my own NBA's - Devendra "D" Rathore. I must thank Devendra "D" Rathore. I first interacted with D in 2019/2020. I had a situation where I was forced to 'recreate' a Grievance at Step 2 from another Steward and could not settle locally. The Grievance lacked the evidence I normally would provide. "D" was able to negotiate most of the remedy I was seeking – which I requested knowing some of it was impossible. His direct approach left a lasting impression.

Over the years I have attended training presented by D, had plenty of shoptalk, and I consider him a friend. D was the first NBAs to ask me to be his Technical Assistant / Advisor. D has been a supportive friend who encourages me to improve. If it were not for D, I would not have the same passion I have had since 2019/2020 to research and study Arbitrations with aggression.

Finally, D renewed my faith in the APWU. At times we become disillusioned with the process. The time it takes for Grievances to be resolved, inconsistencies with remedies, etc. D is consistent. It does not matter if it is Step 3, Pre – Arb, or an Arbitration. The case can be a 'winner' or a 'loser'. D does his best to get the best deal possible for the membership.

I have known and worked with many who have had a profound impact on how I approach Grievances and Advocacy but if I mentioned everyone, we would be here all day. Some other names stand out, such as Central Region Coordinator Amy Puhalski, and MPWU President Mike Mize. Despite knowing me for years, I appreciate the shop talk, exemplary guidance and treating a young Steward as an equal. Amy has always been remarkably supportive going back to when she was Vice President of her local.

My first National Convention as a delegate was under the MPWU banner. MPWU Secretary – Treasurer Darren Joyce gave me excellent advice, "sit next to Mike Mize to soak up as much as you can." I took Darrens' advice, but on the second day of Convention I could not help but speak up when Robert's Rules of Order were broken, or a Resolution was moronic. Mike and I spoke at length, and he treated me as an equal. By the end of the Convention Mike turned to my locals then

Executive Vice President Steve Wood and said something to the effect of, "Eric thinks like us, he is a good one to have." Those words left a lasting impression.

I must also thank my two Presidents from the 480-481 Area Local. Roscoe Woods and Steve Wood. Roscoe encouraged me to 'keep doing what I am doing' when it comes to Due Process and even requested my help in the 480-481 Area Local annual Steward Training – a right typically reserved for NBA's. His faith and mentorship have been instrumental in the path I have chosen to take in the APWU.

I currently serve under Steve Wood on the 480-481 Area Local Executive Board. Steve has encouraged and allowed me to take on additional responsibilities which pull me away from helping my local more – slack he picks up. Steve has been a fantastic mentor, encouraging me when needed. One quote which sticks with me is, "We all know what you can do Eric, just do it." Steve prefers to be in the fight himself, something I emulate to this day. I will forever appreciate my home local.

I would be remiss not to mention the following four individuals – who had the greatest impact on me as a Steward. Former 480-481 Area Local Vice President Gary Thomas has been a pivotal guide on how to approach Grievances, Management, and the Union. Gary has always seen my potential and has pushed me to tackle complicated or unwinnable Grievances to learn. His trust and mentorship are truly appreciated. Whenever I have a problem I cannot unwrap, I call Gary.

I must thank the advocates I have known my entire life and taught me my foundation. First is John Merritt, or Mr. Merritt. John is what I define as a 'Contract guy' in the DDAL. The knowledge I have gained from being in John's presence is astonishing. I don't think John knows the importance of handing out fliers in front of the DDAL Union Hall with the child of a friend; talking shop with him; or having Contract debates in front of that child, but I have never forgotten, and the information has shaped how I represent members today.

Next, but most important, is my father, Patrick Chornoby, the longest serving officer in the DDAL. The list of things I was able to help the DDAL with is exhaustive. Building the DDAL's file room and categorizing grievances, attending several State/National Conventions, attending every General Membership Meeting in Detroit for years, and even creating/binding the training books used in the DDAL. The knowledge I gained has been the bedrock of my advocacy even when I did not know it at the time. Most importantly, I learned the value of putting our membership first over personal gain. Without our membership we would not be here, and he is the reason I always put the membership first and believe it is the right thing to do.

Growing up, I would read the CBA in his office on weekends when General Membership Meetings were conducted. When I became a Steward, he gave me copies of all the training material he put together throughout the years and some Arbitrations I asked for. My only personal goal with my work in the APWU is to be as good an advocate as he is. I will let others judge how I am doing.

Finally, I must thank Tracy Watson, Installation Director and Chief Steward in the 480-481 Area Local. Tracy has been my mentor, my confidant, and my greatest supporter. Every opportunity I have taken was the result of her encouragement, guidance or effort. Tracy has encouraged me to take risks, fight hard, and grow as a Steward. I don't compare myself to many other advocates, but Tracy is the singular individual I go to for approval and help. Words cannot express my gratitude for the impact Tracy has had on me. I will be forever grateful to have her in my life.

About the Author

My name is Eric Chornoby, and I am a Steward and Officer in the MPWU and 480-481 Area Local. I grew up in the APWU. I can proudly say I knew the APWU Contract prior to ever becoming a Postal Employee. While in College I applied and was hired as a PSE. My first stint in College was seeking a degree in, ironically, education.

Over the years I was asked several times to be a Steward. In hindsight I regret not doing so sooner. I eventually got into trouble myself. A Steward, Tracy Watson, saved my job. After saving my job, Tracy asked me to be a Steward. I said yes – I felt obligated to repay her and the Union.

Once I hit the floor, I found I did not need to reference the Contract often, or the JCIM. I began trying to find Arbitrations to learn nuances. Arbitrations from the APWU, the NALC, and non – Postal sources. Knowing that we 'always' get one result using the same arguments was not enough. I wanted to settle issues on the floor permanently.

My educational journey pivoted once becoming a Steward. I earned multiple certifications in Negotiation and Conflict Management, including from the University of Michigan. From Harvard Edx I have a certification in rhetorical writing and speaking. Every waking moment has been about improving my ability as a Steward to argue, represent and negotiate.

With pride I say I have read thousands of Arbitrations and have reviewed thousands of Grievances – numbers which I am underselling. I have attended APWU training courses on my own time and dime. I have attended multiple Labor Notes Zoom Training programs, proudly representing the APWU. During COVID I reached the landmark of being in 1,000 Investigative Interviews actively preventing Discipline.

To round out my education I own and have read the very same textbooks Arbitrators learn from, such as: Practice and Procedure in Labor Arbitration by Owen Fairweather, How to Prepare and Present a Labor Arbitration Case by Charles S. Loughran, How Arbitration Works by Elkouri, Evidence in Arbitration by Marvin Hill and Black's Law Dictionary by Henry Campbell Black and so on. My bookshelf is full of worn legal textbooks with sticky notes, tabs and highlighting which I still reference often.

My representational activities are vast. I serve on two Executive Boards. I am the Editor of the 480-481 Area Local and the Executive Secretary of the MPWU – the number two position akin to Vice President. In 2024 I temporarily served as President of the MPWU. I have been a TA, or Technical Assistant/Advisor, in multiple Arbitrations. With luck I was an attendee at the Inaugural APWU Leadership Institute.

I currently assist with grievance appeals to Step 3 / Arbitration for the 480 – 481 Area Local and have conducted Due Process training for Stewards. I run a website providing resources to Stewards, APWUSteward.com. I am the Chairperson of the 480-481 Area Local Young Member Committee and a member of the National Young Member Committee. You may recognize me from the 2024 National Convention where I was on the microphone or appearing on stage for my work organizing Amazon. I live, breathe, and unfortunately dream APWU. This guide is for Stewards, by a Steward who believes our strength comes from working together for our membership.

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Introduction

NOTE: This first section of the introduction is copied from the 2006 Krueth Four State Training Manual, up to "The Power of Interviews".

Any discussion of grievance processing must begin with and emphasize this basic element: WE MUST RAISE OUR ISSUES AND ARGUMENTS IN SPECIFIC DETAIL NO LATER THAN IN THE WRITTEN STEP 2 APPEAL. We must share available documentation and evidence no later than the Step 2 discussion. The last real chance to add to or correct the record is our Additions and Corrections. Never rely on being allowed to introduce something later.

ARTICLE 15 GRIEVANCE-ARBITRATION PROCEDURE

Section 2. Grievance Procedure Steps Step 1:

(d) The Union shall be entitled to appeal an adverse decision to Step 2 of the grievance procedure within ten (10) days after receipt of the supervisor's decision. Such appeal shall be made by completing a standard grievance form developed by agreement of the parties, which shall include appropriate space for at least the following:

1. Detailed statement of facts;

2. Contentions of the grievant;

3. Particular contractual provisions involved; and

4. Remedy sought.

Step 2:

(d) At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the effort to develop all necessary facts, including the exchange of copies of all relevant papers or documents in accordance with Article 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.

Step 2 is the "full disclosure" stage of our grievance/arbitration procedure. We have a contractually required obligation to raise our issues and arguments in detail in our Step 2 appeal and at the Step 2 meeting. Should we fail to raise those arguments or provide documentation at Step 2, management will be expected to argue that the Union failed to meet its obligation in pursuit of the grievance. Management will argue their due process rights to address the issues and arguments at the lowest possible step--and thus the possibility of lowest possible step resolution--have been violated. Management will, in effect, turn the tables on us and pursue their own due process issues if we fail to fully raise our issues and arguments at Step 2.

We must remember that in recent years, the Union has been extraordinarily successful in winning procedural arguments within the grievance/arbitration procedure and at arbitration. Due process violations in disciplinary cases--such as the Pre-Disciplinary Interview--and in contract cases--such as lack of proper grievance appeal language in letters of demand--have resulted in a solid history of successful grievance processing. As we have pursued these due process violations to successful ends, management has increasingly sought and pursued due process issues against the Union. Their education in due process is directly related to our successes. For these reasons, we can expect management to raise every due process issue which presents itself and in particular our obligation to raise our issues and arguments in our Step 2 appeals.

It must be noted that Management has an equal obligation to make a full and detailed statement of facts and contractual provisions relied upon at the step 2 meeting. Further, Management has the same obligation to provide all documents they rely upon. It must be absolutely mandatory that we record what documents are exchanged, and what arguments Management presents. We also attempt to exclude Management's admission of New Argument/New Evidence at arbitration hearings.

Without a commitment and practice to fully develop our arguments through thorough grievance investigation and processing, we will see many valuable Union issues and evidence excluded by arbitrators and deny ourselves the opportunity to fully defend our members or to prove our case. It also follows that unless we record documents exchanged and the arguments presented, Management will continue to have the luxury of building a case just prior to the arbitration hearing.

The Power of Interviews

This is where my advice, and the common advice begins to deviate. Interviews are a right we have under Article 17 and 31. Out of the dozens/hundreds of Grievances I have appealed to Step 3 / Arbitration, only a couple have had interviews in the case file. Out of the hundreds/thousands of Arbitrations I have read, very few have effective interviews included – which results in credibility, and he said/she said contentions. This is a fatal error on the Unions part. Even experienced Stewards and Officers shy away from interviews. Everyone should interview more – but I recommend more diversity in your Interviews!

Before we dive into Interviews, we must address an evident fear. Let's say you are a Steward who has been doing this for 30 years. You can walk into a Manager's Office and talk

them into tossing out discipline and you always settle Overtime violations at Step 1. You likely fear ruining this relationship. I suppose that makes sense. Until you have one Grievance which Management will not settle. Or if you are elected, the membership doesn't see you 'fight' and you lose your next election.

For new Stewards I commonly see and hear issues of not being respected, RFIs not being completed and not getting Union time. Interviews alleviate these issues. When I became a Steward, I was not respected, my Union time was limited and Management flat out refused to give me some information I knew they could have.

I increased my interviewing, and I submitted long, specific Requests for Information (RFI). I even had a Labor Management Meeting called on my RFI's alone. Within six months Management caved. My RFI's and Union time were no longer questioned. Whenever I asked for something, I got it. The reason was I had an alternative, I could spend 20 hours writing and conducting multiple Interviews and submit multiple 20-line-item relevant Requests for Information or Management could give me what I needed. Whenever a new Manager or Supervisor would try to fight, I would simply pull out the old, "I can turn in RFI's and Interview about this or we can work this out."

The value of using an excessive volume of work to gain Union time, Respect and Experience cannot be undersold. If Management denies your time to Interview and does not provide a makeup time, now you have another Grievance and need to Interview them to discover why! This is a cyclical process, and this is a fight we will always win.

The fear of interviewing, or making a relationship worse, is a self-imposed belief. If an Interview ruins a relationship, you were not properly representing the membership. Management must respect you as a Steward, not like you. Not only are Interviews an extremely powerful tool in the Grievance procedure, but it also allows you to 'flex' your muscles on Management and gain their respect. With enough respect, you can resolve things outside the Contact.

Before I had any training, or read a book on interviews, I was interviewing Management and employees. When I first became a Steward, I held a "Post Investigative Interview" after each Investigative Interview/Pre-Disciplinary Interview I attended. I would ask the questions I believed Management missed and to confirm Due Process / Just Cause violations I caught during the Interview. The philosophy is based on the 'Best Evidence' rule and the Preponderance of Evidence Standard. The Best Evidence rule is that original documentation prevails. The Preponderance of Evidence Standard is the most believable evidence is accepted as factual and prevailing I learned about in Arbitration Textbooks and from Arbitrations.

It is also a common complaint that the National Business Agents do not settle enough cases or hear enough. The real issue is when Management will not settle cases at Step 1, Step 2, or Step 3. Management will also not Pre-Arbitrate cases they believe they could win. The Unions way to squash this delusion is to have more Interviews to the point Management does not believe testimony can over-turn a losing case later in the process. This would alleviate the caseload Business Agents have.

When you have a Stewards Interview Notes and a Statement by a Grievant you may lose to 'Managements Official Record.' For some reason, several Arbitrators view Management and Customers as the 'highest level of trustworthiness' in the Grievance – Arbitration process. While we know Management is not the honest, upstanding group of individuals they should be, the fact remains this is a common trend we must prepare for.

Let's say you have a hypothetical Interview, and you noticed Management was not writing down the employee's answers, did not present evidence, and did not allow the employee to go and get evidence to defend themselves. As the Steward you fully exercised your rights under Procedural Due Process and Weingarten, but Management also did not record that.

Most Stewards would address this by making the argument exclusively using their notes or even worse, 'assist' the Grievant by writing their statement. A Steward written Statement will not hold up if the Grievant is cross-examined effectively. If the Steward, instead, conducts their own 'Interview' you can attain the exact information you need to support your position. An example of one such Interview will appear under Example Documents Referenced as #1 Sample Document – Post II Interview of Grievant.

Interviews have many purposes but the most common reasons to interview are:

1. Prove a Violation – Common for Contractual Grievances in which you ask factual questions of Management to elicit the information you need.
2. Create a Violation – When unsure if a violation occurred, you 'grill' Management to catch discrepancies.
3. Codify the Record – To confirm information you know is true, common with hostile or dishonest witnesses such as Management or after Management's interview.
4. Negative Inference / Adverse Inference – To prove the absence of information such as no Discussion, or Management not having / not relying upon specific evidence.

The value of each interview depends on the Grievance, but it is important to note the flexibility and utility of our right to interview. Proving a violation is simple and what every Steward should be doing for Grievances and examples will appear in this Guide several times. For all interviews you should know the answer before you ask the question, and this is most true to prove the violation. The questions will follow a factual format to elicit specific information, as an example, "On May 1st, did you witness Jane Doe clock in?"

Creating a violation is more advanced and typically seen in discipline cases where the official record does not add up or your arguments are inferred. For example, if Management Interviews a Grievant and states, "Do you recall having a Documented Discussion on May 4th," but you suspect another Supervisor held the discussion as the Supervisor who held the Interview was on Vacation that week. You asked the Grievant and submit an RFI for all discussion dates, times and subjects with Grievant related to this issue and get May 4th, and July 23rd of the previous year – over one year old. You would Interview the Supervisor who held the Interview and ask, "On May 4th you stated the Grievant had a Documented / 16.2 Discussion while you were on Vacation, is this true?"

You would follow up with the following questions:

Did you conduct this Discussion?

Who conducted the Discussion?

Are you aware that Supervisors' Personal Notes cannot be exchanged between Supervisors, per the 1980 USPS Position Letter by Labor Relations James Tessier?

How do you know what was discussed during the Discussion if notes cannot be exchanged?

In the Unions request for Information, two discussion dates were listed. One conducted by you over one year ago. Are you aware that per the ELM Appendix – Record Control Schedule Number 64 A, Supervisors Personal Notes of Discussions must be disposed of after 12 months unless disciplinary action has been taken?

How did Labor Relations have information on personal notes you cannot put in an OPF which you were required to dispose of X months ago?

By asking Management questions which push the potential violation, you easily expand what could be a minor violation (No Discussion) to a direct violation of the ELM, multiple provisions of Article 16, Just Cause, and Article 19. Management does not even need to answer, the absence of an answer to the last questions infers guilt or wrongdoing. This also absolutely pushes the Supervisor into a corner.

The third interview type is to confirm information. An example would be #1 Sample Document – Post II Interview of Grievant. You know that Management did not provide statements, or witnesses to cross examine, or an opportunity to present evidence. You just need to have a record of this. You can easily turn this into an Interview of Management by inversing questions such as: "During the Investigative Interview, was any evidence presented to you to prove your attendance was irregular" becomes, "During the Investigative Interview, what evidence did you present to the Grievant to review?"

The fourth type can be the most difficult as it requires you to know more than Management and to ask about items you know they did not consider. Some Stewards will simply submit a Request for Information and when Management does not provide something will argue Negative Inference. It is far more powerful to ask them specifically.

For example, if you have a Grievance about falsified Medical Documentation and Management has provided zero proof / evidence in the Interview, and in the Request for Information Management does not provide any proof. You then Interview Management to get the issuing Supervisor, and the Concurring Official to admit they did not have proof to review, or they did not investigate. The violations easily snowball.

The interview would look like:

On what date did you contact the Grievants Medical Office?

What was the name and title of the person you spoke with?

How did you verify the number you called was the correct phone number?

Did you, or anyone to your knowledge, go to the Medical Office to confirm the information was factual?

The interview questions are all designed to force Management to tell you no. The questions can be leading and can assume an answer. The entire purpose is to put on the record no reasonable effort was made and that the appropriate evidence does not exist.

By the time your Grievance goes to Arbitration, the Supervisors and Managers involved will be coached. They will be told what to say. I have sat in Arbitrations where Management 'needs to use the bathroom' and they go to a Manager's office to discuss. I have also had Step 2 Designees tell Stewards at Step 2 that they are working with District Labor Relations to come up with counter arguments based on the additional arguments I was adding to their Grievances when doing their Additions/Corrects and Step 3 Appeals.

When you get Management telling the truth, on record, they cannot later change their version of events. Management cannot even call them as a witness to explain or justify Discipline or their actions as the Union will be allowed to cross examine their conflicting testimony. Interviews are not a secret weapon; they are an ignored weapon. An extremely powerful weapon at that. The only time I refuse to interview is when I know it will harm my case.

When interviewing I recommend the following best practices:

1. Read the answers back and allow Management to make changes. Make note of all changes my crossing out an old answer with a single line so you can reference it later if needed.
2. Tell Management to speak slowly and record every word, pause, or sound they make.
3. Once finished, ask Management to sign the interview. If refused, make note of the refusal and sign it yourself.
4. If asked, provide Management with a copy of the completed interview if they sign.
5. Conduct the interview in person.
6. Request the Interview via a Request for Information at a specific date/time/place.
7. If Management cannot accommodate the date/time/place request an alternative.

Management will try to avoid an interview. That is perfectly fine, if you get this in writing and make a good faith effort to interview. Management is so afraid of saying the wrong thing in an interview they will break every rule and policy possible to avoid it or get the answer right. I have personally had a Supervisor put me on speakerphone and had a Labor Relations Representative assisting her in answering questions. I have had Management ask to bring a NAPS Representative and/or a Manager to the Interview. I have had Management ask to bring a witness to an interview. I have had Management try to look up answers during an interview. I even had a 204B try to plead the 5th – as if we were in criminal court.

Document and record everything. Every wrong thing Management does strengthens your Grievance. Do not take it personally. When Management pulls 'tricks' it is a sign, they fear and respect you as a Steward.

Interviews normally should be roughly 10 questions. You want to be in and out. On rare occasions I have gone to 30 questions with Management and over 50 questions with a Grievant for a more complicated Grievance. The best answers are based on direct, yes or no questions. When I need a long interview with Management it is usually due to a huge list of violations, I need to prove in a discipline Grievance, or I need to push back against the person being interviewed. With a Grievant, interviews run long if Management did a horrible job in the Interview, and I have a lot of questions pertaining to Mitigation. These are exceptions. Stick to roughly ten excellent questions and your success rate will skyrocket.

A final note how you Interview. We are not police officers. We are not interrogating. If you hit a sore spot for Management, or learn something new, you absolutely should add more questions mid-interview, but this is not the goal from the outset. You want to be in and out. The work is done when preparing questions. You should reasonably know how your questions can be answered. Be willing to skip questions you pre-make and if you make a mistake don't worry about it.

I Need You To Write a Statement...

I have seen a lot of Statements. Mostly bad. The common knowledge is you want a Statement to cover the 'Who – What – Where – When – How' of a situation. This is the wrong way to approach a Statement. If a Grievant writes a novel you have a higher chance of that Grievant mis-remembering the details if the Grievant is brough in as a witness. It also increases the amount of things Management can dispute. The problem I see is Stewards are trying to solve a problem. This problem is we know what we need the Statement to say to prove our violation and need the Grievant to figure it out and at some point, give up.

I have seen two solutions. One is Stewards will write a Statement for the Grievant. I understand that approach, as Postal Inspectors do that and ask the Grievant to sign the Statement. The issue is the Postal Inspectors don't care if the Grievant later recants the Statement. The Union does. The Grievant or the Unions witness cannot be deemed unreliable on cross examination. Management wants the Grievant to be viewed as dishonest. The Postal Inspectors know that once the answers are in the record it is most likely a done deal. Watching Postal Inspectors Interview several times and confirming the members words is a huge influence on how I request Statements.

The second solution is a typical Grievance statement form which asks for the 'Who – What – Where – When – Why – How' of a Situation. This is usually the default when investigating, but the Postal Inspectors are onto something. The negative is this statement does not elicit everything you need and can provide harmful information. The Generic Statement is fine for a Witness Statement or while investigating, but it is inferior to a directed Statement to winning a Grievance.

A Directed Statement is a Statement in which you talk to the Grievant or Potential Grievant and hear them out. Once they finish talking, you summarize what they said and ensure they agree. Then you repeat back what they told you and say, "I need you to write down exactly what you told me as your Statement."

For example, a Grievant tells you a long story about how they were bypassed for their Vacation pick. Their rambling includes assumptions, a theory on how Management is out to get them, and they bring up suspected retaliation from filing a Grievance on discipline. You don't want any of that. But the Grievant did tell you their Seniority Date, that they have not made any selections, and that they had a service talk stating round two picks have begun.

As the Steward you should say, "**Thank you for telling me everything that happened to you. It is important I get the basic facts in a Statement. You told me your Seniority date is March 1st, 2017; that your Supervisor John Smith had a Service talk and announced round two was being solicited, and you told me that you have not made any vacation picks. I need you to write that in a Statement.**"

By doing Statements this way you can control the narrative, confirm what happened, and ensure unrelated information is excluded. If you allow the Grievant to go blindly into a Statement, odds are you will miss an essential element. You know what you need, a Grievant does not know what is important in the Grievance – Arbitration Procedure.

Organizing and Documenting Grievances

You should look at all Grievances as a 'Reasonable Person'. That means an unbiased, normal individual. As a Steward you are biased. So is Management. So is the Grievant. We are all biased about how our office operates and what we know of people. Your Grievance must be organized and documented for an unbiased, normal individual. That is what we call a Reasonable Person.

This means someone who is not 'Postal'. This is someone who has never stepped foot into your Office/Facility. This is someone who doesn't know your LMOU, doesn't have any of your Step 1 or Step 2 Settlements. An Arbitrator may know our Contract but does not know Postal Operations. The National Business Agents require information on your LMOU (Unless they have a copy), all related Settlements, Seniority Rosters, Past Practices, etc.

An Arbitrator needs you to provide evidence and proof of everything you argue, claim or assert. Grievances are won on Documentation, not on Arguments. It does not matter how 'right' you know you are. Every piece of paper you create is a document to help prove your claim. Every item from a RFI is a piece of evidence to prove your claim. What documentation you need is specific to the violation, but one commonly missed element of Documentation is organizational documents.

Organizational Documents are actual elements of your Grievances and can be cited as Exhibits at Step 2. These documents make Grievance easier to read and primarily prevent disputes by Management later. Refer to # 2 Sample Document - Discipline Chronology. This Document can be used to prove a violation, such as Management waiting an extreme amount of time to issue discipline, and to combat an accusation of being untimely.

My modifications to the standard timeline are minor, but one change is highlighting. I want all parties to be plainly aware of extensions, and violations of the process. This prevents later disputes and makes it plain if Management was untimely at any point.

Another example of organizational documentation as evidence is #3 Sample Document - Management at Step 2. This Document confirms what you receive from Management and should be included in your casefile. I have seen disputes at Arbitration where Management claims to have provided documents during Step 2 which were denied previously in a RFI. This Document alleviates the entire argument.

A third example is #4 Sample Document - Exhibits Additions/Corrections which is a simple organizational document which is designed to confirm everything you are adding to your casefile and sending to Management after you submitted your Step 2 Appeal. The evidentiary value is to prevent Management disputing evidence later in the process.

The more organized your casefile is, the easier it is for all parties to follow. I cannot express the number of cases I have reviewed which have a bunch of documents which either should not be exchanged and harm the case, or a lack of Steward notes or organization so I cannot make heads or tails of what the Steward was intending while appealing cases. I could only imagine what our Business Agents receive.

If an average, unbiased person could not review your case file and come to the same conclusions you argued at Step 1 or at Step 2 your Grievance is unlikely to win when moving to Step 3 or Arbitration. I highly recommend proper documentation by using organizational documents. At the end of the day, you would rather a Business Agent spend an hour improving your Grievance over an hour making sense of your casefile?

You should make note of denied/not provided information. Again, to prevent Management from later introducing it. Some Stewards believe that it may be reasonable for Management to need extra time to get some records. A case that comes to mind is a Grievance about abolishing bids. When I was contacted, I asked about residual bids, and the Steward submitted an RFI for a list. Management asked for two extra weeks to gather the information. I advised the Steward to have them put that in writing and argue Management did not consider the residual bids prior to attempting to abolish positions. We should never sit on a Grievance that long, and the Negative Inference is good enough for the argument I was suggesting.

Without that RFI, and without Management admitting they did not have a list available; the Union would not have an argument to make. By being organized, we make stronger cases.

Researching a Grievance

We do not have the right to research random subjects while being paid by the USPS. We do have the right to properly investigate **ANY** potential Grievance. New Stewards need to become comfortable telling Management you need time to Investigate everything. We have that right. The membership must be informed to ask for a Steward with any questions they have.

If you still cant read between the lines, let's say you are a Steward in a small office and you struggle to get Union time. A member comes to you and tells you, "I got a jury duty summons. Do I have to use my own leave?" You may know the answer is no, but you tell the member, "No, and you may not even need to take leave. Ask for a Steward so we can discuss in private what your options are." You may have the ELM memorized but still take the time to

look it up and explain it to the members who ask. This is how the USPS can compensate your Research. This is a negotiated right we have and not enforcing it means we are giving our time for free.

Research becomes an increasingly important skill as you deal with more and more complicated Grievances. As our experienced advocates retire, they take with them knowledge which could be essential to winning current Grievances. Knowing how a Past Practice was formed or knowing why your local negotiated something into your LMOU can be the difference between gaining or losing right we have fought so hard for.

Unions have a cultural issue of institutional knowledge. While each generation of Steward has superior training and resources, the institutional knowledge is often not passed down in full. This necessitates Stewards to be willing to research and ask questions. The only way to have the institutional knowledge passed down is to ask! Some of us are not lucky enough to have someone to ask, or we have a question local leadership cannot answer. When you can't get an answer, you must use your research skills.

Fortunately using a few 'tips' you can vastly improve your ability to Research. The first tip is to have a physical copy of the JCIM and the Contract. Treat the Contract and JCIM as textbooks you do not have to return. Highlight, bend corners, place sticky notes, etc. My first copies as a Steward look like they have been through hell and back. If you are studying on your own, it should be a physical copy. The Contract does have an index in the back to search. You will pick up things when reading the Contract over being told or searching for a quick answer.

When you have a live or active Grievance, or a question from a member, your quickest option is to use an online or PDF version of the Contract or JCIM. On your keyboard you can use the Ctrl and the F keys to search for any term. Simultaneously press Ctrl and F and a box will pop up to type in the word you want to find. This is the quickest way to find a term in the Contract or the JCIM.

The issue you will run into is the complication of Postal Terms. Publication 32 is over 100 pages of Postal Terms and Abbreviations. Additionally, you have Contractual terms. Some terms, such as Realignment, are rarely mentioned in the Contract but are common terms we use. Some facilities/districts use different terms for the same piece of equipment as well. I have seen different facilities, Districts and Areas use different terms for the same item. Don't give up if you can't find something but search related terms. Ask around for alternative names of things.

The ELM does also have an index. Using Ctrl and F you can search for related terms far quicker. The good thing about the online version of the ELM index is that once you find the term, you will find the ELM section number as a clickable link to go to the ELM page directly. When you are looking for supporting handbooks or manuals, use Publication 223, a Publication containing all official handbooks/manuals.

Google is a powerful tool to find obscure information such as USPS Legal Department Manuals, OIG Reports, etc. The NALC also publishes a large amount of Arbitration information online. A caution, this can attain excellent results, but it also can take a considerable amount of

time sorting through information for applicability. Google should be your last resort when you cannot find information elsewhere.

I strongly discourage using AI or Artificial Intelligence. As Editor for my local, I can tell which contributors use AI. I am fully aware of many Stewards across the country use AI, but the reality is AI includes information based on its input – or the information it has available. Unless you have a paid AI program and manually upload every Arbitration, MOU, and Local Settlement, AI will not be accurate. AI does also not know how to format arguments properly and does not consider Past Practices.

An easy way to see this is to use Google yourself. If you type in a question Google provides a synopsis of information at the top of page one. This is AI. You will often find the information is incomplete or wrong when it comes to Grievances. Perhaps one day we will be replaced by AI, but as of now AI cannot replicate what a Steward does.

The next research tip is to reference Collective Bargaining Report Special Editions and any Flash Drive provided by the National APWU. CBR Special Editions are special guides when we have confusing Contract Language or changed Contract language – essentially. For example, the Article 8: Understanding the Overtime Issues provides relevant contractual language, common issues, and a plethora of analysis. Although the issue may be old, it the best guide we have. This guide is so good I had is bound and printed for about $10 to reference and annotate.

Over the years the Research and Education Department has released a plethora of excellent information we underutilize. The same goes for any National APWU Training Flash Drive. The Flash Drive is not intended for a reading, it is designed to be a resource and reference for material the National APWU cannot or should not post online. Use the search function to filter through the Flash Drive quicker.

The final best advice is to save your Settlements, Arbitrations, Service Talks and important documentation you receive. My external hard drive is filled with helpful documents, winning Grievance templates, and valuable information. When organizing files, I put them into related folders to use later. I also have a private cloud so I can reference things from anywhere.

As frustrating as it is to keep information, the utility of saving information is second to none. I have found myself looking for old Statements I used in a Grievance, or a copy of an old Request for Information to use in a current case. No one remembers everything and retaining important documents will save you hours of time in the future.

The files, documents, and templates you save should be on a personal device. Especially casefiles. If your local is ever Labor Charged you do not want years old information on a locally owned device. But you can, and should, save Arbitration Awards, Settlements that could have precedence, etc. for personal use on a personal device.

You should also save templates of Grievances to give you a launching point for future Grievances. If I successfully argue and win a Step 3 decision on 3189's, I am not just keeping the settlement. I am keeping the entire Step 2, a copy of my Exhibit list, etc. That way if I ever have another Grievance in that facility I can copy and paste my existing work and improve upon it to

win an increasing remedy. As far as I am concerned, if I researched it once I should only research to ensure that nothing has changed Contractually.

Your Grievance File

When preparing your Grievance file, you have several schools of thought on the 'best way' to prepare a case. For most Grievances you want to either follow the National APWU Document Order, or you want to use the order of Exhibit format. From the National APWU, the following is recommended:

1. Step 3 or Direct Appeal from Step 2 to Arbitration;

2. Additions and Corrections to Management's Step 2 Answer, if written;

3. Management's Step 2 Answer, if provided;

4. Management's PS Form 2609, if provided;

5. Step 2 Grievance Appeal Form;

6. Management's Step 1 Answer, if provided;

7. Management's PS Form 2608, if provided;

8. Step 1 Grievance Appeal Form, if used;

9. Copy of extension documentation(s), if an extension was granted;

10. Notice of Letter of Charges, if a discipline case;

11. A copy of all live discipline in the grievance file and the disposition of those grievances;

12. A copy of all documents applicable to the contract dispute, if a contract case (i.e., Policy Changes, Reversion; Bid Posting; Overtime Desired List(s), and Clock Rings, etc.;

13. Information Request Form;

14. The steward's notes taken from the interview with the supervisor;

15. The supervisor's notes from the Pre-Disciplinary Interview, (PDI);

16. The steward's notes taken from the interview with the grievant;

17. Steward's statement of the facts and contentions of the case;

18. Witness Statements;

19. Medical Documentation, and/or other records relevant to the grievance, and

20. All Emails and/or FAXs received.

An easier method is to place number 1 – 5 at the top of your casefile and then list all documents as Exhibits in the order you cite them in your Grievance. Regardless of the method used, I recommend having a glossary in your casefile or an Exhibit List (Refer to #5 Sample Document – Modified Exhibit List) to organize what your casefile contains. Always ask your local Leadership or Business Agent if they have a preferred method.

Arguing Grievances at Step 1

As a new Steward I was nervous about everything. My first Step 1, my first Step 2, my first Labor Management Meeting, my first time in an Arbitration, my first time being a Technical Assistant, etc. How I handled these butterflies is by establishing a system for everything. Step 1 Meetings are no exception.

I spent hours upon hours researching how to do a proper Step 1 Meeting. I spoke to Stewards and Officers from my Local, other Locals, and retirees. Everyone did their own thing for the most part. This was incredibly frustrating as everything worked. Some Stewards befriend Supervisors, some come hard with the Contract, some tell Management what they are going to do. This is something I spend considerable time going over in my training on Investigative Interviews – how differing Steward styles can get excellent results.

This is what presents a problem – if everyone does something different how do you teach new Stewards how to Argue at Step 1? In my Negotiation Training, I show a video from another Union (As it is the best I could find) and I critique ways to improve using basic negotiation tactics and tools.

The video has a Steward who presents a Grievance in the following format:

'Thank you for meeting with me. We are meeting on X issue. This is a straightforward issue, but because you are new I think you may just not know how we normally do this. We feel Y employee should be paid Z amount. The Contract, Articles 1, 2, and 3 state (…). The Contract is very clear on this issue.'

The Step 1 then devolved into meetings some back and forth and excuse giving. The Union suggested some alternative options to resolve the issue, the Grievant jumped in to tell the Supervisor he was wrong. In general, the Step 1 went nowhere. The meeting ended with the Supervisor denying the Grievance.

This is where the problem comes into play. Not only is this 'traditional format' of the Union presenting their case on a Contractual Violation ineffective on a Negotiation front, but how Stewards also typically present their case is fundamentally flawed as well. This is not a Stewards fault, or Union Leadership. No one, to my knowledge, in any Union teaches how to Negotiate or how to form Logical Arguments. These are specialized skill sets that fall under the umbrella of a Lawyer and Salesman more than a Union Steward.

But new Stewards, unless you have a mentor whose style you emulate, are desperate for a roadmap. We are in the Internet and AI age. People are used to Google, Alexa, etc.

provide an AI synopsis for any question asked. Every book ever written is at our fingertips. Despite this availability, young people also do not read like they once did as a short cut exists.

Students use AI to write papers. Spark Notes provides a cheat sheet for any High School class you could imagine taking. Every test has a guide, including most Postal Exams. For the modern Steward, the expectation is information will be provided. It is not the Stewards fault, as that is how everything else in life happens when it comes to learning.

My point is to illustrate that new Stewards need a format, and more experienced Stewards may still benefit from using an actual system. Not providing a format is setting a Steward up to fail. Especially those who have gone to High School Post 2000. It is a different world today than it was yesterday. In this section we are not going to discuss the Negotiation aspect of a Step 1, but we are going to discuss the format of presenting a Step 1.

A Legal Framework – IRAC

We are going to pretend we are in Law School for a moment. The Legal classes I have taken clearly identify several formats to present arguments in an effective way. Two have stuck out at me the most, which is what we will explore. The first is **I.R.A.C.** I.R.A.C. stands for:

- Issue
- Rule
- Application / Analysis
- Conclusion

First is **ISSUE**, or what happened. "Employee Jane Doe did not work Overtime on X date." Or. "Jane Doe received a Letter of Warning on June 5th." Or even. "Management abolished 12 residual vacancies on July 22nd." The issue is simply what happened.

Second is **RULE**, or the relevant Contractual / JCIM / Handbook language. For example, for the Letter of Warning example, you would say, "Article 16 of the Collective Bargaining Agreement states Discipline must be corrective in Nature."

Third is **APPLICATION / ANALYSIS**, which is how you believe the rule applies to the issue or how the issue violates the rule. This is commonly where you can apply Exhibits or Documentation. For example, "Exhibit 1 shows that another employee worked Overtime which is contradictory to the LMOU." Or it can be, "The Just Cause requirement mandates that in order to issue Discipline Management must affirm the Grievant knew the Rule being applied which has not been done in this Grievance."

Fourth is **CONCLUSION**, which is a simple summary. "Therefore, Management violated Article 16 when they issued the Grievant a Letter of Warning, and the Letter of Warning must be expunged."

Pulling together an **I.R.A.C.** Argument: "Employee Jane Doe did not work Overtime on June 13th. The CBA requires that Seniority is solicited to volunteers by Seniority. Exhibit 1 –

Clock Rings shows that junior employee Tommy Pickles did work overtime, which conflicts with the Language in the CBA. To remedy this conflict Jane must be made whole." Or, "Employee Jane Doe was issued a Letter of Warning on June 13th for Failure to Adhere to Attendance Regulations. Article 16.2 states, 'For minor offenses by an employee, management has a responsibility to discuss such matters with the employee.' The cited Discipline was for three absences which were connected and should be considered one occurrence and is minor. Therefore, the Discipline issued violates Article 16 of the CBA as it is not corrective, no Discussion occurred, and this requires the Discipline be expunged."

The above is my preferred method of Arguing Grievances at Step 1. The reason for this is three-fold. One, is you can very easily copy this format and NOT follow the next sections advice "Contentions at Step 2" with very little modification. You just leave off the Conclusion until the very end and would close with something like, "The Union contends for the above reasons this discipline violated Article 16 and the only corrective measure is to expunge the Discipline as issued."

The second reason is it gives a clear and easy to fill method to argue. While other Logical and Legal formats do exist, they have additional steps or are more redundant. This format is a 'get in and get out' format.

Finally, this format requires that every argument you make has some contractual basis. While I am all for throwing everything at the wall, plenty of new Stewards go off of what they were told, or a personal understanding of contractual application. This format requires each Steward to fully connect a perceived violation to some sort of Language. From a teaching perspective, this makes the IRAC the quickest format to learn the Contract and how to Argue at Step 1.

A Legal Framework - CREAC

C.R.E.A.C. stands for Conclusion -> Rule -> Explanation -> Application -> Conclusion. This format most closely emulates how I do and recommend Step 2 Grievance Appeals. While I personally like this method, it comes from a place of meeting with Management as an expert and telling them what the CBA, Handbooks, and Manuals means. This approach is not for everyone but of the formats I have used, learned and taught is highly effective. Let's analyze the elements of the C.R.E.A.C. format.

- Conclusion
- Rule
- Explanation
- Application
- Conclusion

First is **Conclusion**, or we start at our summary of what Management did wrong. "This Discipline violates Article 16 of the Collective Bargaining Agreement." Or, "Management violated the CBA and LMOU by bypassing Jane Done for Overtime."

Second is **Rule**, or we cite the CBA, JCIM, LMOU, ELM, etc. "The JCIM states that all Discipline must be for Just Cause and defines the elements as …" It can also be, "The LMOU states that the pecking order for Overtime Solicitation is …" This step is simply proving the Language you believe backs your conclusion.

Third is **Explanation**. This step is where you can explain the rule. "The Language in Article 16 is clear, Discipline can only be issued when Management meets the requirements of Cause as identified in the JCIM. Failing to meet Cause renders the Discipline procedurally defective." Or, "The Language in the LMOU is clear, the Grievant must be offered Overtime before anyone lower in Seniority, before any PTF, and before any PSE."

Fourth is **Application**. This is how the rules and explanation apply to the current situation. "The Grievant was fully unaware of the Rule being applied, as proven by Union Exhibit – RFI which requested Discussions, Service Talks, etc and Union Exhibit – Employee Statement." Or, "Bypassing the Grievant in favor of the PSE / PTF / Lower Seniority Employee clearly violates the existing language in the LMOU and CBA."

Fifth is **Conclusion**, again. "The Union has demonstrated that Management violated Article 16 and the only appropriate remedy is to expunge Discipline." Or, "The remedy to this clear violation of the LMOU and CBA can only be remedied by …"

A tip is the two conclusions do not need to be identical. Pulling it together, this argument structure would look something like:

"The Discipline issued to the Grievant violates Article 16 of the CBA. The JCIM states, 'The principle that any discipline must be for 'just cause' establishes a standard that must apply to any discipline or discharge of an employee.' This means that regardless of circumstances, prior to issuing Discipline, at minimum, Management must ensure that the six identified elements of Just Cause in the JCIM or met. The Union has uncovered that the Grievant was aware of the Rule being applied, and Discipline was not taken in a timely manner which contradicts the language in JCIM. Due to this violation of the CBA and JCIM, the only corrective remedy is to expunge the Discipline issued."

Yes, this is what you would say. That is your 'entire' presentation of the Unions case at Step 1. After that you pivot to negotiating a resolution, if appropriate. I like this format for two reasons. One, as aforementioned, I personally like to explain to Management what they did wrong. I establish myself as an authority. This is a rattling technique. Management does not want to be told what they did wrong and when I prove it, either negotiations go easier or I save time.

The second reason I like this format is it more easily transfers to Step 2. If you already have identified the violations, the applicable language, and formatted it in this manner your eventual Step 2 Appeal writes itself.

Those very reasons I like this format personally are exactly why I recommend **I.R.A.C.** over **C.R.E.A.C.** Newer Stewards may not be able to effectively explain a Contractual Provision, and some in Management will not respect you as an authority when you try to explain.

While we have several other formats for Legal Arguments, they tend to be more convoluted, translates poorly to Arguing at Step I and finally they add unnecessary fluff which is typically added for Legal style or strategy. Our Strategy at Step I is entirely to present a clear argument and move on if Management says no. Next, we will move onto forming a Logical Argument.

Using a Logical Argument

A fun fact, I was Captain of my High School Debate and Forensic Clubs. Forensics is a combination of Public Speaking, Debate and Acting. My specialty was long – form debate on Government Issues / Policy which used the traditional Logical Argument Format. During my first round of College, I took Logic classes from the Psychology Field. I share this not to brag (Who brags about High School anyways?) but to illustrate that I have been using this format for nearly decades now and have used it with extreme success prior to learning legal formats both inside and outside the USPS.

The basic premise of a Logical Argument is to present an Undisputed Universal Fact or Rule, present a Situation Specific Rule or Fact and then draw the conclusion. The most common example is:

- Roses are Red, and Violets are Blue
- This flow is not Red or Blue
- Therefore, this flower is not a Rose or a Violet

Using this at Step I looks like this:

- Article 16 States, "The principle that any discipline must be for 'just cause' establishes a standard that must apply to any discipline or discharge of an employee"
- The Grievant was not aware of the Rule being applied as confirmed during the Investigative Interview
- Therefor, this Discipline does not meet the Requirements of Article 16

The beauty, and benefit, of a Logical Argument is extremely simple. All the Steward is doing is presenting information in a way which, on its face value, cannot not be disputes and assumes your Conclusion.

A **Universal Fact** is simply an established, not in dispute rule or policy that is written down. Basically, if it is written in black and white and not open to dispute, it is a Universal Fact. This would be direct Contract Language, ELM Language, JCIM Language for our purposes, or outside this context a Universal Fact could be, "The Sky is Blue" or "Speeding is Illegal." These are Universal Facts or Truths.

The **Situation Specific Rule or Fact** can be boiled down to a fact about the case or situation you are dealing with. This does not need to be a true fact but based on what Management has said or done. We know Management does things wrong, that is why we have the Grievance procedure. A good example would be if Management skipped Progression. That is a fact about this case. "Management issued a 7 Day Suspension, despite the Grievant never receiving a Letter of Warning."

The **Drawn Conclusion** would be the logical result of the two facts or statements. For example, if the Universal Fact is: "Article 16 requires Discipline must be Corrective, and not Punitive." The **Situation Specific Fact** is: "The Grievant was never issued a Letter of Warning and Management jumped directly to a Seven Day Suspension." The **Conclusion** would be, "Clearly the Discipline was not corrective and is punitive as it skipped progression."

In practice, you would say: "Article 16 requires Discipline must be Corrective, and not Punitive. The Grievant was never issued a Letter of Warning and Management jumped directly to a Seven Day Suspension. Clearly the Discipline was not corrective and is punitive as it skipped progression."

The first benefit of this approach is it is the easiest to follow. You don't need to follow a fancy format or overthink things. You just tell the Supervisor facts and then tell them the logical result of those facts being true.

The second benefit, and most important, is that this approach directly translates to effective negotiation. When you present facts like this, a Reasonable Person should come to the same conclusion you did. When you force Management to agree with you, they are more likely to settle with you. The negative of this approach is the success is entirely dependent on the person across from you being a Reasonable Person.

The benefit is also the weakness. Management, more likely than not, tends to not be reasonable. With some Supervisors I can use this logical approach. This requires them to also know the Contract or believe me when I tell them something is in the Contract (Or handbook or manual). Normally, when I get a Supervisor like this the conversation goes like this, "Come on Eric, but the employee still did X, Y and Z!" We then switch to negotiating about what is appropriate based on the accusation – more often than not a Discussion.

For Contractual violations, it tends to go like: "I had to get the mail sorted and out by time the carriers came. I didn't have a choice." And then we begin negotiating how to rectify the harm and violation. When Management does not participate in this line or Step I arguing, they will often dig their heels in and refuse to participate in negotiating. While there are negotiating tactics available to deal with this type of refusal to engage, it is more advanced.

Picking a Structure

When teaching new Steward training, I default to either **I.R.A.C.** or a **Logical Structure**. This depends on the type of person I am teaching. Some people gravitate to a more formal structure while other Stewards gravitate to a more informal structure based on the Management they deal with. When a Steward tells me they have a great relationship with Management, Management listens to them, and they work most issues out I default to a **Logical Structure**.

For most of us, where Management will not play nice, I recommend the **I.R.A.C.** approach. The reason is it does not have an explanation step. While you can explain to a degree with analysis / application from **I.R.A.C.** the fact remains that newer Stewards often cannot fully explain the CBA and the multiple conclusions can be confusing under **C.R.E.A.C.**

On occasion I do recommend **C.R.E.A.C.** but that tends to be to Stewards who gravitate towards that approach, or I know they will immediately be doing their own Step 2 Appeals. That is simply to assist with the transition in how to format a Step 2 Appeal. Every Local is different in what Stewards do so that advice can be highly individualized.

My advice for you is to pick the approach that works best for you. Even if it is not listed above. All that matters is what you do, works, and provides the results we need.

Contentions at Step 2

A fundamental misunderstanding exists when writing Step 2 appeals and making arguments at Step 2. This misunderstanding I call 'the chicken or the egg paradox.' What comes first, the evidence or the argument? What even is an argument? Isn't everything a violation?

You can write your Step 2 however you wish if it proves a violation of the Contract. You can use the above format(s) that you use when Arguing at Step 1 if you would like. The issue I commonly encounter when teaching Stewards is writing in the above format can be confusing and convoluted. To make it easier to understand, I have adopted the Argument Contention format we will discuss below.

When I began doing Step 2's I had no training apart from reading Step 2's years prior when helping the DDAL (Detroit District Area Local) build their file room. My then Chief Steward asked me to help him with his, and I was barely a Steward at that point. I referenced Arbitrations and Arbitration Textbooks such as How to Prepare and Present a Labor Arbitration Case. The format I adopted was to write in a way that an Arbitrator would understand in a legal format.

The following is how I have explained it to other Stewards to remarkable success. These are not the technical definitions of the terms, but this is how it makes sense. The following is even copied and modified from an email I sent to a Steward on how to do Step 2 Appeals.

When writing Step 2's you have three parts:

A. Proving the violation.

B. Codifying / confirming your evidence in writing.

C. Meeting the CBA requirements of a Step 2 which are:

1. detailed statement of facts;

2. contentions of the grievant;

3. particular contractual provisions involved; and

4. remedy sought.

Outside of these 'requirements' you have best practices, such as codifying Exhibits specifically to prevent a later objection by Management. Such elements are timeliness, evidence presented/exchanged, etc.

Proving the Violation

We can't just say, "Management did X wrong, and I am right." The format is we allege Management made a mistake and provide proof they did make that mistake. Proving the violation has two parts. Part one is Contention; Part two is Argument.

A **Contention** is your thought or opinion on what Management did wrong. For example, a Contention could be "Management violated Article 16 of the CBA." An **Argument** is the 'reason' Management is guilty of the Unions Contention. For example, "Management did not conduct a Documented Discussion with the Grievant which the Union argues (Clear Argument) violates Just Cause as the Grievant was never made aware of the rule being imposed." While remarkably similar, they are different.

When combined, you would write: "The Union **Contends** Management violated Article 16.2 of the Collective Bargaining Agreement. The Union **argues** that Management has no record of an Article 16.2 / Documented Discussion, which directly violated Article 16.2 and the inference is that the Grievant was unaware of the rule imposed creating a violation of Just Cause. The Union asserts the absence of a record of a 16.2 Discussion this discipline has no merit."

A **Contention** is your overall conclusion or opinion. An **Argument** is the supporting statements or evidence which proves the Contention is accurate.

Writing your Step 2 Appeals in a format that allows each Contention to start or end a Paragraph, and the Arguments fill in the remaining space you will end up with concise, well developed and difficult to refute positions.

Codifying / Confirming your Evidence in Writing

To codify means to collect and restate information in a format/structure/code. When it comes to a Step 2, you want to codify or incorporate your 'proof' in writing as an Exhibit. An **Exhibit** is the evidence that proves the Argument. The main reason you do this is to ensure Management can't claim you never presented the evidence and secondary is to back up every claim you make so it not conjecture. We must prove every violation we allege.

A lot of people put a list of documents at the end of their Step 2 which is a useful approach but one I do not follow. Arguments are easier to follow if you include the Exhibit within the body of your appeal, and I commonly run out of space on complicated Grievances. I want to ensure Management, and the Union (Step 3/Arbitration) can follow my arguments. This incorporation is the easiest way to ensure people can follow your Appeal.

It looks like this out together: "The Union Contends Management violated Article 16.2 (Exhibit 1 - Copy of Article 16.2) of the Collective Bargaining Agreement. The Union argues that Management has no record of an Article 16.2 / Documented Discussion (Exhibit 3 - Unions

Request for Information) and the inference is that the Grievant was unaware of the rule imposed creating a violation of Just Cause. The Union asserts the absence of a record of a 16.2 Discussion this discipline has no merit." When you do it this way you know for a fact Step 3 / Arbitration will follow your contention, will follow your arguments, and cannot dispute the evidence/exhibits you provided to Management. This also makes your casefile extremely easy to follow.

Meeting the CBA/Contractual Requirements

If you do 1 and 2, the rest is simply preventive measures to counter common Management Contentions. The 'meat' of the Step 2 are your **Contentions, Arguments and Exhibits**. A proper Contention cites the contract provision violated. The rest is "sandwiching" in the rest. What we have so far: "The Union Contends Management violated Article 16.2 (Exhibit 1 - Copy of Article 16.2) of the Collective Bargaining Agreement. The Union argues that Management has no record of an Article 16.2 / Documented Discussion (Exhibit 3 - Unions Request for Information) and the inference is that the Grievant was unaware of the rule imposed creating a violation of Just Cause. The Union asserts the absence of a record of a 16.2 Discussion this discipline has no merit."

Now we add the rest to it: "On December 1st Management issued a Letter of Warning to Grievant John Doe (Exhibit 0) for Failure to Adhere to Attendance Regulations. This Grievance is timely in accordance with Article 15 of the Collective Bargaining Agreement as the Union met at Step 1 and has filed this Step 2 appeal within the time limits within Article 15."

"The Union Contends Management violated Article 16.2 (Exhibit 1 - Copy of Article 16.2) of the Collective Bargaining Agreement. The Union argues that Management has no record of an Article 16.2 / Documented Discussion (Exhibit 3 - Unions Request for Information) and the inference is that the Grievant was unaware of the rule imposed creating a violation of Just Cause. The Union asserts the absence of a record of a 16.2 Discussion this discipline has no merit."

"Due to the identified violations including violating Article 16.2 and Just Cause, the Union is asserting this Discipline is expunged and the Grievant be made whole."

Some Stewards will write a Step 2 in a narrative format and like to tell a story. Others like to write as little as possible. It does not matter how you say it, if you hit the required elements. This is exactly why I adopted and recommend the above method. The entire point is hitting every required element, without wasting much space, and preventing disputes by Management. Management cannot dispute evidence was provided later when it is included in the Step 2 Appeal.

What I recommend excluding from Step 2 Appeals are Arbitrations commonly referenced in training manuals. **This is the reason I am not referencing many in this Guide, unlike all other Training I conduct or advice I give.** I have four reasons I usually exclude Arbitrations from my Step 2 Appeals, and I recommend you also exclude them. The first glaring issue is when you are provided with an Arbitration/GATS number and a quote of a case you do not know the arguments made and why the Arbitrator ruled as they did.

I have hundreds of examples of decisions that rule one way, but the arguments made, or the opinion differ. One common example is when Management cites Undue Enrichment. Their primary example is the Mittenthal Award. The Opinion agrees with the Unions position and arguments! But the award asserts that for a first-time violation a compensatory remedy is not justified and stated it was Undue Enrichment. Mittenthal later awarded a compensatory remedy when Management reoffended, and the Union filed a second Grievance. The issue wasn't the argument, it was the strategy and remedy requested.

When Management cites the Mittenthal Award / Decision on Unjust Enrichment they are shooting themselves in the foot if the Union introduces the entire Arbitration. It proves the Unions argument, and if the Union has a local cease and desist, or this the Grievance was for recurrence, the case is won by Managements reliance on the Mittenthal Award. Stewards, unless they have read the full Arbitration and understand it, should not fall prey to such a simple mistake. It is far superior to make the argument and allow the Business Agent to cite the Arbitration themselves. It is not new argument; it is not new documentation. It is simply stating a similar issue has been ruled upon.

The second issue is that, unbelievably, not all Arbitrators are universally respected. To put this into perspective, imagine you have an Arbitrator who made a ruling which favors your position, but this Arbitrator tends to make decisions based on what they feel is fair, and not based on the language of the Contract. Another Arbitrator, who does their job properly, may consider the ruling harmful to the Union despite the fact it does support your position.

Just as some Union Stewards do not get along, and some in Management do not get along, some Arbitrators do not get along. We have no control over that. What we can control is not giving an Arbitrator or Management a reason to deny our Grievance. Our NBAs know the Arbitrators hired, stand in front of them often, and know what works best. Our dues pay their salary, and I believe we should trust them to do their job.

The third reason is citing Arbitrations is fundamentally a bad habit. Once you begin relying on rulings most Stewards tend to spend less time proving the violations or making new arguments. It is an easy trap to fall into, wanting to stop 'arguing' and find a smoking gun. The reality of being a Steward is our job is Contract Enforcement. If Management did not reviolate the Contract none of us would be Stewards. We need to prove the violation.

In a Step 3 Appeal I have included Arbitrations. The difference is these Arbitrations have been read cover to cover by myself multiple times, the background was relevant, and they were local. When in doubt, ask your Local NBA and/or Leadership to see how your region would like you to handle Arbitrations. In my experience they are a hinderance to building a solid casefiles more than an asset.

The final reason is different Areas / Regions have different standards and precedence. For example, some Areas have a negotiated JCAM, or Joint Contract Application Manual. JCAMs essentially take on common disputes and give a defining answer both parties agree too. Think of a JCAM as the LMOU of the JCIM world. When the Union already has an answer and both parties agree too, your fight is fundamentally different. Grievances such as recurrence or awards

for Compensatory Remedies are far easier when you have another layer of mutual agreement and may have a lower evidentiary value.

This must be considered when looking at Arbitration Decisions from other Areas. There are reasons that the National and National Business Agents do not just send out all Arbitration Awards and the only thing universally shared are Global Settlements.

Why are Step 1's and Step 2's Different?

This is an addition after getting feedback from newer Stewards and I think the concern has merit. Some Stewards are exceptionally good at negotiating. Maybe they were in one of my Negotiation Trainings, or maybe they are a natural salesperson. Natural negotiators tend to make a fatal mistake of writing a Step 2 like a Step 1 Appeal.

Very good negotiators can get away with not presenting any information or Contractual Language at Step 1. I have seen persistent negotiators badger Management at Step 1 so they just give up. I have seen confident negotiators at Step 1 make up, or mis apply language that Management just believes. These are incredible abilities at Step 1, but this is detrimental later in the process.

At Step 2 and beyond we must not only raise every argument and contention in writing, it also must have supporting evidence and be understandable. The easiest to understand format is going to be a narrative, and the above format is more technical in nature and packs in more supporting evidence.

This all boils down to the simple fact that when teaching to a broad audience (Such as I am with a guide) I need to account for most Stewards having a natural ability to deal with Management – or else you would not be a Steward. Every Steward is different. I gravitate to a more robust Step 2 Appeal over spending as much time dancing at Step 1.

My final note on Step 1s and Step 2s will be that rules are designed to be broken. I normally follow my above advice but I have done narrative Step 2s. My Step 1's are normally in the C.R.E.A.C. format but with some Supervisors I use I.R.A.C. while in others I use a Logical Format. The more experienced you are the more you learn how and when to cater to the individual and situation. As long as you are hitting the required elements you simply need to do what works for you.

Is It a Grievance?

Before we move onto the next section we need to discuss the elephant in the room. Is it a Grievance? I have seen some absolute insane ideas on whether something is a Grievance or not. Just because you disagree with something does not make it a Grievance. Something also is not true just because you believe it. We have enough work to do, and enough Grievances to file, over chasing our beliefs and dreams.

The inverse is also true. Many seasoned Stewards and Officers are quick to dismiss a Non – Grievance. This can lead to labor charges but also fundamentally harms the membership.

Even if it is not a Grievance the membership has a right to know why it is not a Grievance. For non-Members, a simple "this is not a Grievance" works, but those who pay dues deserve better.

Old School Grievances Exist

A perk of growing up in the APWU is I have seen and read every version of our Contract, JCIM, etc. Prior to the APWU being formed, we had the 1968 7 Way Contract which included four of the five Unions that formed the APWU. That agreement had this definition of a Grievance:

"A grievance is any cause for dissatisfaction outside an employee's control if the matter grows out of employment in the Postal Service and the remedy sought is within the authority of the Postmaster General or other postal official to whom such authority has been delegated."

This definition may be old, but it is closer to what the Membership believes. In 2025 we may not consider or believe it as even our most experienced advocates were not around then, but the Great Postal Strike and Postal Workers gaining rights changed the landscape for Federal Unions. Even as other Government Agencies gained partial rights to organize, the fundamental belief that we could complain about anything and not get fired still exists. Once we become Stewards, we quickly forget that Members believe they pay Union dues to go to the Union with complaints and issues.

If you google "Grievance" the AI synopsis states, "*A grievance is a real or perceived wrong or hardship that can be used as a legitimate reason for complaint."* This is how members view Grievances. It is not their fault. It is our responsibility to educate our membership.

A Step 1 Grievance is a conversation. You do not need to appeal a Step 1 Grievance. When dues paying members come to you with a complaint it is easy to dismiss them stating it is not a Grievance. This is the wrong approach. You still have a friendly conversation with Management. You do not pull a local grievance number, nor do you submit a RFI. You simply have a conversation.

The best method is to educate the member that it is not a contractual violation but still offer to have a conversation with the Supervisor/Manager/Postmaster. I have several real examples of this approach working. My favorite is wall color. I had a member with horrible vertigo and Management in the facility had the bright idea to paint one wall an ugly cartoon vomit green. Was it ugly? Absolutely. Did I mock the Manager who did this? Openly.

Then a member came to me and said the wall was aggravating her vertigo looking at it all day. Was this a contractual violation? No. The Grievant was on a rehab job offer and color was not identified as a safety issue, nor would their doctor write a note for this – despite my insistence. The member did not even want to fill out a 1767. I could not even get the member to write a statement. Despite this, I wanted to try.

What I could do and did do was have a conversation with Management. I sarcastically said it would be great to repaint the wall but offered a compromise. Move the member so they don't stare at the wall all day every day.

I entered the conversation honestly, asking for a solution and not a settlement. The member was satisfied and knew their Union bent over backwards to do everything we could even when the Contract fell short. We will never make the membership completely happy – nor should they be. We should always want a better work environment. That does not mean we should not do all we can to provide members with every display of representation possible. The moment members decide they can get better results leaving the Union is the day we lose a member for good.

I am also not recommending extending this offer to non – members. We are obligated to represent non – members with their, by definition, contractual Grievances. That does not include time explaining why something is not a violation, nor does it include trying to take additional steps to remedy a situation outside of the Contract. If labor charged, you must be able to explain why you did not file a formal 'Grievance' in a particular situation and why you acted differently – if you did. The reason is you never do. You have conversations.

If you feel obligated to treat everyone completely the same, that is a local and personal decision. But in my experience, and recommendation, the more you try to do for the non – member the more likely they are to come back with non – Grievances and become upset when something cannot be done.

How to Use this Guide

This guide is designed in multiple parts. As you have read so far, it is packed with practical advice and tips ranging from Investigation to Arbitration tips. Unfortunately, some advice is sprinkled in within this Guide due to the nature of the Grievance – Arbitration Process. What we do when investigating directly impacts what happens later in the process. This results in advice being practical when you can use it and not where it is impactful. I strongly recommend at least looking at everything.

Part One covers Contractual Grievances. These are common Contractual Grievances including a definition, key arguments, interview recommendations, relevant CBA provisions, and tips from handling similar Grievances. It is designed to be a one stop shop to get going on a related Grievance. Use this as a template or a starting point. This section is largely an expansion and updated of previous training manuals. If it wasn't broken, I was not about to try to fix it. But I did add tips and explanations.

Part Two covers Discipline / Corrective Action. This section goes into common Due Process and Just Cause defenses. In large part this is borrowed from Jeff Kehlert's Defense vs Discipline. The expansions made in this section includes several additional defenses to discipline, covering expanded provisions to defend against discipline and finally an in-depth coverage of how to set up defenses during the Pre-Disciplinary Interview / Investigative Interview. I have spent considerable time mastering Procedural Due Process and is reflected in multiple chapters.

Refer to the table of contents to find the relevant section or argument you want to review or read. At the very back of this book are some personally made modified forms reference in this guide thus far and will include future forms mentioned. This includes organizational documents, modified national forms, and sample interviews.

Part One

Investigating and Documenting Common Contractual Grievances

Chapter One

THE ISSUE: SUPERVISORS PERFORMING BARGAINING UNIT WORK IN 1.6.A OFFICES

THE DEFINITION

Supervisors in offices with 100 or more bargaining unit employees are prohibited from performing bargaining unit work unless it falls within one of the five (5) enumerated exceptions in Article 1.6.A.

THE ARGUMENT

As a general rule, supervisors in offices with 100 or more bargaining unit employees are prohibited from doing bargaining unit work. If management claims that the work performed falls within one of the enumerated exceptions the burden shifts to **the employer to establish the applicability of that exception**. This means the burden is on Management to establish a justifiable exception exists – Not the Union to disprove the exception.

Generally, all distribution functions and window work are accepted as exclusively bargaining unit work. Other work, such as administrative duties, etc., may not always be exclusively bargaining unit work. However, if we can show that such work has historically been performed by clerks in an office, we have a strong case for arguing that it should not be assigned to supervisors.

THE INTERVIEW(s)

Bargaining Unit Employee:

- Which supervisor was it and exactly what did you observe him or her doing?
- For how long and when (dates and times) was that Supervisor doing craft work?
- Did you say anything to the supervisor? If so, what did you say and when?
- Who else was present and may have witnessed this incident? Craft employees? Other supervisors?
- Have you witnessed this supervisor doing similar work in the past? If so, when? Where?
- Would you be willing to write a statement and/or testify at an arbitration if that should be necessary?

Whenever possible get a written and signed statement from each witness. Ask the employee to be as specific as possible about the exact times and specific work that he observed being performed. Be sure that the employee understands that they may someday be called as a witness for arbitration.

Remember, in determining credibility the arbitrator often analyses the witness's ability to recall and testify about "specifics." This is why we want the Interview to codify the facts as specifically as possible but to not be overly elaborate to later be disputed.

The Supervisor

- Why were you sorting mail on Monday?
- How long did you spend sorting mail on Monday?
- Is it unusual for you to sort mail or do you perform this type of work often?
- Is there anybody who can verify how long you were sorting mail?
- Is there anybody who can verify that you have regularly or routinely performed this type of work?
- Who would have done this work if you had not been available to do it?
- Do any other supervisors that you know of also do this type of work?
- If so, when, and how often?
- Exactly what type of work were you doing?
- Would you mind giving me a signed statement?

Do not ask the supervisor what exception to Article 1.6 they are relying upon. They will come up with the excuse that the work fits one of those exceptions quickly enough on their own. Many times, the supervisor will deny doing the work for the length of time alleged in your witness statements but will still admit to doing bargaining unit work for a significant period of time. This will leave you with an enviable dilemma - do you insist on pursuing the entire remedy or do you "settle" for what the supervisor admitted to.

Do not anticipate many supervisors agreeing to provide statements. However, what does it hurt to ask? I recommend asking for a Statement, then putting in a Request for Information (RFI) a copy of the Supervisors Statement. This does allow the Union to argue Negative Inference later in the process if/when the Supervisor is called as a witness.

THE DOCUMENTATION

- Witness statements & interviews
- Supervisor statement or interview
- Remember: WHO saw WHAT? WHO said WHAT? WHEN did it happen (date and exact times)? WHERE did it happen?
- Seniority lists, by section and work area, showing available craft employees
- OTDL for purposes of establishing remedy
- Position descriptions of bargaining unit employees
- PS Forms 1723, if 204-B
- Supervisor sign-in sheet, scanner data or work record showing they were working
- Supervisor Badge Swipes if no sign-in sheet, scanner data or work record
- A Calculation of the estimated hours, and dollar amount at the appropriate level for the work performed by Management

THE AGREEMENT

- National Agreement, Article 1.6.A
- JCIM, Article 1.6

JCIM Remedy

The JCIM has a clearly defined remedy in the following Language: "Where bargaining unit work which would have been assigned to employees is performed by a supervisor and such work hours are not de minimus, the bargaining unit employee(s) who would have been assigned the work shall be paid for the time involved at the applicable rate."

You should specifically reference this as your remedy in a Step 2 Appeal.

Additional Tips

When investigating your Grievance, it is essential to broaden your scope to prevent Management from disputing the amount of time they performed Bargaining Unit Work. In a large facility, you should consider Maintenance / Custodial employees, 3rd Party Vendors such as FedEx or UPS, and Carriers. Any way possible to confirm the timeline can be beneficial.

We do have language on Interviewing non – Postal employees or individuals not at a Postal Facility. This can be a large amount of work for little gain. It is recommended to at least ask these witnesses for a Statement or quick interview. You can ask a couple brief questions to a vendor/contractor and simply have them sign the paper you wrote the answers on.

For 1.6 Violations in Large Offices, the NALC are your greatest asset. Developing a relationship with the NALC Shop Steward can provide excellent evidence. I have seen and experienced the NALC notifying the APWU when Management performs APWU work and vice versa. This environment is ideal and can help win more Grievances.

You can and should cite text messages from other crafts/Unions as evidence in your grievance. If it comes down to it, and you cannot prove how many hours Management worked but they admitted to some you are left with a choice – settle for less or appeal the Grievance. This decision must be based upon and evaluated by the strength of your evidence, and variety of witnesses, and how often Management performs Bargaining Unit Work.

Remember at Step 3/Arbitration the extraordinary costs of the process and that it is likely, if the numbers are not far off, the NBA will likely take a lesser amount of some sort. In this situation is may be more advantageous to negotiate a settlement between the two numbers and avoid the time/expense. It would be advantageous, in this situation, to add language to the settlement that Management will cease and desist from performing Bargaining Unit Work. If you give Management something, they can give you this language in return. You should never settle for language only unless the time performing work is minimal.

Chapter Two

THE ISSUE: SUPERVISORS PERFORMING BARGAINING UNIT WORK IN 1.6.B OFFICES

THE DEFINITION

Postmasters and supervisors in offices with fewer than 100 bargaining unit employees are prohibited from performing bargaining unit work unless it falls within one of the five (5) enumerated exceptions in Article 1.6.A or when the duties are specifically included in their position description.

THE ARGUMENT

Per the MOU and Global Settlement on 1.6B:

"In Level 18 offices, the postmaster is permitted to perform no more than fifteen (15) hours of bargaining unit work per week. There will be no PMR usage in Level 18 offices.

In Level 16 offices, the postmaster is permitted to perform no more than twenty-five (25) hours of bargaining unit work per week. There will be no PMR usage Level 16 offices.

In Level 15 offices, the postmaster is permitted to perform no more than twenty-five (25) hours of bargaining unit work per week. There will be no PMR usage in Level 15 offices.

In the event there is a second supervisor in any of these offices, only one (1) of the supervisory employees may perform bargaining unit work as prescribed above (either the postmaster or the supervisor)."

In level 18, 16, and 15 Offices Management is allowed to perform Bargaining Unit Work up to maximums as defined above. Management varies depending on if they refuse to do Bargaining Unit Work or if they try to do all the work possible. Any work outside of the hour limitation is a violation of the Collective Bargaining Agreement, the MOU, and the Global Settlement.

THE INTERVIEW(s)

Bargaining Unit Employee:

- What supervisor was it and exactly what did you observe them doing?
- For how long and when (dates and times)
- Have you said anything to the supervisor? If so, what and when?
- Who else was present and may have witnessed the postmaster's performance of our work? Craft employees? Other supervisors?
- Have you witnessed this supervisor doing similar work in the past? If so, when? Where?
- Would you be willing to write a statement and/or testify at an arbitration if that should be necessary?

- Has the amount of bargaining unit work performed by the supervisor or postmaster changed significantly? Is she doing more or less of our work?
- Have your hours increased or decreased?
- Were there clerks available to do this work or does the postmaster only do bargaining unit work when no other clerks are available?
- Have past supervisors or postmasters performed similar amounts of bargaining unit work? More work or less work?
- Have you ever been sent home before the distribution is completed and does the postmaster continue distributing mail after you leave?
- Are you window qualified? Scheme qualified? What other training have you had?
- Do you ever serve as a 204-B? If so, when you do, what bargaining work do you do? Are there other clerks available who could have been scheduled to do this work?

Whenever possible get a written and signed statement from each witness. Ask the employee to be as specific as possible about the exact times and specific work that he observed being performed. Be sure that the employee understands that they may someday be called as a witness for arbitration.

The Postmaster or Supervisor

- How much bargaining unit work do you do each day?
- Why is it necessary for you to do this work?
- What alternatives have you considered?
- How much bargaining unit work is expected from you by your office's budget or by your supervisors?
- What are your clerks' schedules?
- What are your window hours?
- Who performs your morning distribution? How often to you assist and for what period of time?
- Are any clerks ever sent home before all the distribution (first and third class) is completed? How do you find time to get the rest of this finished by yourself?
- Do you ever work the window? If so, how often and for what period of time?
- Why don't you schedule a clerk to do this work?
- Has any management official ever instructed you to perform this work? Do you understand that it is expected that you perform a certain amount of bargaining unit work each day? If so, how much?
- If you didn't do this work, who would do it?
- With all of the bargaining unit work you are doing, how do you possibly find time to do your postmaster duties?
- Have you given any consideration to scheduling a craft employee to do this work? If not, why not?
- Are your craft employees qualified to do this work?
- Would you mind giving me a signed statement?

Do not anticipate many supervisors agreeing to provide statements. However, what does it hurt to ask? You will be able to come up with many more appropriate questions which

are particular to each office and fact situation. Take good notes during your interview. Once higher level management gets their hands on their subordinate, their story is going to change dramatically. The above interview is designed to establish a baseline of work allowed and work performed.

THE DOCUMENTATION

- Witness statements & interviews (establish who does what and when - particularly, what hours does the Postmaster work and what time does she spend performing distribution or working the window?)
- Clerk seniority list
- Clerk work schedules (at least 6 months)
- Clock rings, timecards (both sides) or ETC printout (at least 6 months) for all clerks, FTR, PTF, and PTR as well as any PSE's, TE, loaner or cross craft hours
- Overtime Desired List
- Supervisor/Postmaster statements or interviews
- Function 4 / Workload-Work hour analysis
- Work hour budgets (last several years)
- Any written instructions or admissions regarding performance of clerk work
- Supervisor/Postmaster position descriptions
- Bargaining unit employees' position descriptions
- PS Form 3930 [Operational Analysis Form]
- Window hours for Post Office
- Office History Survey
- PS Form 1723, if Supervisor is a 204B
- PS Form 1260 / Time Clock for Supervisor/Postmaster when performing Bargaining Unit Work
- Calculation of the hours worked, the rate of the highest level employee, and a total of the financial damage to the employees

THE AGREEMENT

- National Agreement, Article 1.6.B
- National Agreement, Article 19
- USPS Handbook, EL-202
- JCIM, Article 1.6
- MOU RE: 1.6B

National Awards

- Arbitrator Shyman Das, Q98C4Q-C01238942; 1/4/2005
- Arbitrator Sylvester Garrett, AC-NAT-5221; 2/6/1978
- Global Settlement Q06C-4Q-C 10005587

JCIM Remedy

The JCIM has a clearly defined remedy in the following Language: "Where bargaining unit work which would have been assigned to employees is performed by a supervisor and such work hours are not de minimus, the bargaining unit employee(s) who would have been assigned the work shall be paid for the time involved at the applicable rate."

You should specifically reference this as your remedy in a Step 2 Appeal.

Additional Tips

Management in small offices have a knack of not accurately reporting their required hours and doing 'whatever it takes' to make the facility run. While this attitude is pervasive everywhere, it can be far more difficult to prove in a smaller facility where a Postmaster is allowed to perform Bargaining Unit Work. The lines can quickly blur.

You are likely to run into issues in which witnesses are unsure if/when a Postmaster should be performing Bargaining Unit Work. The key to winning this Grievance type is in the above awards. Management who performs Bargaining Unit Work in a small office typically has a schedule of some sort in which they conduct Bargaining Unit Work to fill an operational need.

You are likely to find a Postmaster who performs the same daily tasks, such as 2 hours a day of window coverage or sorting mail in a Po Box Section. While this can be allowed (Depending on job description) you should know any additional work is outside of the allowed hours. The issue becomes witnesses in small offices who may like or have a co-worker relationship with the Postmaster.

The burden can be absolved with creativity in witnesses. You should look to contractors who clean the facility for Small Offices. Ask them for a statement or to interview. Same with Motor Vehicle Services (MVS) who deliver mail to the facility as well, or Carriers who pick up mail and bring it to another facility.

An often-overlooked element are scanners in today's day and age in a Small Office with a Po Box section. Postmasters will often use a clerk's scanner they are signed into to scan mail at the Po Box while the Clerk works the window, or vice versa. This overlap confirms that someone, such as the Postmaster/Supervisor, was doing one of the jobs while the Clerk did the other.

The same applies to the Postmasters scanner in a Level 18 Office. While permitted to do Clerk Work, they have limits. You can easily argue scans were outside the Postmasters reported hours. The point is to think outside the box when you cannot prove this violation. The best source of confirming this violation are statements and interviews.

A final note is from the documentation list. Like all Grievance, some documentation is only applicable in some situations. Although 1.6B violations are usually for level 18 and under facilities, you only need to retrieve the Supervisors/Postmasters job descriptions in those offices. Above level 18, you do not need the position description and Management is not allowed to perform Bargaining Unit Work.

Chapter Three

THE ISSUE: PAST PRACTICE – FIVE MINUTE WASH-UP

THE DEFINITION

A reasonable amount of wash up time is granted to employees who work with dirty or toxic materials through Article 8 of the National Agreement. Article 30 of the National Agreement gives the Union the right to negotiate additional or longer wash-up periods for all employees. Many installations allow some amount of additional time for a wash up period for their employees. The actual amount of wash-up time is subject to the grievance procedure. Where no specific LMOU provision exists, the past practice in the office determines the length of the wash-up time that is allowed for each employee.

THE ARGUMENT

The employees in the installation have enjoyed a five minute wash-up period prior to going to lunch and prior to going home for a long period of time. Management has unilaterally ended the long standing past practice without any discussion with the Union. Article 5 of the National Agreement prohibits the Employer from taking a unilateral action without discussion with the Union.

To establish a past practice, the claimed practice must meet the following conditions:

1) clarity and consistency

2) longevity and repetition

3) acceptability

4) underlying circumstances and

5) mutuality

The fact that supervision allows the employees to leave the work area and take the 5-minute wash-up time demonstrates the acceptability. It must be clear to all involved where the employees are going five minutes prior to clocking out time. In this case, the Union must prove that the past practice of 5 minutes wash-up is a long standing past practice. Senior employees can testify to the fact that the past practice has been in place for a long period of time. Examine your facts carefully. Is everyone taking the five (5) minute wash-up? Are they using the time to wash-up or for other purposes?

THE INTERVIEW(s)

Bargaining Unit Employee:

- How long have you worked here?

- How long have you had a 5-minute wash-up time?
- How did you become aware of the 5-minute wash-up practice?
- Has anyone in management ever mentioned the 5-minute wash-up?
- How much time is needed for wash-up in this office?
- What special circumstances make the 5-minute wash-up necessary?
- Until recently has anyone in management ever challenged the 5-minute wash-up?
- What were you recently told about the wash-up period?

The Postmaster or Supervisor

- How long has management allowed the employees to take a 5-minute wash-up prior to lunch and ending tour?
- Were all employees allowed to take the 5-minute wash-up?
- Did you allow your employees to leave the workroom floor and wash-up?
- Did you discuss this wash-up time with any of your employees?
- Did you attempt to discipline any of your employees for leaving the workroom floor?
- Why did you decide to end the wash-up time privilege?
- Who told you to end the 5-minute wash-up time?
- How did you end the wash-up past practice?
- Did you discuss the action with the Union?
- Were notices posted to advise employees of the change in past practice?
- Did you attempt to eliminate the wash up language in the last local negotiations?
- Did you attempt to change the wash up language in the last local negotiations?
- What is the language regarding wash up in the LMOU?

THE DOCUMENTATION

- Witness statements or interviews
- Supervisor interviews or statements
- LMOU provisions
- Notes from service talks, etc. where past practice was previously recognized or announcement of change was made
- Labor-Management minutes / written instructions, etc.
- Any management documents expressing a recognition of past practice
- Correspondence regarding management's intent to change practice
- Any proposals from either party during local negotiations on wash up
- Any notes from LMOU negotiations which reference the Past Practice
- Any settlements referencing the Past Practice (At any level – even if non precedent setting)

THE AGREEMENT

- National Agreement, Article 5
- National Agreement, Article 8.9
- National Agreement, Article 30

- LMOU
- JCIM, Article 5

Appropriate Remedy

The appropriate remedy for all Past Practice violations is to reinstitute and follow the accepted practice. Example language would be, "The parties agree to cease and desist violations of the Wash-Up Past Practice and shall reinstitute five-minute wash up for all previously covered employees."

For recurring violations, you would seek escalating remedies.

Additional Tips

REFER TO CHORNOBY TRAINING: SILENT - Using Past Practice & Article 5

Past Practice can be as complicated as you make it. I have a full 70+ Slide PowerPoint training on this subject alone. When I conducted the training, it was over four hours alone and it cannot be fully explored here. This will be a short cliff note synopsis of tips.

It is highly recommended to argue the following three elements, if possible, in addition to the 5 elements identified above:

1. Establish how the Practice became a Benefit
2. Establish the Purpose / Function of Past Practice
3. Establish the violation / conflict / harm

These three additional elements are commonly seen in successful Arbitrations against employers. After reviewing APWU Past Practice Grievances, historic court decisions, Past Practice Grievances from other Postal Unions and other such sources commonly have an Arbitrator or Judge who specifically mentions one or more of these three elements in their Award / Opinion. The success rate of Unions drastically goes up when we preemptively argue these points.

Under the example of Wash-Up Time, you should include verbally at Step 1, and Step 2, how the practice came to be and how it benefits employees. It is challenging to quantify harm in most Past Practice Grievances, and historically this can be a hurdle in Arbitration. The easiest way to quantify harm is to establish that the Past Practice is, or has become, an employee benefit.

Often a Past Practice will either be directly in the LMOU, the result of a Settlement or discussion at a Labor – Management Meeting. Past Practices form out of necessity and, as it relates to working conditions, are Mandatory Bargain Items. This may require you to speak with or interview a previous Steward or retired employee who was employed when the practice came to be. Do not fear doing so. It can be extremely beneficial to your casefile if you can establish the Wash-Up Time is a negotiated benefit.

You will also want to include any Settlement that references the Past Practice. Not only could this be a violation of Articles 5, 8 and 30 - this could be a compliance violation. This is increasingly likely when you have turnover in Management.

Although this is common sense, clearly identify the purpose/function/benefit of the Past Practice. The purpose/function could be as simple as allowing members to eat their lunch without dust, dirt, or debris on their hands. It could be time to remove PPE and put it in their locker. Whatever the case, for an Arbitrator, or Step 2 designee who has never worked in the operation, the importance of Wash-Up Time may not be known.

Finally, it is the harm/violation. The harm for Wash-Up Time is easy – The member is using their break time, or lunch time, to wash-up meaning they are not receiving a negotiated benefit in break times and working off the clock for lunch times. This is financial harm by removing the benefit.

Past Practice has years of precedence in Arbitration that is not included in our Contract nor is it codified in APWU Arbitration. The standard of Past Practice is well known to Arbitrators and can vary on a case-by-case basis depending on circumstance. If you document the above recommendations, you are extremely likely to win your Grievance.

If you have not met your burden of proof, seek interviews with other Crafts. This includes Mail Handlers, Carriers, Custodial Employees, and even other EAS not involved prior to initiating a Grievance. A long-standing Past Practice has a plethora of witnesses.

When dealing with remedies, once you have cease and desist language you will want an escalating remedy of some sort. This depends on the fact/circumstance of the Grievance. For some Past Practices you would seek to expand the member benefit. In others the violation is of Article 1, Union Recognition and the remedy requires payment to the APWU due to harm to our bargaining position and trust amongst the membership. The violation could be Article 14 for creating a hostile work environment due to non-compliance. Each case is different.

Past Practice is the grease that makes the wheels of the USPS operate. No handbook, manual, or agreement fully covers how all operations function. Those blind spots are all filled with Past Practice. While we use the example here of Wash – Up time, Past Practice Grievances should be the bedrock of any change in the workplace that impacts working conditions. The Past Practice is what has been done, which the APWU did not dispute, and the membership is accustomed to.

When in doubt about Past Practice seek guidance from your local leadership or Business Agent. Past Practice can be a temperamental Grievance type and for Stewards at Step 1, the burden can often be daunting when you do not know how to gather evidence to prove the existence of the Past Practice. This Grievance type of the quintessential example of Documentation wins Grievances over arguments.

Chapter Four

THE ISSUE: CROSSING CRAFTS / OCCUPATIONAL GROUPS

THE DEFINITION

Management may not normally make cross-craft or cross-occupational group assignments unless there is an insufficient workload in the losing craft and an unusually heavy workload in the gaining craft.

THE ARGUMENT

The circumstances under which cross-craft or cross-occupational group assignments may be appropriate are very limited. Article 7 is a general prohibition against such assignments with very limited exceptions. If management claims an insufficient workload in one craft and an unusually heavy workload in another, the burden shifts to the Employer to prove those claims. Management may not make such assignments solely to avoid overtime in one craft or occupational group.

THE INTERVIEW(s)

The Postmaster or Supervisor

- What work did Letter Carrier Smith perform on Wednesday between 0700 and 0900?
- Isn't (distribution of parcel post) normally Clerk Craft work in this office?
- Who made the decision to make this cross-craft assignment?
- Why did you decide to use Letter Carrier Smith to perform this Clerk Craft work?
- Why couldn't you have used Clerks to perform this work?
- Wasn't one of your major concerns the fact that you would have had to bring in a Clerk on overtime?
- How much overtime did the Letter Carrier Craft work on the day in question?
- How much overtime was worked in the Clerk Craft on that day?
- Why were not enough Clerks scheduled to handle the mail volume?
- Did you attempt to contact any Clerks to come in and work the mail?

THE DOCUMENTATION

- Position description(s) of employees assigned across crafts, occupational groups or levels
- Position description(s) of employees normally performing this work
- Clock rings of employees assigned across crafts, occupational groups or levels
- Clock rings or work hour summary for all members of craft working in APWU craft or occupational group (overtime level in losing craft or occupational group)

- Clock rings or work hour summaries in gaining craft (overtime level in gaining craft)
- PS Forms 1723 [Assignment Order] if used
- PS Form 1230 A or B if used [usually in smaller offices]
- Mail volume reports
- Transfer hours reports
- Identify or document work available in employee's own craft
- Witness statements or interviews
- Supervisor interviews or statements
- Light / limited duty job offer (if applicable)
- Medical restrictions of employees (if any) being assigned across craft lines
- Transfer hours report
- Copy of OTDL
- Copy of Seniority Roster
- RFI for the Operational Conditions which required crossing crafts
- Copy / documentation of any excessing the gaining unit/section
- RI 399 Inventory (if applicable)

THE AGREEMENT

- National Agreement, Article 7.2
- National Agreement, Article 13 (Possible)
- National Agreement, Article 19
- Employee & Labor Relations Manual, Part 546
- JCIM, Article 7.2.A

National Awards

- Arbitrator Block, A8-W-0656, 4/7/82; 4/7/1982
- Arbitrator Mittenthal, H8C-2F-C-7406; 8/23/1982

JCIM Remedy

The JCIM has a clearly defined remedy in the following Language: "Generally, when the Union establishes that an employee was assigned across craft lines or occupational groups in violation of Article 7.2.B or 7.2.C, a "make whole" remedy requires the payment (at the appropriate rate) to the available and qualified employee(s) who would have been scheduled to work but for the contractual violation."

You should specifically reference this as your remedy in a Step 2 Appeal.

Additional Tips

Crossing Craft violations are increasingly common in Local Post Offices. Several factors contribute to this. The Universal Clerk initiative increased use of technology which reduced the need for scheme qualification, and more mail arriving presorted. This created an environment over the past twenty years where Management has vastly reduced the amount of clerks needed in Local Post Offices to the point that many offices do not even have coverage for breaks and lunches.

The result is a fragile mail processing environment where one call off, vacation, or higher than usual mail volume means Management will either perform the work themselves or have another craft. This issue is so common that many Postmasters just pay out Grievances and consider the payment the cost of doing business. The APWU's only way to combat this business model is constant Grievances and if possible, cease and desist language for flagrant violations.

A plethora of Regional Arbitrators have ruled on this subject, and you may have local settlements that relate to this subject. The Contract is clear on the conditions Management may assign work to other crafts. It is best practice to include in your casefile counter arguments to Managements protections including previous local settlements.

The template discussed here is not for RI – 399 Violations in which Mail Handlers are in dispute over the work being performed. I highly recommend if your local does not already have a point person to handle RI – 399 Violations, one to be selected.

For 7.2B, Management can only assign work within the same wage level and to qualified individuals. For 7.2C it is required that the gaining Craft has an exceptionally high workload, and the losing Craft has a light workload. Take note of exceptionally high workload. This is not a busy day, this is a day in which work is so unpredictably high it would be impossible for a fully staffed facility to manage the volume, even with curtailment of applicable mail.

This would indicate a sudden influx of mail which could not be predicted, not a staffing shortage. Management must prove the need to have another Craft perform the work.

The exception is the need cannot be a condition created by Management. For example, if Management refused to offer NS Day Overtime to Clerks on a predictably busy day such as surrounding a holiday, but allowed excessive Overtime for Carriers, this is an artificial event created by Management.

Previously Management fought this with more vigor and attempted to justify their decisions via 7.2. It has become less and less common while Crossing Crafts has increased. Despite this fact, It is highly recommended to preemptively establish that Management failed to prove the operational need in your Additions/Corrections if the contention is raised by Management. We never want to raise a justification for Management, but we need to be prepared when Management does.

Chapter Five

THE ISSUE: CONSECUTIVE OFF DAYS

THE DEFINITION

Employees are entitled to work schedules with consecutive workdays (and consecutive off days). Split duty assignments with split off days must be minimized.

THE ARGUMENT

Article 8.2.C requires that "as far as practicable the five days (of a full-time regular employee's work week) shall be consecutive days..." What this means is that the Employer must make every effort to avoid split off days and where it must post a position without consecutive off days, the burden shifts to the employer to show why doing so was not "practicable."

Employees have a considerable interest in working a consecutive day work week and the Employer must shoulder an equally considerable burden in demonstrating why this is not "practicable" or "doable." Simply avoiding overtime or convenience of scheduling excuses will usually not be enough. The Employer must show that some significant service consideration required the change.

THE INTERVIEW(s)

- Didn't this duty assignment previously have consecutive days off?
- Who made the decision to change it to split off days?
- Why was this duty assignment changed to split off days?
- What consideration, if any, was given to retaining some form of consecutive days off?
- Was your sole reason for making this change an attempt to reduce overtime on Mondays?
- Has your overtime decreased on Mondays?
- What change has occurred in your overtime on the other days of the week?
- How many other split off day duty assignment do you have posted in this section?

THE DOCUMENTATION

- Previous job posting
- New job posting or notice to employee/union of intent to abolish and repost
- Clock rings / timecards
- Witness statements or interviews
- Supervisor interviews or statements
- Overtime records (by day of week)
- Mail volume reports or other documentation of workload by day of week
- Delayed mail reports if any

- Position description
- LMOU provisions
- Documentation as to other duty assignments in the section or office (how many are currently consecutive off days and how many are split?)
- PSE work schedule

THE AGREEMENT

- National Agreement, Article 8.2.C
- LMOU
- JCIM, Article 8.2 C

Appropriate Remedy

The following are potential remedies for this Grievance type:

- That the duty assignment(s) be restored to consecutive days off,
- That the current incumbent employee(s) be granted out of schedule pay for all hours worked and returned to former duty assignment(s), and
- That the former incumbent employee(s) be granted out of schedule pay for all hours worked and returned to the duty assignment(s) with consecutive off days.

Additional Tips

This section is applicable to Realignments as well and this is a pervasive issue for Abolishing and Reposting positions. Management must make every effort to have Consecutive Off Days. In Local Post Offices, Management typically attempts to circumvent this by claiming the work volume does not exist on Sundays to allow Consecutive Off Days.

The Unions strongest defense to this is a combination of PSE usage, Overtime usage, and Crossing Crafts on Sundays. Someone must work the mail and by totaling the hours Sunday could very well be a viable service day for a bid. Management often does not even consider this as an option and the burden will fall to the Union to establish this as a possibility.

It is also essential to consider that the posted bid can have a different start time on a day of the week. If considering Sunday, it may be advantageous to suggest or include as a remedy a bid with alternative hours to align with parcel delivery and sorting.

Another consideration is some LMOU's include Mandatory Consecutive Off Days. This language is stronger than the Contract and should take precedence if your LMOU includes such language. You should review your LMOU and any potentially relevant local settlements that may pertain to Off Days to ensure you do not have stronger, binding language.

Chapter Six

THE ISSUE: OVERTIME ASSIGNMENTS

THE DEFINITION

Full-time employees not on the overtime desired list (OTDL) may not be required to work overtime unless all available employees on the OTDL have worked up to twelve (12) hours in a service day or sixty (60) hours in a service week.

THE ARGUMENT

The overtime provisions in Article 8 and your LMOU are intended to protect employees who do not wish to work overtime from having to do so whenever possible while giving those employees who wish to work overtime the opportunity to do so. Management cannot require non-OTDL employees to work overtime unless they have first maximized the utilization of available and qualified OTDL employees. Management may not bypass available OTDL employees and require non-OTDL employees to work overtime solely to avoid the payment of penalty overtime.

THE INTERVIEW(s)

The Postmaster or Supervisor

- What work didn't the non-OTDL employees perform on overtime?
- Haven't you been told by your superiors to avoid penalty overtime at all costs?
- Isn't the main reason you sent the OTDL employees' home after two (2) hours because they would have thereafter gone into a penalty overtime status?
- There is no dispute that the OTDL employees were available and qualified to perform the work in question (other than their penalty status), is there?
- Were there any reasons other than your concerns about penalty overtime which precluded your using the OTDL employees up to twelve hours instead of requiring the non-OTDL employees to work?
- Did you make the decision to send the OTDL employees home after 10 hours or were you told to do so?
- Isn't it true that if the OTDL employees had been used for an additional two hours it would still have been possible to meet the critical dispatch?

THE DOCUMENTATION

- Overtime Desired List
- Seniority list
- Clock rings / timecards
- Overtime authorization (PS Form 1261)

- Dispatch schedules
- Witness statements or interviews
- Supervisor interviews or statements
- 3971's for any employees excused
- Position description of employee doing work
- Position description of bypassed employee
- LMOU provisions
- Work schedules
- Training records or documentation establish qualification of bypassed employee

THE AGREEMENT

- National Agreement, Article 8.5
- LMOU
- JCIM, Article 8.5

JCIM Remedy

The JCIM has a clearly defined remedy in the following Language for exceeding 12/60 Hours: "The parties agree that with the exception of December, full-time employees are prohibited from working more than twelve (12) hours in a single workday or sixty (60) hours within a service week. In those limited instances where this provision is or has been violated and a timely grievance filed, full-time employees will be compensated at an additional premium of fifty percent (50%) of the base hourly straight-time rate for those hours worked beyond the twelve or sixty-hour limitation. The employment of this remedy shall not be construed as an agreement by the parties that the Employer may exceed the twelve and sixty-hour limitation with impunity." The JCIM has additional language on bypassed opportunities.

You should specifically reference this as your remedy in a Step 2 Appeal.

Additional Tips

Management has potentially harmed two individuals. The Non-List and the List employee. Precedence exists on compensating Non-List being forced to work and a separate Grievance can be filed on their behalf with a remedy of a 50% Premium for the Non-List employees to compensate for their harm.

This is a common dispute amongst employees who want to work the Overtime and do not want the Union to file a Grievance. It is recommended to still file the Grievance and to focus on interviewing Management and attaining witness statements to see who witnessed the violation. If you are having 12/60 issues outside of peak season/December, your facility will be in a horrible position when peak arrives.

A common misconception is what happens when you hit your 60-hour maximum before the end of the service week. In that situation the employee should immediately clock out and they should be paid for the remainder of the day, up to the 8-hour guarantee.

Chapter Seven

THE ISSUE: ABSENT WITHOUT APPROVED LEAVE (AWOL)

THE DEFINITION

Absent without approved leave (AWOL) is a non-pay status resulting from a management determination that no kind of leave (paid or unpaid) can be granted, either because (1) the employee did not obtain advance authorization or (2) the employee's request for leave was denied.

THE ARGUMENT

The Postal Service's leave policy still must be administered on an equitable basis, considering both the needs of the Employer and the welfare of the individual employee. The supervisor may not arbitrarily, capriciously, or discriminatorily disapprove leave, thus placing the employee in an AWOL status. Nor may every disapproved request for annual leave or sick leave automatically be charged as AWOL. If the supervisor, for instance, is satisfied that a request for annual leave is legitimate, but the employee has insufficient annual leave, the request should be approved but recorded as LWOP. Or, if a request for sick leave is warranted but not compensable under the sick leave provisions, the employee should be given the option to convert the request to annual leave or LWOP, instead of automatically being charged AWOL.

Similarly, not every leave request for which advance authorization was not obtained may be charged as AWOL. The leave provisions anticipate that occasional requests for unanticipated annual leave or sick leave will occur. Even a blanket policy that all no-calls or late calls are to be charged AWOL would be inappropriate. Undoubtedly, many no-calls will turn out to warrant an AWOL determination. However, each case must be examined on its own merits. For example, where an employee was incapacitated and notified the employer as soon as she was able to do so, sick leave would be appropriate rather than AWOL.

THE INTERVIEW(s)

The Postmaster or Supervisor

- Why was the grievant determined to be AWOL?
- Who made the decision?
- Is everyone who calls in late automatically AWOL?
- Is this policy that everyone who fails to call in before their scheduled start time is automatically AWOL in writing somewhere?
- You did understand, didn't you, that grievant was in the hospital this morning and didn't have access to a phone until two (2) hours after her tour began?
- Would it have made any difference if you had known this?
- Is there anything grievant could have done or submitted to get you to change your mind and approve sick leave for the two (2) hours before she called in?

THE DOCUMENTATION

- PS Form 3971 (leave slip)
- PS Form 3972
- Medical/emergency evidence or documentation
- Grievant's statement or interview
- Witness statements or interviews
- Supervisor interviews or statements
- Call-in records (Such as IVR Conformation Number)
- Employee's PS Form 3972
- Discipline notice if issued
- Documentation or statements to other employees treated differently

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- LMOU
- Employee & Labor Relations Manual, Part 510

Appropriate Remedy

The remedy for any AWOL Grievance is for the AWOL charge to be rescinded and removed from the employee's record as well as the leave being changed to the requested leave type (sick, annual, or LWOP).

Additional Tips

Management has been defaulting to AWOL increasingly often rather than just marking leave as unscheduled. AWOL is the highest attendance offence one can make. AWOL will harm transfers, promotions, etc.

The ELM does provide protection, such as ELM 512.422. When disapproving leave, Management must annotate why the leave is being disapproved on the 3971. This is a strong procedural defect which can prove the decision was arbitrary. Management must have a good reason to issue the AWOL. Management also cannot unilaterally make all denied leave AWOL. The ELM has provisions for leave authorization. A successful defense may be arguing the leave should have been approved initially over arguing that it should not be an AWOL.

Management will often determine late notification as a reason for AWOL, such as calling in after the beginning of the employee's shift. The ELM has language surrounding notification as soon as possible, such as ELM 512.412, 513.332, and 515.51. This is a strong defense as to why the absence should not be AWOL. When using such a defense you must interview the Grievant and attain documentation to establish the call-in was as soon as possible. The F-21 (143.12) also has language on makeup time for tardies 30 minutes or less.

Chapter Eight

THE ISSUE: DENIED ANNUAL LEAVE

THE DEFINITION

Annual leave is an earned benefit. Employees earn annual leave each year and they are entitled to use that earned leave either for scheduled vacations, incidental scheduled leave or emergency situations.

THE ARGUMENT

Some annual leave is guaranteed by the Agreement. Most LMOU's have provisions on vacation scheduling guaranteeing employees' certain rights to approved annual leave for their scheduled vacations. Some LMOU's even provide for guaranteed incidental leave up to certain fixed percentages during the year. These are negotiated rights to use an earned benefit, and management may not deprive employees of this right. Once annual leave is approved it must be honored except in serious emergency situations.

All requests for incidental annual leave other than those guaranteed under the Agreement must be approved or disapproved by the supervisor. Where no specific procedures are spelled out in the parties LMOU, the supervisor's decision must not be arbitrary or capricious. It also may not be discriminatory and must be equitable, considering on a case-by-case basis both the needs of the service and the welfare of the individual employee.

Annual Leave is an earned, negotiated benefit. Denying Annual Leave arbitrarily is the equivalence of not allowing an employee to cash their check or not allowing them to use their health insurance.

THE INTERVIEW(s)

The Postmaster or Supervisor

- It appears that you are the supervisor who disapproved Johnnie Wilson's request for annual leave. Is that correct?
- Why did you disapprove it?
- Were there any specific needs of the Service which factored into your decision?
- You didn't happen to ask Johnnie why he needed this annual leave, did you?
- Why didn't you feel that would be necessary?
- As I understand it, you had decided that no additional annual leave would be granted on Wednesday, so it really didn't matter at all what Johnnie's reason for requesting leave was, did it?
- Is this policy that no more than two (2) people may be off on annual leave a written instruction from your superiors or is it one you have adopted on your own?
- Are there ever any exceptions to this policy?

THE DOCUMENTATION

- PS Form 3971 denying the leave request
- LMOU provisions
- Vacation calendar or leave book
- Seniority list
- Grievant's statement or interview
- Witness statements or interviews
- Supervisor interviews or statements
- Timecards / clock rings
- Employee's PS Form 3972
- Employee's annual leave balance (check stub or computer print out)
- Work schedule and other PS Forms 3971 for day in question

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- LMOU
- Employee & Labor Relations Manual, Parts 510 & 512
- JCIM, Article 10

Appropriate Remedy

The remedy for improperly denied Annual Leave is that the leave request be approved. If the requested date has passed, the absence is changed to scheduled and the leave type changed to Annual Leave. If repeat violations exist, an escalating remedy of Administrative Leave should be sought.

Additional Tips

Management has a habit of denying Annual Leave with minimal to no effort to determine if it can be approved. At minimal Management should check the vacation schedule to see if any openings exist. You should also double check to ensure no one has canceled their vacation selection for availability.

As the workforce ages more and more, and with the extensions of Annual Leave carryover, employees are at a greater risk of being in a use-it or lose-it situation. Although the employee does have some responsibility for waiting until the end of the year to realize they have leave to burn, it does not change that it is a Postal Service/Federal Government policy which limits the employees roll over.

The Unions strongest position tends to be finding an error in Managements decision making, arguing it was arbitrary or capricious. This may require you to interview the determining Supervisor, the denied employee, any witnesses, and compare to other approvals/denials.

Chapter Nine

THE ISSUE: DENIED SICK LEAVE

THE DEFINITION

Sick leave is an earned benefit. Employees earn sick leave each year and they are entitled to use that earned leave when they are incapacitated or unable to work because of an injury or illness. In addition, employees may use sick leave to care for an incapacitated family member (parent, spouse or child).

THE ARGUMENT

Sick leave is an earned benefit. Sick leave insures employees against loss of pay if they are incapacitated for the performance of their duties because of illness, injury, pregnancy or medical treatment. When possible sick leave is to be requested and approved in advance. However, in unexpected illness/injury situations the employee must notify appropriate postal authorities as to their illness/injury and expected duration of absence. The supervisor is responsible for approving/disapproving each sick leave request. Such approval may not be unreasonably, arbitrarily, or capriciously denied. Medical documentation may only be required when the absence is for more than three (3) days, when the employee is on restricted sick leave, or when the supervisor has a legitimate reason to suspect abuse.

Under the Dependent Care Memo ELM 513.12, employees are entitled to use up to 80 hours of sick leave each year to care for incapacitated family members (spouse, parent, or child). Such requests for sick leave are subject to the normal documentation requirements for sick leave.

THE INTERVIEW(s)

The Postmaster or Supervisor

- Why did you disapprove Mary's request for sick leave?
- Didn't Mary call in before her tour to indicate she would be unable to work because of her cold?
- So, as I understand it, you just don't feel that Mary's cold was severe enough to incapacitate her?
- Other than that belief on your part do you have any other basis for believing that Mary was able to work?
- Under what circumstances do you believe sick leave is appropriate?
- Why did you request medical documentation?
- Under what circumstances is it appropriate for you to request medical documentation?
- Why don't you believe it was appropriate for Mary to use sick leave to care for her sick child?

THE DOCUMENTATION

- PS Form 3971 denying leave request
- Medical documentation
- Call-in records
- Grievant's statement or interview
- Witness statements or interviews
- Supervisor interviews or statements
- Employee's PS Form 3972
- Restricted sick leave records
- Documentation or evidence as to "blanket policy" existing as to medical documentation requirements
- FMLA or dependent care sick leave documentation
- Employee's sick leave balance (check stub or computer printout)
- Documentation or statements as to employee's treated more favorably

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- Employee & Labor Relations Manual, Parts 510 & 513
- JCIM, Article 10

Appropriate Remedy

The absence be changed to approved Sick Leave, and if medical documentation is required all related expenses be paid such as mileage, copay, etc.

Additional Tips

Like Annual Leave, Sick Leave is an earned benefit and should be treated as such. Denied Sick Leave takes two forms. One being Sick Leave requested in advance, and two Sick Leave being requested via call-in. These both are fundamentally different fights.

You will often find local policies which are violations such as limits of the number of hours allowed for a medical appointment, a demand for medical documentation, etc. In this situation the Unions must argue this is an ELM violation in addition to an Article 5 violation. The interview may need to be modified to determine where the policy came from, why Management made the decision and what medical expertise the Supervisor has to determine how much time would be needed, such as for a medical appointment.

The interview should be modified to determine whether the decision was arbitrary. Management has this belief that because the ELM states that if a Supervisor believes documentation is necessary for the protection of the Postal Service, they have carte blanche to request documentation. This is false. Management must have a rational, reasonable reason to require this documentation.

Chapter Ten

THE ISSUE: RESTRICTED SICK LEAVE

THE DEFINITION

Employees may only be placed on restricted sick leave in accordance with the strict requirements of the Employee & Labor Relations Manual. Management's action may not be arbitrary, must be for the reasons specified and must follow the procedures spelled out in the handbook.

THE ARGUMENT

There are two (2) possible reasons for placing an employee on restricted sick leave. Supervisors who have evidence that an employee is abusing their sick leave may immediately place the employee on the restricted sick leave list. "abuse" means using sick leave for reasons other than incapacitation. It does not mean using too much sick leave. There is no minimum sick leave balance which determines excessive use. When an employee is placed on restricted sick leave because they are considered to have used sick leave too frequently, ELM 513.37 spells out a very specific procedure including several reviews, discussions with the employee, and opportunities to correct the alleged deficiency which the Service must follow.

This process entails some 9 months. Before the employee may be placed on restricted sick leave the following steps must occur: 1) establish an absence file; 2) review the absence file by both the supervisor and higher level management; 3) review of absences and sick leave usage with employee; 4) review of the next quarters absences; 5) if there has been insufficient improvement, meet with the employee and advise him that if there is no improvement during the next quarter, the employee will be placed on restricted sick leave; 6) if there is no improvement, the employee may then be placed on restricted sick leave. If this complete procedure is not followed, an employee may not be placed on restricted sick leave for alleged over-use of sick leave.

THE INTERVIEW(s)

Bargaining Unit Employee:

- How were you notified you were on Restricted Sick Leave?
- Has anyone told you the reason you were on Restricted Sick Leave?
- Has anyone ever reviewed your absences and sick leave usage with you?
- When were you notified you were on Restricted Sick Leave?
- Has anyone ever told you the appropriate amount of Sick Leave you could use?

The key to interviewing the Grievant when dealing with RSL is to establish that Management did not properly notify the Grievant, nor did Management clearly provide the

Grievant an opportunity to improve. Since this can become a he-said, she-said situation, it becomes essential for the Union to prove the proper steps were not followed.

The Postmaster or Supervisor

- Were you the supervisor responsible for placing grievant on restricted sick leave?
- Would it be fair to say that you were unhappy with the amount of sick leave grievant has been using during the past few months?
- Is it true then, that the grievant was placed on restricted sick leave because he had used an excessive amount of sick leave?
- Were there any other reasons why you placed grievant on restricted sick leave?
- Other than your suspicions, do you have any evidence at this time indicating the grievant was not actually incapacitated on each of the occasions he requested sick leave?
- On what occasions have you reviewed Grievant's attendance with him?
- On what occasions prior to placing grievant on restricted sick leave have you discussed the possibility of restricted sick leave and its consequences with grievant.
- Did you ever tell grievant that if he did not improve his attendance within the next 90 days they would be placed on restricted sick leave?
- Do you have a minimum sick leave balance which you believe triggers consideration for restricted sick leave?

The purpose of the interview with Management (Supervisor who placed Grievant on Restricted Sick Leave / Higher Level Official) is to establish the decision was arbitrary in nature and that Management did not follow the proper protocol.

THE DOCUMENTATION

- Notice of placement on restricted sick leave
- PS Forms 3971
- PS Forms 3972
- Medical documentation
- Witness statements or interviews
- Supervisor interviews or statements
- Copy of quarterly listing / attendance review
- Employee's discipline records, if any
- Grievant's sick leave balance (check stub or computer printout)
- Check employee's OPF for attendance awards, etc.
- FMLA documentation
- Key Indicator Report

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- Employee & Labor Relations Manual, Part 513

- JCIM, Article 10.5

Appropriate Remedy

The first remedy is to have the Restricted Sick Leave notice rescinded. If any expenses were incurred, such as co-pays, or mileage, a reimbursement to the Grievant.

Additional Tips

Restricted Sick Leave is a long, complicated process. It requires not only the decision to be made with sound reason, but several steps must also be followed/taken prior to an employee being placed on Restricted Sick Leave. The ELM is abundantly clear on the proper protocol.

The Unions arguments are primarily two-fold. One is that the decision itself was arbitrary and capricious. The questions in the Interview you conduct should be focused on establishing that the decision was purely based on emotion, and not any need to protect the USPS or to help correct any alleged leave abuse.

The second argument is a failure to follow the proper protocol. Not only is Management required to abide by the ELM requirements, the JCIM further strengthens APWU members protections. The JCIM states:

"Management may place an employee in "restricted sick leave" status, requiring medical documentation to support every application for sick leave, if: (a) management has "evidence indicating that an employee is abusing sick leave privileges"; or (b) if management reviews the employee's sick leave usage on an individual basis, first discusses the matter with the employee and otherwise follows the requirements of ELM, Section 513.391.

The use of "restricted sick leave" at the Local office is optional as determined by Local management. When used, restricted sick leave must be administered in accordance with ELM, 513.391."

The emphasis is on "management has "evidence indicating that an employee is abusing sick leave privileges." If Management indicates, when interviewing, they have substantiation or evidence to indicate that abuse is occurring, you must submit a second request for information requesting said documentation and will need to perform a second interview.

Your second interview should be focused on the evidence, how it was obtained, its admissibility/credibility in the Grievance procedure, etc. This is highly unlikely that Management has any proof or substantiation sick leave was being abused, unless the member posts on social media or had a coworker "tattle" on them. The scope of who you interview may vastly expand.

The above is unlikely. Most often Management makes an arbitrary decision to place an employee on Restricted Sick Leave. Always argue the ELM must be followed in addition to the requirements in the JCIM. I can say I have never seen an employee properly placed on Restricted Sick Leave. I have seen many employees being informed they must provide documentation, but Management typically does not have the foresight to monitor and discuss sick leave usage for several months on end with a given employee.

Chapter Eleven

THE ISSUE: DEEMS DESIRABLE

THE DEFINITION

Employees may only be required to provide medical documentation for absences of three days or less if they are on restricted sick leave in accordance with the strict requirements of the Employee & Labor Relations Manual (ELM) or "when the supervisor deems documentation desirable for the protection of Postal Service interests." Management's action may not be arbitrary, must be for the reasons specified and must follow the procedures spelled out in the handbook. A Deems Desirable state may not be used to circumvent the requirements under the ELM.

THE ARGUMENT

Management often uses technology to bypass the requirements under the Employee & Labor Relations Manual (ELM) to require employees to provide documentation for short absences. This technology includes eRMS and the IVR. A Supervisor can manually trigger a 'Deems Desirable' status in eRMS which then notifies employees when they attempt to call off documentation is required to substantiate the absence.

This 'Deems Desirable' status is an attempt to bypass the requirements of 'Restricted Sick Leave' as outlined in the ELM and JCIM. Deems Desirable is not an official list, status, or protocol. The use of technology to bypass the ELM is specifically mentions in the JCIM, "RMD/eRMS (or similar system of records) may not alter or change existing rules, regulations, the National Agreement, law, Local Memorandums of Understanding and agreements, or grievance settlements and awards."

THE INTERVIEW(s)

Bargaining Unit Employee:

- How were you notified Management 'Deems Documentation Desirable' for your absences?
- Has anyone told you that you were on Restricted Sick Leave?
- Has anyone ever reviewed your absences and sick leave usage with you?
- Have you ever been told the reason you were Deemed Desirable?
- When were you told that you were Deemed Desirable?
- Has anyone ever told you the appropriate amount of Sick Leave you could use?
- Has anyone ever told you when you would no longer be 'Deemed Desirable' to provide documentation?
- When were you informed you would no longer be required to provide documentation?
- Were you ever provided time to address your sick leave usage prior to being 'Deemed Desirable'?

The key to interviewing the Grievant is to establish that Management did not follow the requirements of the ELM for Restricted Sick Leave and to establish the decision was arbitrary. Management's argument will be that the Grievants attendance record justifies this status under the ELM, which means you do not want to ask or address the actual attendance record with the Grievant.

The Postmaster or Supervisor

- Were you the supervisor responsible for indicating the Grievant was required to provide documentation for absences?
- How did you notify the Grievant documentation was required?
- How did you place the Grievant in a deemed desirable status?
- Would it be fair to say that you were unhappy with the amount of sick leave grievant has been using during the past few months?
- Is it true then, that the grievant was placed on restricted sick leave because he had used an excessive amount of sick leave?
- Other than your suspicions, do you have any evidence at this time indicating the grievant was not actually incapacitated on each of the occasions he requested sick leave?
- On what occasions have you reviewed Grievant's attendance with them?
- On what occasions prior to placing the Grievant in a deems desirable status have you discussed the possibility of restricted sick leave and its consequences with grievant?
- Did you ever tell grievant that if they did not improve his attendance within the next 90 days they would be placed on restricted sick leave?
- Do you have a minimum sick leave balance which you believe triggers consideration for a deemed desirable status?

The purpose of the interview with Management is to establish that Management did not properly meet the requirements of Restricted Sick Leave, and the decision was arbitrary.

THE DOCUMENTATION

- Notice of placement on restricted sick leave / deems desirable
- PS Forms 3971
- PS Forms 3972
- Medical documentation
- Witness statements or interviews
- Supervisor interviews or statements
- Copy of quarterly listing / attendance review
- Employee's discipline records, if any
- Grievant's sick leave balance (check stub or computer printout)
- Check employee's OPF for attendance awards, etc.
- FMLA documentation
- Key Indicator Report
- List of any/all employees in a 'Deems Desirable' status

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- Employee & Labor Relations Manual, Part 513
- JCIM, Article 10

Appropriate Remedy

The primary remedy is a cease and desist from using Deems Desirable and bypassing the provisions of Restricted Sick Leave. In addition, compensation for any costs incurred such as co-pays or mileage. Finally, for repeat violations, an escalating remedy.

Additional Tips

The JCIM is abundantly clear when it comes to Restricted Sick Leave as well as the use of ERMs. Provisions which address ERMs usage include:

"RMD/eRMS enables Local management to establish a set number of absences used to ensure that employee attendance records are being reviewed by their supervisor. However, it is the supervisor's review of the attendance record and the supervisor's determination on a case-by-case basis in light of all relevant evidence and circumstances, not any set number of absences that determine whether corrective action is warranted."

"RMD/eRMS (or similar system of records) may not alter or change existing rules, regulations, the National Agreement, law, Local Memorandums of Understanding and agreements, or grievance settlements and awards."

"Pursuant to ELM 513.361, when an employee requests sick leave for absences of three (3) days or less, "medical documentation or other acceptable evidence of incapacity for work or need to care for a family member is only required when an employee is on restricted sick leave (see ELM 513.39) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service." A supervisor's determination that medical documentation or other acceptable evidence of incapacitation is desirable for the protection of the interest of the Postal Service must be made on a case-by-case basis and may not be arbitrary, capricious, or unreasonable."

What you will commonly find is Management "checks the box" in eRMS to require documentation without thought or consideration. When interviewing, emphasis may be placed on how Management came to the decision to check that box. Expect Labor Relations / a Manager / a Postmaster to discuss this matter with the Supervisor prior to your interview.

Regardless of the outcome of the interview, always argued that the decision was arbitrary and Deems Desirable is being used to bypass the requirements of Restricted Sick Leave. Management could even be right, but the ELM has a protocol to deal with abuse in Sick Leave.

Chapter Twelve

THE ISSUE: REQUIRING DOCUMENTATION FOR ABSENCES 3 DAYS OR LESS

THE DEFINITION

For periods of absence of three (3) days or less, management may accept the employees' statement explaining the absence and request for sick leave. Medical documentation may be required only when the employee is on restricted sick leave or when the supervisor has a reasonable basis to believe it is necessary to protect the interests of the Postal Service.

THE ARGUMENT

The supervisor's request for medical documentation may not be arbitrary or capricious. It must be based upon a legitimate belief that real interests of the USPS must be protected. Generally, this would mean that the supervisor must have some reason to believe that the employee may not actually be incapacitated as claimed. A history of discipline for attendance might be one consideration. A pattern of requesting sick leave in conjunction with off days or pay days might be another. Any evidence of possible abuse would certainly raise legitimate suspicion. If the employee had previously been denied annual leave and then called in for sick leave this might be another.

Absent any of these conditions, we would argue that the supervisor's request was arbitrary and a violation of the Agreement. No blanket policy requiring everybody to call in on certain days, etc., is permissible. Appropriate medical documentation should be requested at the time of the call-in, not later, and most certainly should never be requested after the employee's return to work. Where medical documentation is requested in violation of the ELM, the appropriate remedy would be compensation for any medical expenses, time spent getting the documentation, mileage and any other out-of-pocket expenses.

THE INTERVIEW(s)

The Postmaster or Supervisor

- Why did you instruct Sarah to provide medical documentation to support her 2-day request for sick leave?
- Is Sarah on restricted sick leave?
- Do you have any evidence that Sarah has abused her sick leave or requested sick leave when she was not actually incapacitated?
- What, if anything, did you review before you decided to require medical documentation?
- To your knowledge, were any other employees required to provide medical documentation under similar circumstances?
- Isn't it true that Sarah has never been disciplined for attendance?
- Had she previously requested annual leave for these two days?

THE DOCUMENTATION

- Medical documentation
- Medical bill, receipt or canceled check
- Record of mileage
- Receipts or documentation of other expenses
- Witness statements or interviews
- Supervisor interviews or statements
- PS Forms 3971
- PS Forms 3972
- Restricted sick leave records
- Any related discipline or AWOL charges
- FMLA case information
- Documentation or statements regarding other employees treated more favorably

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- Employee & Labor Relations Manual, Part 513
- JCIM, Article 10

Appropriate Remedy

The appropriate remedy is to change the leave to scheduled, and compensate the Grievant for any expenses related to attaining the documentation such as copay, mileage, etc.

Additional Tips

We must make the distinction between documentation of 3 Days or Less, 3 Days or More, and Return to Work Documentation/Fitness for Duty Documentation for an extended absence. For three days or less, the ELM and JCIM allow the employees' statement to suffice.

If any additional documentation is requested, over the employees' word or a written statement, we must argue that the decision was arbitrary. Management's defense will often be a poor attendance record, a pattern, or previously requested leave.

To combat a pattern, simply do the math for Management. The odds of a call off hitting an NS Day are high. If the Grievant has connected off days, they have 2 days which are connected. 2 divided by the 5 possible call in days means the Grievant has a 40% chance to call in on a day connected to a NS Day. For split off days, or NTFT's, it is more likely to call in on a day connected to a NS Day than not. If a pattern claimed is every payday, or the day after every holiday, the Grievant should be on Restricted Sick Leave.

Chapter Thirteen

THE ISSUE: ADVANCED SICK LEAVE

THE DEFINITION

Employees who have exhausted their sick leave and suffer from a serious disability or ailment are entitled to request the advance of up to 240 hours of sick leave. Such requests must be supported by appropriate medical documentation and provided there is reason to believe the employee will be able to return to work and be able to repay the advance, such requests may not be unreasonably denied.

THE ARGUMENT

Advance sick leave is provided for in ELM 513.5. The fact that an employee has exhausted their sick leave is not a basis for denying advance sick leave. By definition all applicants for advance sick leave will have exhausted their sick leave. So long as the employee has exhausted his or her sick leave, can reasonably be expected to return to work and repay the advance, and supports the request with appropriate medical documentation of a serious medical condition, the installation head may not arbitrarily deny the request. Simply put, the installation head must have a reasonable basis for doing so and must be able to explain it.

THE INTERVIEW(s)

The Postmaster or Installation Head

- As postmaster or installation head, you are responsible for approving or disapproving all requests for advance sick leave, isn't that correct?
- Did you disapprove the Grievant's request for advance sick leave?
- Was the request accompanied by appropriate medical documentation?
- Was there any reason to believe that grievant would not recover and be able to return to work?
- Why did you disapprove the Grievant's request for advance sick leave?
- Do you have any evidence that grievant abused his sick leave or is your major concern simply that he has used too much sick leave and should have saved more over the years?
- Have you ever approved any requests for advance sick leave? If so, for whom and when?
- Have you ever disapproved any requests for advance sick leave? If so, for whom and when?
- How did their situation differ from the Grievant's?

THE DOCUMENTATION

- Request for advance sick leave
- Medical documentation

- Management's denial of advance sick leave request
- Grievant's statement or interview
- Supervisor interviews or statements
- PS Forms 3972
- Restricted sick leave list
- Medical documentation for any serious illness which used up significant amounts of sick leave
- PS Forms 3971 showing annual leave or LWOP actually used for absence
- All advance sick leave requests and action taken for previous 12 months

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- Employee & Labor Relations Manual, Part 513
- JCIM, Article 10.5

Appropriate Remedy

The remedy is to have the maximum amount of Advanced Sick Leave approved per the ELM 513.5, and any Annual Leave or LWOP used be changed to Advanced Sick Leave.

Additional Tips

The JCIM has supporting language which states: "Up to thirty days (240 hours) of sick leave may be advanced to an employee with a serious disability or ailment if there is reason to believe the employee will return to duty (ELM, Section 513.511). The Postal Service installation head has authority to approve such requests. An employee is not required to use all annual leave before receiving advance sick leave."

Management will often deny Advanced Sick Leave out of a staffing need or issue in an arbitrary way. The defense they provide typically is to claim they do not believe the employee can make up the time or will continue to miss work. Combat this with Math.

If a Grievant has been a Postal Employee for ten years, is 35, and can retire at 57, the simple math is an employee earns 13 days of Sick Leave a year, and 13 x 22 years is 286, or 2288 hours. A reasonable person would believe that an employee who is a Full Time Regular, who is vested in our retirement program, and has not indicated quitting will continue to work until the minimum retirement age. It is completely unreasonable to claim the employee cannot make up the time.

The only remaining likely hurdle tends to be procedural due to the Grievant requesting Advanced Sick Leave on short notice. We would argue the request was unavoidable at the time and denial cannot be arbitrary or capricious. This requires Management to not just deny the Leave just because they are upset the Grievant waited until the last minute.

Chapter Fourteen

THE ISSUE: "ACT OF GOD" ADMINISTRATIVE LEAVE

THE DEFINITION

When groups of employees are prevented from working or reporting to work by community disasters (such as storms, fire, or flood) which is general rather than personal in scope and impact the installation head should approve "Act of God" Administrative Leave.

THE ARGUMENT

Not every storm is an "Act of God" as that term is used in the Employee & Labor Relations Manual (ELM). Only when the storm rises to the level of a community disaster can it qualify. It must prevent groups of employees from working or reporting to work. When all these things occur, employees are entitled to the "Act of God" administrative leave benefit as spelled out in ELM 519. "Act of God" leave is a contractual entitlement.

While the Employer does have discretionary authority to approve or disapprove administrative leave within the specific confines of ELM 519, "Act of God" administrative leave is not subject to the arbitrary or capricious whim or discretion of management. The installation head is required to determine whether the employee's absence was due to the storm, or whether he or she could have reported to work with reasonable diligence.

THE INTERVIEW(s)

Bargaining Unit Employee:

- Where, specifically, do you live and what routes to you normally travel to get to work?
- Were any alternative routes available and safe to travel?
- What was the weather like as best you recall on Monday?
- What efforts did you make to get to work?
- Could you describe the road conditions on Monday?
- What advice or reports from local authorities were you aware of?
- Do you have tapes of any TV or radio reports?
- Did you call in, use the online system or call the office to notify you would not be coming into work?
- What kind of leave did you request?
- What were you told when you called in?
- In what ways, if any, was this storm different from most winter storms?
- Did you or any family members travel anywhere at all on Monday? If so, what was it like?
- What instructions, if any, have you been given by management about safety and winter driving conditions?

Whenever possible get a written and signed statement from each witness. Act of God – Administrative Leave should be applied to multiple employees and their Interviews can be cross – used in a singular Class Action Grievance or to support one another.

The Postmaster or Installation Head

- Are you the management official responsible for determining whether to approve "Act of God" leave in this installation?
- If not, who is?
- Isn't it true the ELM requires the Postmaster or Installation Head to make the determination?
- Why did you disapprove "Act of God" leave for employees who requested it during the last storm?
- Isn't it true that almost 85% of our employees were unable to make it to work because of the storm?
- What percentage of employees do you believe would need to be prevented from reporting to work to constitute a "group?"
- Have you ever approved "Act of God" administrative leave?
- If so, how did that situation differ from this one?
- If not, what do you envision would be necessary for a storm to rise to the level of community disaster warranting the approval of "Act of God" administrative leave?
- Do you have any reason to believe that the employees who called in could have made it to work if they had used reasonable diligence?
- Are employees expected to put their lives at risk in order to get to work?
- In your mind, what does constitute reasonable diligence in that regard?
- Do you expect your employees to comply with the instructions of authorities regarding the safety of using the highways?
- Were you able to report to work on the day in question?
- Were any EAS employees unable to report to work on the day in question?
- Were those EAS employees granted Administrative Leave or were they forced to use their own leave?

Like all Contractual Grievances, interviews are essential. Management is often unlikely to provide statements which could support our case. For Act of God – Administrative Leave you may consider interviewing EAS Employees, such as Supervisors, who had difficulties coming to work.

THE DOCUMENTATION

- Newspaper accounts
- Television or radio accounts (videotapes or tape recordings)
- State, local, or federal declarations of emergency
- Witness statements or interviews for each employee (method of transportation usually used, routes taken, efforts made, and problems encountered)
- Supervisor interviews or statements

- Cancellations of USPS services (letter carriers / rural carriers / MVS or contract routes, etc.)
- Truck arrival and departure records
- Machine run times / MODS / volume reports / tour condition reports
- LMOU provisions on curtailment
- Prepare map showing all employees who made it and those who didn't
- Public transportation records (were, airports, city buses, taxi cabs, etc. running?)
- Weather Service reports
- Highway Patrol or local authority road condition reports
- List of all employees identifying those who made it and those who didn't (including start time) from all crafts
- PS Forms 3971 for each employee who called in

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- National Agreement, Article 30
- LMOU, Item 3
- Employee & Labor Relations Manual, Part 519

Appropriate Remedy

This is a multi-part remedy. First, all paid leave used to be reimbursed in lieu of Administrative Leave. Second, the Grievant be made whole for any unpaid leave. Third, the absence is changed to scheduled Administrative Leave, and finally the Grievant be paid for any Holiday Leave missed per Article 11.2 due to absence.

Additional Tips

The ELM and the JCIM provide plenty of ammunition to win this Grievance. The JCIM states:

"Administrative leave is governed by Section 519 of the Employee and Labor Relations Manual (ELM). Administrative leave is defined as absence from duty authorized by appropriate postal officials without charge to annual or sick leave and without loss of pay. The ELM authorizes administrative leave under certain circumstances for various reasons such as civil disorders, state and local civil defense programs, voting or registering to vote, blood donations, attending funeral services for certain veterans, relocation, examination or treatment for on-the-job illness or injury and absence from duty due to "Acts of God." An employee in a NTFT duty assignment is eligible to receive Administrative Leave."

The ELM also states, "Postmasters and other appropriate postal officials determine whether absences from duty allegedly due to "acts of God" were, in fact, due to such cause or whether the employee or employees in question could, with reasonable diligence, have reported for duty." The inference is the determination must be on a case-by-case basis and not a

unilateral decision. If all employees were denied, the argument must be made that the decision was unilateral and not decided on a case-by-case basis.

It is essential that you claim the Grievants made every effort to report to work. This Grievance type is also far more likely to resolve during the initiated pay period 'in-house', as if Grievants used an alternative leave type adjustments would need to be made. I recommend immediately jumping into action to attempt to resolve this matter.

In 2025, you do have a plethora of ancillary evidence you could provide to support your case. Twitter/X comments, News Station Facebook Posts, etc. can be evidence to support your Grievance. If local Management will grant your desired remedy at Step 1, you must fully be prepared to justify that the conditions justified 'Act of God' provisions in the ELM. The more evidence the better.

Other alternative evidentiary types include city or county weather alerts, school closings, other public service closures, etc. The more evidence you provide the more likely your remedy is to be granted. Following the Reasonable Person standard, the case file built should be designed to make it unreasonable to not approve the leave.

We usually view 'Acts of God' strictly as simply bad weather. An Act of God is a Contractual and Legal Term which has a far larger scope. According to Black's Law Dictionary, an Act of God is, "Overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado." While we apply the principle to unavoidable weather such as a thunder or snowstorm, in the event of any 'natural disaster' we should be arguing for Act of God pay.

A key point is to consider that blanket decisions to close a facility occur at a higher level. You are likely to be interviewing, and speaking with, individuals who feel they do not actually have a say.

You may run into a situation in which Management closes a facility or sends employees home early. ELM 519.214 has specific provisions on paying Administrative Leave for the remainder of the employees shift. Management will often attempt to bypass this requirement by 'offering' employees to leave early.

This becomes a complicated situation of he-said, she-said. Your best defense is to have the statement of multiple employees who can corroborate they were being sent home. You will also want to check for dispatch, truck arrival, etc. to see if the facility was still operational. Other crafts will be beneficial to interview such as Carriers to establish if the facility did close early.

To get Carriers off the street Management must instruct them to return to the facility early. This becomes your strongest evidence that APWU represented employees were not offered but instructed to go home early.

Chapter Fifteen

THE ISSUE: FAMILY & MEDICAL LEAVE ACT VIOLATION

THE DEFINITION

Qualified employees are entitled to up to twelve weeks of approved FMLA protected leave during each leave year, when such absences are necessitated by the employee's own incapacitation, or the incapacitation of the employee's spouse, child, or parent, due to a serious medical condition, or as the result of the birth or adoption of a new son or daughter. When properly documented and requested such leave requests must be approved and may not be the subject of discipline or other adverse action.

THE ARGUMENT

Family and Medical Leave is protected by the law and by the Contract. Enacted by statute and further developed through Department of Labor Regulations as well as ELM 515, FMLA leave is a protected right. Properly submitted and documented requests by eligible employees for FMLA protected leave may not be denied. The law, and postal regulations, requires that the employee make the Employer aware that he is requesting leave for an FMLA covered condition. The employee does not have to specifically request FMLA leave to invoke the protection of the Act. The law requires, and the Postal Service has acknowledged, that no employee may be disciplined for using FMLA protected leave.

THE INTERVIEW(s)

The Postmaster or Supervisor

- Do you have any reason to believe that Charlie is not eligible for FMLA leave?
- Didn't Charlie submit documentation from his child's physician on an appropriate APWU Form supporting his request for leave?
- Were there any parts of that form which were not filled out or which you could not understand?
- Why did you disapprove Charlie's request for FMLA protected leave?
- It is my understanding that you approved the leave, "not FMLA." Is that correct?
- Do I understand correctly that you will not approve FMLA protected leave unless the physician's documentation includes a diagnosis and prognosis?
- Is it your understanding that you are entitled to receive and review the physician's prognosis and diagnosis? If so, on what do you base that understanding?
- Do I also understand that the other reason for your denial was because Charlie's six year old son was in the hospital and not at home where Charlie might be needed for his care?

THE DOCUMENTATION

- PS Forms 3971
- FMLA documentation (APWU forms, WH-381, or medical documentation)
- Management correspondence with the employee's doctor
- Copies of all documents given to the employee by supervisor
- Grievant's statement or interview
- Supervisor interviews or statements
- Any additional or more detailed medical information
- Copies of specific portions of FMLA regulations cited as being violated
- Previous years' work hours to show 1250 hours worked
- Check bulletin boards for appropriate postings
- WH-380
- Call-in records
- PS Form 3972

THE AGREEMENT

- National Agreement, Article 10
- National Agreement, Article 19
- Employee & Labor Relations Manual, Part 515
- JCIM, Article 10

External Resources

- 5 C.F.R. Part 630 Section L
- 29 C.F.R. Part 825
- Department of Labor FMLA Fact Sheets
- The Family and Medical Leave Act of 1993 (**Public Law 103-3**)

Appropriate Remedy

The most common FMLA violation is FMLA leave being denied by local Management despite approval by HRSSC. In that situation the appropriate remedy is to have the leave changed to approved FMLA leave, and all records to be corrected to show the leave was FMLA approved.

Additional Tips

The JCIM has ample information on common situations you will encounter as it relates to FMLA. The basics always apply. When dealing with troublesome Management who is going against an approved FMLA case is to follow the above format, stick to the language in the JCIM, and you are likely to win your Grievance. The employee has the right to use any desired leave type when using FMLA.

Unfortunately, despite the information in the JCIM and ELM, they do not fully address the rights and responsibilities under FMLA. It is essential to keep in mind that the USPS has protocol for Management to dispute or question the Grievants FMLA. If local Management disputes the FMLA they should contact HRSSC for reconsideration.

Management can request recertification for a substantial change in FMLA usage every 30 days. If local Management suspects that the Grievant is taking leave outside their FMLA, they should request recertification via HRSSC.

Management can also question the validity of FMLA documentation and seek "clarification". In such a case Management should send the documentation to the Local Medical Unit and the Medical Unit can contact the employee and request permission to contact their medical provided to seek clarification. Management also can request a second opinion, but unlike other second opinions requested by the USPS, the medical practitioner should not be employed by the USPS.

Disputes are extremely unlikely of the above types, but it is worth noting that none of the above should be conducted by local Management. The employee should be notified by HRSSC or the Medical Unit. Never a local Supervisor or Postmaster.

A common question is whether overtime counts towards the 1250 hour requirement. The answer is yes. I frequently also have Stewards inquire about FMLA entitlement. Unfortunately time the USPS is not paying you does not count towards FMLA. Arbitrator Das has ruled on this, Union Leave does not count for FMLA. But 'Union Time' does. Your on-the-clock representation activities do count. I must note to fellow Union representatives (and members) that hitting your 1250 work hours is incredibly easy. Using myself as an example, I cleared nearly 2,000 work hours in 2024. This excludes a State Convention, a National Convention, three weeks at the Leadership Institute, Amazon organizational time and one day a week working at my home local doing Step 3 / Arbitration appeals. While this does include working overtime, it is possible to hit your work hours as a Union representative or as a Steward. Unfortunately, it may not be possible if on Union Leave multiple days per week.

A final note is a huge misconception, which is that FMLA is for blood/legal relatives only. The exception is called *in loco parentis*. According to Cornell, "In loco parentis is a Latin term meaning "in [the] place of a parent" or "instead of a parent." The term refers to a common law doctrine which denotes the legal responsibility of some person or organization to perform some of the functions or responsibilities of a parent."

You can commonly see an *in loco parentis* situation when the primary care given is incarcerated, deployed, or a child is actively involved in an adopted/foster situation but has not officially been resolved. The FMLA allows *in loco parentis* relationships to qualify – despite not being clarified in the ELM / JCIM. If a member approaches you about an in loco parentis situation, the advice should be to file for FMLA as they normally would.

It is highly unlikely that HRSSC will request a substantiation of a relationship as that relationship has already been verified by the mere fact the medical practitioner released the information and created a connection. HRSSC should have no reason to question the validity of the claim, absent indication by the member of the medical provider.

Chapter Sixteen

THE ISSUE: HOLIDAY SCHEDULING VIOLATION

THE DEFINITION

As many full-time and part-time regular employees as possible must be excused from working on a holiday or day designated as their holiday. They cannot be required to work until after management has utilized all available and qualified part-time flexibles, PSEs, and volunteers to the maximum extent possible including the use of overtime where necessary.

THE ARGUMENT

Article 11 is intended to protect full-time and part-time regular employees from working their holiday whenever possible. It requires that the Employer determine the numbers and categories of employees needed to work the holiday in advance and that a schedule be posted by Tuesday of the preceding service week. Article 11 and the Local Memorandum of Understanding determine the exact "pecking order" to be used in each office. PSE's and PTF's should be required to work, including overtime, before anyone can be drafted on their holiday. All volunteers, both holiday and overtime (including penalty), should be given the opportunity before anyone is required to work their holiday.

Employees are not necessarily guaranteed to work their bid schedule when scheduled to work the holiday. The posted holiday schedule should include their start time or hours of work and that is the schedule they are entitled to work. If, after the posting deadline, management changes that schedule the employee is eligible for out-of-schedule premium. Employees who report to work are subject to workhour guarantees in Article 8. While employees may waive those guarantees in cases of personal emergency or illness, management should not solicit volunteers to leave early. If conditions change after the posting, management may cancel some or all of the scheduled employees (prior to their reporting) without incurring any guarantees. On the other hand, management is prohibited from "playing it safe" by routinely over-scheduling and then canceling as the holiday approaches. If, because of changing conditions, additional employees must be added after the Tuesday posting deadline, the overtime desired list selection procedures, and not the LMOU holiday "pecking order," apply.

THE INTERVIEW(s)

The Postmaster or Supervisor

- Who made the determination as to the number and categories of employees needed to work on the Presidents' Day Holiday?
- What did you base this determination on?
- What efforts, if any, did you make to maximize the number of employees who could be excused on their holiday or designated holiday?
- For how many hours did you schedule available casuals?

- For how many hours did you schedule available part-time flexibles?
- Why didn't you consider scheduling the PTF's or casuals for overtime?
- Didn't full-time regular clerk Roberts volunteer to work his off day on Monday?
- Was there any reason Roberts was not scheduled other than the fact that he would have been on penalty overtime?
- Who approved PTF Clooney's request for annual leave for Monday? What was the reason for the request?
- Do I understand correctly that PSE employee Phillips cannot work on Mondays because of his other job?
- What time on Wednesday were FTR's Alexander and Johnson as well as PTR Wendell added to the schedule? Do you know why they were omitted in the first place?

THE DOCUMENTATION

- Holiday schedule
- Holiday volunteer list / solicitation
- Seniority list
- Clock rings / timecards / ETC reports
- Mail volume reports / present holiday and previous holidays
- Past holiday schedules
- Witness statements or interview
- Supervisor interviews or statements
- LMOU pecking order
- Work schedules for PTF's and casuals
- Staffing comparisons between normal workdays and holiday
- PS Forms 3971 for any employees excused early
- PS Forms 1723 for 204(B)'s

THE AGREEMENT

- National Agreement, Article 11
- National Agreement, Article 30
- LMOU, Item 13
- JCIM, Article 11

JCIM Remedy

The JCIM has a clearly defined remedy for improperly requiring employees to work or for bypass in the following Language: "The following applies when management improperly schedules employees to work on a holiday:

• Full-time employees and part-time regular employees who file a timely grievance because they were improperly assigned to work their holiday or designated holiday will be compensated at an additional premium of 50% of the base hourly straight-time rate.

• For each full-time or part-time regular employee improperly assigned to work a holiday or designated holiday, the employee who should have worked pursuant to the provisions of Article 11.6 or the LMOU, but was not permitted to do so, will be compensated at the rate of pay the employee would have earned had he/she worked on that holiday."

Additional Tips

In the absence of LMOU language, you may have a standing Article 5 Past Practice which establishes an Amendment by Conduct to your LMOU. In the absence of this language the JCIM's language prevails in the absence of the LMOU. The language in the JCIM is:

"When the LMOU does not establish a pecking order the following should be used to select employees to work on a holiday:

• all part-time flexible employees to the maximum extent possible, even if the payment of overtime is required;

• all full-time and part-time regular employees who possess the necessary skills and have volunteered to work on their holiday or their designated holiday, by seniority;

• postal support employees (PSEs);

• all full-time and part-time regular employees who possess the necessary skills and have volunteered to work on their nonscheduled day, by seniority;

• full-time regular employees who do not volunteer on what would otherwise be their nonscheduled day, by inverse seniority;

• full-time regular employees who do not volunteer on what would otherwise be their holiday or designated holiday, by inverse seniority.

The pecking order must be followed regardless of whether the scheduling will result in an employee(s) receiving penalty pay."

The JCIM also clarifies Untimely Posting, which states, "If the holiday schedule, is not posted by the Tuesday preceding the service week in which the holiday falls, a full-time employee that works his/her holiday or designated holiday will receive holiday scheduling premium for each hour of work, up to eight (8) hours, regardless of whether the employee volunteered to work."

The intent of the language is to minimize FTR's being forced to work. If you have a situation in which the list is late, it is encouraged to contact Management and notify members to ensure if those who do not wish to work, but would regularly be scheduled, will not work.

This is one of the few times I encourage and recommend working with Management. Some of our members work as much overtime as possible, and some members prioritize time with their family. A situation in which people are forced or excluded helps no one, regardless of any eventual Grievance you may file.

Chapter Seventeen

THE ISSUE: DENIED TRANSFER REQUEST

THE DEFINITION

Employees should not be unreasonably denied the opportunity to transfer, either to another installation or to another craft within the installation.

THE ARGUMENT

Article 12, the Transfer Memorandum (page 305, of the 2000-2006 National Agreement), the Transfer Opportunities to Minimize Excessing (page 343 of the current National Agreement) and applicable regulations in the EL-311 and EL-312 handbooks all establish the employee's right to be considered for transfer and establish the work rules and priorities under which requests for transfer must be evaluated and considered. Management may not arbitrarily deny the requested transfer.

THE INTERVIEW(s)

The Postmaster or Supervisor

- It appears that you are the deciding official who denied Susie Smith's request for transfer to your installation. Is that correct?
- Why did you deny this transfer request?
- What, if anything, did you review before making that decision?
- How many transfer requests have you approved? For whom and when?
- How many transfer requests have you denied? For whom and when?
- Do you have any written transfer policies or guidelines for your installation?

The intent of this interview is to establish the decision made was arbitrary in nature. Brevity is recommended as the more questions you ask; the more likely Management is to say something they did consider when making their decision.

THE DOCUMENTATION

- All written correspondence between the employee and USPS regarding request for transfer
- Employee's PS Form 50's and/or Form 50 History
- Employee's pay records or clock rings and craft complement and hours history in gaining installation if issue includes ability to get more hours by transferring
- Installation head's evaluation and/or supervisory recommendations
- PS Form 3972
- Written explanation from the employee if sick leave balance is at issue (including FMLA documentation and 3971's if applicable)

- Safety and or accident records, if applicable
- Employee's Training Records
- Other evidence of skills, qualifications or knowledge
- Statement and/or interview with grievant rebutting management's reasons for denial of transfer
- Hiring registers, seniority lists, personnel actions showing new hires
- List of transfer requests over last two (2) years and action taken on each
- Size and location of both gaining and losing installations
- Interview with deciding official

THE AGREEMENT

- National Agreement, Article 12
- Transfer Memorandum
- EL-311
- EL-312
- JCIM, Article 12.6

Appropriate Remedy

The transfer be granted and if the position is already occupied a mirror bid to be posted and assigned.

Additional Tips

Article 12 of the JCIM provides clear requirements for Voluntary Transfer / Reassignments. This chapter focusses on a Denied Voluntary Transfer/Reassignment on the basis the decision the decision was Arbitrary or improper. When an employee does not meet the minimum requirements, such as time in the facility or length of service, the APWU does not have a real Grievance as the language is agreed upon and codified in the JCIM.

When it comes to employee evaluations, the JCIM states, "Managers will give full consideration to the work, attendance, and safety records of all employees who are considered for reassignment. An employee must have an acceptable work, attendance, and safety record and meet the minimum qualifications for all positions to which they request reassignment."

The lynchpin, and the reason for frequent emphasis, on winning this Grievance is determining the decision by any evaluating or determining official was Arbitrary. The JCIM clearly states, "Both the gaining and losing installation head must be fair in their evaluations. Evaluations must be valid and to the point, with unsatisfactory work records accurately documented." The decision cannot be Arbitrary. It cannot be due to staffing in the losing facility. It must be fair to the Grievant who was evaluated.

Chapter Eighteen

THE ISSUE: DENIED LIGHT DUTY

THE DEFINITION

Any full-time regular or part-time flexible employee recuperating from a serious illness or injury is entitled to request light duty work. Such requests must be supported by appropriate medical documentation and be submitted in writing to the installation head. The Employer must give the greatest consideration to such requests and make every effort to locate and provide appropriate light duty work.

THE ARGUMENT

The Employer is obligated to make "every effort" to find light duty work for requesting employees. They must give the "greatest consideration" to each request. This is a very substantial obligation. The employee must submit a written request supported by appropriate medical documentation. Once this happens the burden shifts to management to show what efforts were made to find light duty work within the employee's restrictions. It is not enough to simply assert that no work is available.

Management must demonstrate the extent of their effort to find available work. This effort must be timely. In most cases it should not take more than one or two days to process a light duty request and locate available work. If no work can be found the Employer must notify the employee in writing, stating the reasons why no work could be found. The absence of a written denial is often found, by itself, to be a sufficient basis for sustaining a denied light duty grievance.

THE INTERVIEW(s)

The Postmaster or Supervisor

- Were you the management official responsible for determining that there was not light duty work available for grievant within his restrictions?
- Exactly what did you do to try to find light duty work for grievant?
- Did you keep any records of who you talked to or what they said?
- What was the hold-up that made it take 10 days before grievant was told no work was available?
- How did you notify grievant that no work was available? Did you telephone him or what?
- Are Customer Service employees permitted to work light duty in Mail Processing?
- Did you consider crossing crafts to find a light duty assignment?
- I noticed that Mary Sheely was recently given a light duty assignment. Was that because she was injured on the job?
- Couldn't the grievant have cased mail on the primary with his left hand?

- How many PSEs were working in the unit?
- How long has it been the Postmaster's policy not to provide light duty work for employees injured off-the-job?

The intent of the interview is to establish that not even the minimum effort was performed to attempt to find work for the Grievant. Expect to receive answers which do not match the facts of your case. With Light Duty, Management often takes the belief it is an option, not a requirement, to search for work.

THE DOCUMENTATION

- Request for light duty
- Medical documentation
- Written denial of light duty
- LMOU light duty provisions
- Grievant's statement or interview
- Witness statements or interviews
- Supervisor interviews or statements
- Names/evidence of employees given light duty within the past year
- Names/evidence of employees denied light duty within the past year
- Evidence of work available within Grievant's restrictions
- PS Forms 3971
- Employee's seniority
- Fitness-for-duty results (if applicable)
- Work schedules showing casuals doing work within employee's restrictions
- Clock rings / timecards for PSE's
- Documentation of management efforts (or lack thereof) to find work
- Management documents showing office policy on light duty assignments
- Any Reasonable Accommodation Committee findings / results

THE AGREEMENT

- National Agreement, Article 13
- National Agreement, Article 30
- LMOU, Items 15-17
- JCIM, Article 13

Appropriate Remedy

This remedy has four parts. First is the Grievant be granted a light duty assignment. Second is the Grievant be reimbursed all paid leave used after denial of light duty. Third is out of schedule pay if applicable for new assignment. Fourth is a make whole remedy for all missed hours which could have been worked within the restriction. That the grievant be accommodated in a light duty assignment;

Additional Tips

The crux of this Grievance is to establish that Management did not make "every effort" to find work for the Grievant. This can take many shapes and forms but your Grievance will have the most success if you can find specific examples.

At a local Post Office you will find a plethora of work. This work includes UBBM, accepting accountable mail, and all the way to sorting supplies. Light Duty is designed to be a limited time assignment, and not to be long term/forever. Plenty of work exists, even if Management must look outside of the craft boundaries.

In a local Post Office Management often makes no concerted effort to check for work. I have seen Supervisors and Postmasters say that 'counting rubber bands is not a job.' As asinine as this position is, the fact is Management often fails to even consider creative solutions. You know your office the best, better than someone remotely writing a guide. It can be dropping flats, passing advo's/red plums/advertisements, or even collecting missorted mail from carrier's cases and manually sorting the mis-sorts. There is always low – impact work which can be used.

For PNDCs/Plants/SNDCs/etc., the environment is different but the amount of 'other work' is plentiful. Some facilities still have Newspaper sections. Others have manual letters. Other manual flats. Some machines have rejects to sweep. Registry Cages require staffing and checking in accountable mail. Clerks who work on the dock need to check in and sign paperwork for deliveries and inbound mail.

The only limitation you have is how much 'other work' you can cobble together to justify that the Light Duty assignment is possible. You are not limited to what makes financial sense, what makes contractual sense, or what makes postal sense. If you dig into USPS job descriptions, you find a lot of work we can do.

Local Post Offices previously had lobby assistants, secretaries, etc. Clerks previously did timekeeping duties and now do TACs. Be creative and think outside of the box when it comes to Light Duty assignments. Let Management argue that it is not reasonable. The only thing we care about is that we uncovered a plethora of options which proves "every effort" was not made.

Chapter Nineteen

THE ISSUE: HOSTILE WORK ENVIRONMENT / HARASSMENT

THE DEFINITION

The Employer is obligated by the Agreement to provide a safe and healthful working environment for its employees free of Harassment and Hostility.

THE ARGUMENT

Article 14 commits the Employer to provide safe working conditions. Article 3 requires Management to comply with all relevant laws including Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), and the Americans with Disabilities Act of 1990 (ADA). Article 19 requires Management to comply with all USPS Handbooks and Manuals. Management must comply with all relevant laws pertaining to Harassment as outlined above.

Harassment has a strict legal definition as outlined in the above laws. Extensive USPS policy grants protection against a Hostile Work Environment. Management is obliged to treat employees with dignity and respect.

Once reported, Management has very strict requirements to investigate Harassment / a Hostile Work Environment as outlined in Publication 552 known as the IMIP. The onus is on Management to ensure every employee has a safe, healthful, working environment. Management must, with haste, investigate any reported instance of harassment / a hostile work environment.

THE INTERVIEW(s)

Bargaining Unit Employee:

- On what date did you experience harassment / a hostile work environment?
- Who was involved?
- What exactly happened?
- Were there any witnesses?
- When did you report this to Management?
- How did you report this to Management?
- Has anyone in Management ever followed up with you?
- If so, what was the follow up?
- Was the harassment / hostile work environment a singular incident or is it recurring?
- Do you still work with or around the person who was harassing / creating a hostile work environment?
- Has the hostility increased since you reported it, decreased, or stayed the same?

- Has anyone else, besides who you reported the harassment / hostile work environment to approach you about the incident?
- Have you taken any steps, such as visiting EAP, to deal with the harassment / hostile work environment?
- Do you feel safe at work?

The interview of the victim is designed to gather the facts of the incident, and equally important record Managements response. The Union cannot quantify feelings but can quantify actions in the Grievance – Arbitration process.

The Postmaster or Supervisor Grievant Notified

- On January 1st, Jane Doe report harassment / a hostile work environment to you. Do you recall this event?
- Do you have a statement from Jane or a record of the conversation?
- What options did you present Jane Doe to handle her reported harassment / hostility?
- Which higher level official did you notify of this harassment / hostility?
- What guidance did the higher-level official give you?
- On what date did you interview Jane Doe?
- On what dates did you interview the witnesses?
- On what date did you interview the alleged perpetrator?
- How many statements have you obtained?
- Who has provided you statements?
- What is your timeline for follow up?
- Of those statements and interviews, which have you deemed credible?
- What would a credible statement look like to you?
- Is there anything Jane Doe could have said to deem her credible?
- How would you define the harassment discussed?
- Have you referred your investigation to HR/District or a higher level?
- What is your litmus for an investigation being referred to a higher level?
- What, do you feel, is the appropriate remedy / corrective action?
- Have you delivered your findings to Jane Doe?
- Where did you document the action taken?
- Who have you submitted your findings, and related documents, to?
- Are you aware of the USPS Zero Tolerance policy?
- What is the Zero Tolerance Policy?
- What is the Postmaster Generals Policy on Workplace Harassment?
- Has anyone else reported harassment / hostility from the alleged perpetrator?
- Could you define ELM 665.16?
- ELM 665.24?
- ELM 673.4?
- ELM 811.23?
- ELM 824.361?
- ELM 824.6?
- What is an IMIP?

- What is your definition of dignity?
- What is your definition of respect?

This is one of the longest interviews we would conduct. The purpose of this interview is to establish the process and protocol outlined in Publication 552 was not followed. The intent of the interview is to make the Supervisor / Manager uncomfortable. This is an aggressive interview. Management should have no quarters when a member is potentially being harassed.

THE DOCUMENTATION

- Witness statements & interviews (Anyone who was a potential victim, including anyone who could have viewed the alleged harassment / hostility)
- Copy of 1767's
- Copy of Managements IMIP Process and paperwork
- Copy of any local settlements
- Timeline written out showing notification and any dates of Managements action
- All statements submitted to Management
- Interview of all Supervisors / Managers involved
- Interview of alleged perpetrator
- EAP referral
- Relevant Regional Arbitrations
- Any related medical documentation
- Any pictures showing harassment / hostile work environment
- Copy of WETS (Workplace Environment Tracking System) from date incident report until date requested
- Copy of IMIP action plan
- Clock rings and badges wipes of witnesses/victim/alleged perpetrator
- List and transcript of any phone calls made to the USPS Harassment line (877-521-4272) pertaining to facility

THE AGREEMENT

- National Agreement, Article 14
- National Agreement, Article 19
- National Agreement, Article 3
- USPS Handbook, 552
- USPS Handbook, 553
- ELM Chapter 6
- ELM Chapter 8
- Joint Statement on Violence and Behavior in the Workplace

National Awards

- Arbitrator Carlton Snow, Q90N – 4F – C

Regional / Extenal Award

- NLRB Settlement Agreement for cases 13-CA-321161 and 13-CA-321162 by NBA James Stevenson
- Arbitrator Joseph A. Harris Regional Award 4B – 21C – 4B – C 22252613 by NBA Peter Coradi

Appropriate Remedy

This Grievance requires a Cease-and-Desist remedy, Emergency Placement of the perpetrator pending investigation, corrective/administrative action against Management Officials to remove them from Supervising or interacting with employees, and if recurring a monetary award to victims/Grievants.

Additional Tips

Harassment and a Hostile Work Environment are two very different things. Harassment has a very strict definition, which the U.S. Equal Employment Opportunity Commission (EEOC) defines as "unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.

To be Harassment, generally, requires there to be a reason which qualifies under the law. Federal Law (Via Article 3) prohibits Harassment. While we may see it as splitting hairs (And so do our members) it can become an important distinction in the Grievance – Arbitration procedure. USPS policies prevent a Hostile Work Environment, which is where we attain the language that all employees must be treated with dignity and respect.

When filing your Grievances you want to ensure you argue the correct actual violation. If you only accuse of Harassment, and cite the above Federal Law, you could be wrong. But if you argue a Hostile Work Environment, and cite the USPS Joint Policy, Contractual Provisions, and the correct handbooks/manuals you are a far more likely to prevail.

You can have a Supervisor who does not target an individual but overall is hostile. They could move equipment to make the workday more difficult. They could always yell. They could throw things in their office. This may not be technical 'Harassment' it is a Hostile Work Environment.

Proving legal Harassment must have arguments formed around the basic premise that that a protected group is facing disparaging conduct due to their protected classification. This can be easy to spot (Sexual, Racial, or Religious comments or actions) or more difficult to determine (Such as assigning more difficult tasks to an older employee to make them miserable explicitly due to their age).

Documentation here is essential and so is establishing what is different between employees to establish a logical reason for disparaging treatment. This can be interviews, statements, etc. This is why 'proving' Harassment can be so difficult and why some areas of the Country clearly win these Grievances, and others do not – the actual argument matters. A

Supervisor can be guilty of creating a Hostile Work Environment but innocent of legal Harassment.

This murkiness is why I recommend you fight Harassment / a Hostile Work Environment as a procedural Grievance. Regardless of the definition, Management has strict protocols for investigating such actions. It is far easier to establish that Management did not properly act over proving the intention of someone's individual actions such as outlined in Publication 552 and the ELM.

If you focus on a Hostile Work Environment, over Harassment as a limiting definition, you expand the scope to the individual's 'impact' on the Unit. A Hostile Work Environment is defined in Publication 553 as, "It is most often defined as a pattern of continuing unwelcome behavior that unreasonably interferes with an employee's work performance or that creates an intimidating, hostile, or offensive work environment."

Publication 553 provides examples as to what a Hostile Work Environment is, but I prefer the broader scope of ELM 673.61 which states, "All employees are expected to treat coworkers with dignity and respect." Simple, yet strong language. Dignity can be defined as, "the quality or state of being worthy, honored, or esteemed" which is simple to apply. If the 'hostile' person were in front of a person who were 'worthy or honored' would they act as they did? As in, would a hostile Supervisor who yells at, belittles or throw items at his or employees do the same to their Manager? No.

Respect can be defined as, "high or special regard." Would a hostile person talk down to the President of the United States? Would they throw things at the President? Would they swear at them? If a reasonable person would not act that way to a superior, you have a compelling argument for a Hostile Work Environment.

Your actual Grievance has two main successful paths to being sustained. You either provide clear and substantial proof of the Harassment/Hostile Work Environment or you argue that the Negative Inference created by Managements failed investigation proves the Harassment or Hostile Work Environment exists. When in doubt, you should argue both.

In addition to the documentation and ELM provisions above, you also have: ASM 273.132; USPS Policy on Workplace Harassment from several PMG's; EEOC Federal Agencies Management Directive 715 (MD 715), Section 1, Element A, Subsection 2(d); etc. You can, and should, stack your casefile with as much policy as possible which Management violated. The interview(s) with Management is designed to prove the IMIP, relevant Handbooks, and ELM provisions were not followed.

The above Awards are not to be copied, but for review and to establish that since the Joint Statement was mutually signed, Management can face adverse action such as termination or transfer if they are found guilty. The NLRB Decision proves we have the right to the IMIP information, as well as WETS documentation.

If you have sufficient evidence and can prove Management did not investigate or address the situation properly you can seek the above remedy. Be prepared to refile, as this is also a compliance issue.

Chapter Twenty

THE ISSUE: DENIED INFORMATION

THE DEFINITION

Upon request, the Employer is required to permit the Steward to review files, documents, and other records relevant to a possible grievance and to provide copies of such documents where needed.

THE ARGUMENT

Whenever management denies information in the form of documentary evidence or witness access for interviews, our due process rights to conduct investigations in grievance processing are violated. During an investigation to determine whether to file a grievance or for evidence gathering in support of a grievance, or, for that matter, to determine whether to continue processing a grievance, the Union has the right to access all relevant information. Often, management denies the Union access to documents, records, forms, witnesses, etc. This denial by management constitutes a very serious due process breach which prevents the best possible defense in a disciplinary case through full development of all defense arguments.

Under the Collective Bargaining Agreement, the Union has contractual rights to all relevant evidence including witnesses. Denial of that information seriously compromises our ability to represent our membership, and each denial must be properly challenged. Should management deny information, then several arguments are born:

1. Negative Inference Created

The negative inference argument is best defined as a presumption that the evidence withheld by management would either prove the Union's case or seriously damage the employer's ability to meet any burden of proof it may have.

The Union must argue that the withheld information would have proven - if it had been produced - precisely what the Union contended the information would have revealed. Just as important, we should demand that because of management's failure to provide requested information, even when that information is made available, because it was denied at the lower steps it can no longer be introduced to support management's case.

2. Lowest Possible Step Resolution Fatally Damaged

Resolution of grievances at the lowest possible step is the cornerstone of the Grievance/Arbitration procedure. When management denies access to the Union of relevant information, then full development of all the facts, arguments, and defenses cannot be achieved. Without such full development and without everything being placed before the parties for discussion, there is no real probability of resolving the grievance at the lowest possible step.

Thus, Article 15.3's basic principle is violated and with it the due process right of both the grievant and grievance to benefit from the possibility of lowest possible step resolution.

WHEN INFORMATION IS DENIED

When a request for access to information is denied, we must ensure that the "hook is set" through very deliberate action. That action includes:

1. **File an additional grievance citing Articles 15, 17, and 31 on the information denial.**

In that grievance, request as a remedy:

(1) The information be provided so long as such access is given prior to any grievance step meetings and,

(2) Should the information not be provided prior to any grievance step meeting, that the original grievance be sustained.

Although it can be argued an additional grievance is neither necessary nor reasonable under our Collective Bargaining Agreement, many arbitrators will ask the question and let management off the hook if the Union did not file the repetitive grievance.

2. Correspond With Follow Up Request For Information

Follow the initial Request for Information with a personalized letter taking the Request for Information form to a more specialized level. In this manner, an arbitrator will notice the Union made a persistent, "second effort" to obtain the information. It is a good idea to submit at least two (2) correspondences in addition to the original Request for Information prior to the Step 2 meeting. At least one of the two should be to the immediate superior of the addressee to the original Request for Information. In this way, we can point out to the Arbitrator we were making every effort including affording a higher-level manager the opportunity to rectify the lower level supervisor's failure.

2. **Include Denial of Information Reference in Original Grievance's Step 2 Appeal, or Additions and Corrections**

Following the full disclosure commitment of the parties in Article 15 and our responsibility to present fully developed grievances at Step 2 (as far as possible), we must ensure that each bit of information we are denied access to during our attempted investigation is referenced as part of our contentions in our Step 2 appeal and/or additions and corrections.

Specifically citing a violation of Articles 15, 17, and 31 in our Step 2 appeal will prevent management from successfully arguing that the denial of information issue is a new argument and not proper for consideration by the Arbitrator. Remember, request all data you believe to be relevant. We then determine what we will use.

Management, when it denies any evidence, violates the Collective Bargaining Agreement and creates very strong due process breaches. Ironically, the arguments management creates by

denying us information are often more beneficial to our case than would be the information had it been obtained.

THE INTERVIEW(s)

While most arguments on information denials will seem self-evident based upon review of management comments on the requests for information, coupled with a "denial" signature or initials, the interview is crucial when there is no such notation. Further, the interview can strengthen our case when management supports its denials through responses. Some examples are:

The Postmaster or Supervisor

- You did deny the information?
- You have the information requested on the Request for Information in your possession?
- Isn't it possible that that information could have been helpful to the Union in deciding whether to pursue this grievance?
- If this Letter Carrier was provided limited duty work in the Clerk Craft why wouldn't her medical restrictions be relevant?
- You did not provide access to Postal Inspector Arnold to the Union?
- Doesn't Article 17.3 give the Union access to witnesses?
- Are you saying Postal Inspector Arnold is not relevant to the Union's grievance?
- What Collective Bargaining Agreement article did you rely upon in denying the Union access to Postal Inspector Arnold?

Denial of information is often a Catch-22 for management and our interview process enables management to really damage their defense of the denial. The interview also ensures management is prevented from presenting some innovative excuse for the denial at arbitration. We not only want proof of denial for our Step 2 appeal, but we want to cement management's reasons for denial. This will enhance our pursuit of this due process violation.

THE DOCUMENTATION

- Request for Information
- Management's denial
- All follow-up correspondence or requests
- Moving papers of the original grievance
- Any documentation which may show either the existence or relevance of the requested information
- Supervisor's interview or statement
- Correspondence/documentation showing status of appeal of information denial under NLRB dispute resolution Memorandum of Understanding

THE AGREEMENT

- National Agreement, Article 15

- National Agreement, Article 17
- National Agreement, Article 31
- National Agreement, Article 3
- JCIM, Article 15
- JCIM, Article 17
- JCIM, Article 31

Appropriate Remedy

The key to any multiple Grievance strategy is all Grievances should all relate to sustaining your original Grievances remedy. If Management continuously does not provide information, you would add Union recognition as a violation and add an escalating remedy.

Additional Tips

We make two assumptions in the Grievance procedure when it comes to denied information. First, we should assume that if Management provided the information, it would prove our case, this is where we argue Negative Inference. Second is we assume Management did not consider or use the information we were requesting in their decision-making process.

Examining the first assumption, if you have a discipline Grievance and request the dates, times and subjects of Article 16.2 / Documented Discussions and Management does not produce the information, you assume no discussion happened and the assumption, or Negative/Adverse Inference, is that no discussion occurred.

Examining the second assumption, if you have a Grievance for a potential Realignment and you request mail volume reports from the previous year, current year, and projection volume. If Management does not provide the volume, you argue Management does not have the information nor did they consider the information, making all proposed changes arbitrary and capricious. While this may not be the strongest argument, it is an appropriate assumption.

The issue for both Management and the Union is that you cannot quantify the harm or damage from the denied information. You must label the harm somehow and provide a nexus if necessary. The above examples have a clear nexus to your case, but if you ask for something obscure it becomes more difficult. For example, the EL 921 states, "Additional information is available through Labor Relations training courses, 'Grievance Handling…'" If we request the Labor Relations training course "Grievance Handling" we will likely be told no as it most likely does not pertain to our actual Grievance.

Management can easily say it has no relevance to most Grievance. It becomes our burden to prove why we needed the information and the damage to our Grievance by not having it. For most requests, the reason should be implied.

Chapter Twenty-One

THE ISSUE: DENIED STEWARD RELEASE

THE DEFINITION

Management may not unreasonably deny a properly submitted request from the steward to be released to investigate or adjust grievances, or to investigate a problem to determine whether a grievance exists.

THE ARGUMENT

Management may not determine in advance what time the steward reasonably needs to investigate a grievance. Management may ask the steward seeking to be released to estimate the amount of time which the steward anticipates will be required. Management may delay the release of a steward during a period which will unnecessarily delay essential work. However, the burden is on the Employer to show what the workload is and why the steward could not have been released, including why a replacement could not have been found.

Management may inquire to the general nature of the grievance but cannot demand specifics. Normally, there should be no delay in releasing the steward. Only in very rare circumstances should the steward's release be delayed beyond two (2) hours. When management must delay the release of the steward, the supervisor must inform the steward of the reasons for the delay and the anticipated alternative release. While stewards are not permitted to continue working in overtime for the sole purpose of processing grievances, management also cannot refuse to release a steward solely because she is in an overtime status.

When management's unreasonable denial of steward's time becomes an issue, it is always a good idea to submit your request for steward's time in writing. Include specific documentation as to the number and general nature of grievances you are working on. This will enable you to better document your grievance.

THE INTERVIEW(s)

The Postmaster or Supervisor

- Why did you deny Steward Olsen's request for steward time yesterday?
- What, exactly, was the pressing workload at the time?
- What alternatives did you consider other than denying Olsen's steward time?
- What other supervisors did you check with to see if they could provide a replacement?
- Why didn't you explain to Steward Olsen why her release must be delayed? Do you believe an explanation would have been appropriate?
- Wasn't there an alternative time before the end of Olsen's tour during which you could have arranged to release her? Why didn't this happen?

- Why didn't you explain to Steward Olsen when an alternative release time would be arranged? Don't you believe such an explanation would have been appropriate?
- You have indicated that Ms. Olsen is not providing you sufficient information about the grievances she is investigating. What specific information do you believe you are entitled to?
- What part of the Contract do you believe entitles you to that specific information?
- You told Steward Olsen that she could only be released for 20 minutes. Have you determined that 20 minutes is sufficient time to investigate this type of grievance? On what do you base that determination?
- Did you consider asking Ms. Olsen to estimate how much time she believed would be necessary?

The interview is to establish the denial of Steward Time was arbitrary, unreasonable and not based in a Contractual reason. If you are the Steward whose release was denied it is advised to have another Steward conduct this interview, if possible. The goal is not to argue with Management but get them to admit to wrongdoing.

THE DOCUMENTATION

- Request for Steward's duty time
- Management's denial
- Documentation as to number and general nature of grievances pending
- More specific information on each of these grievances (moving papers, time limits, nature of documentation to review, etc.)
- Grievant's statement or interview
- Steward's statement or interview
- Supervisor's interview or statement
- Time cards / clock rings / ETC reports
- Documentation of previous denials of steward time / grievances / settlements
- Mail volume and/or overtime reports
- Leave records

THE AGREEMENT

- National Agreement, Article 17
- JCIM, Article 17

JCIM Remedy

The JCIM has a clearly defined remedy in the following Language: "the appropriate remedy in a case where management has unreasonably denied a steward time on the clock is an order or agreement to cease and desist, plus, where the steward was required to process the grievance(s) off the clock, payment to the steward for the time which should have been allowed spent processing the grievance off the clock." You should specifically reference this as your

remedy in a Step 2 Appeal. In addition, for recurring denied time you would seek an escalating remedy after attaining a Cease and Desist.

Additional Tips

Steward time is as straightforward as you wish to make it. The JCIM provides clearly defined rules for both parties. The key to the process is communication. If you ask for six hours, and end up needing two more, you simply ask. Your Supervisor can state they can only give you two now, and after those two you communicate the need for more. Management should designate an alternate time to work on your Grievances.

The assumption the JCIM makes is the two parties do communicate as equals. If Management respects you (and/or the Union), they should treat you as a counterpart and help find you more time so the APWU and the USPS can both complete their operational responsibilities. When you do not have this environment, you end up with this Grievance type.

Frequent questions have been answered through years of Arbitration on this subject to cover unique situations and some appear in the Article 17 Q and A. What I commonly see are misconceptions over three areas. One being the JCIM remedy and implicit assumption that if Management denies you time you can work at home and seek compensation in the Grievance-Arbitration procedure. In a vacuum this may be true. Within context of the JCIM it is not.

First you need to communicate with Management the need for time. If time is provided, even less than you ask for, you must seek more time. It then becomes Managements burden to find the time. If they do not, and you are forced to work from home to remain timely, then you seek compensation. If the Steward has repeated poor attendance preventing make-up opportunities, they did not explicitly seek additional time, or they failed to put the request in writing you very well could have a situation you lose a Grievance for compensation after the Steward did the work. Your best practice is to be anal about requests for time and follow the JCIM. Do not make it 'reasonable' for Management to be unable to provide release time.

The second misconception is Overtime. While nothing prohibits us from conducting Union work on Overtime, nothing states it is an entitlement. In fact, prevailing language explicitly states Union Time would be paid at the straight time rate. Management can have you work your assignment in Overtime. Likewise, the need for Union Time cannot be denied just because a Steward is in an Overtime status, Management clearly has a strong operational need to deny your request while on Overtime but must provide an alternative time.

The final misconception surrounds Past Practice. Some offices have predetermined time for each Steward for 'coverage.' Others may have Stewards conducting Union business while on Overtime. These things are often Past Practices that are mutually agreed upon and an extension of our Contractual Rights. The worst possible thing a new Steward or Officer can do is to come in like a wrecking ball when it comes to what others are doing. Like all Past Practices, you must know how it formed and why before addressing what is being done. In general, we should never act in a way which harms the APWU or a member unless it violates the Contract, which additional rights are not a violation even if a particular Steward does not benefit.

Chapter Twenty-Two

THE ISSUE: HIGHER LEVEL ASSIGNMENTS - UPGRADING

THE DEFINITION

Employees are entitled to be paid at the level of the work they are performing and where applicable to have their duty assignments upgraded to the appropriate level of the work being performed.

THE ARGUMENT

Article 25 requires that employees must be paid higher level pay for performing higher level work. ELM 230 establishes the criteria which must be met for upgrading duty assignments. It is not necessary that the employee be performing higher level work eight (8) hours per day or forty (40) hours per week. Where the employee is performing higher level work a majority of the time or for some part of the day on a daily basis they can meet the criteria for upgrade. It is important to look to the core duties of each duty assignment since many duties can be found in multiple position descriptions at several levels. [Note: the upgrade of a duty assignment to a higher level will require the reposting of the assignment for bid.]

THE INTERVIEW(s)

Bargaining Unit Employee:

- Can you describe what work you perform daily?
- Have you always done this work?
- If not, when did the work begin?
- Were you provided written or verbal instructions to do this additional work?
- How many hours a day to you do each task, on average?
- Are these tasks performed every day?

The employee interview is designed to prove the higher-level work is being performed, and to establish how long. It is essential to prove that the majority of the Grievant's time is spent performing higher level work to upgrade the assignment, which this interview is paramount.

The Postmaster or Supervisor

- For how long have you been Sally's supervisor?
- What are the primary responsibilities of Sally's duty assignment?
- How frequently does Sally perform _____ while doing this job?
- Are there any written instructions or job descriptions available for Sally's job?
- How many hours per day are these duties performed?
- Are they done every day?

The goal of this interview mirrors the employee interview. Your goal is to get Management to admit the employee does the higher-level tasks and also for how long. Expect Management to downplay the actual amount of time and prepare supplemental questions, if needed. Supplemental questions can be, "How do you track how long Sally performs _____ work?"

THE DOCUMENTATION

- Position descriptions of current duty assignment and higher level position
- Timecards, ETC or TACs reports showing higher level
- PS Forms 1723 if used
- PS Form 820, if used
- Any written (locally developed) job descriptions or listing of duties
- Examples of specific forms being used or work being performed
- Statements and interviews of employees and co-workers describing work being performed and for how long
- Statements from previous employees who have held this position
- Interview of supervisor regarding responsibilities of employee

THE AGREEMENT

- Articles 19, 25 and 37
- Employee & Labor Relations Manual Chapter 230
- JCIM, Article 37

National Awards

- Arbitrator Stephen B. Goldberg, Q10C-4Q-C 12318440; 10/28/2013

Appropriate Remedy

The appropriate remedy is to upgrade the position to the appropriate level with backpay for the time spent performing the assignment.

Additional Tips

The National Award originated in the 480-481 Area Local and I have spoke to one of the Unions witnesses extensively. The key to the award was to prove that the positions were evaluated as higher level due to the functions conducted and the service reduced the level based on comparable wages and provides a great example to follow.

If most work performed by the employee would be classified as higher level, the assignment should be higher level. It is key to note that when Management reposts, or modifies a job description, they normally do not have the position reevaluated via a PS Form 820, Management simply 'matches' the work. This more easily allows us to compare the description and actual work to upgrade positions.

Chapter Twenty-Three

THE ISSUE: LETTER OF DEMAND – SECURITY VIOLATION

THE DEFINITION

The National Agreement and the handbooks and manuals require management to provide adequate security for all employees responsible for postal funds. Adequate security has been defined by arbitrators as a burglary-resistant facility and reasonable procedures and means to protect valuables. Clerks must report security violations when they occur on the APWU form or a note to the supervisor. These notifications must be retained until at least the next audit to prove that the clerk did notify management of the alleged security violations.

THE ARGUMENT

In window shortage cases that involve alleged security violations, the Union must prove that the violation did exist. Security violations can occur in a variety of ways. There are three references in the Financial Handbook (F-1) that require management to change the combination on the vault or safe when someone who knows the combination leaves the unit. This includes managers and any member of the bargaining unit. Key checks must be done on an annual basis. This requires the supervisor to take the keys of the window clerk and accompanied by the window clerk check all these keys in all locks in the window area. This includes all the drawers and compartments in the screen line, all other containers that window clerks use to store stamp stock, and the spaces used in the vault or safe to store the stamp stock of the window clerk overnight.

It is not permissible to allow the window clerk to conduct their own key check. The F-1 Handbook requires the supervisor to conduct this key check, however, the supervisor is not allowed to conduct this key check without the window clerk going with the supervisor. The supervisor is required to conduct a semi-annual check on the duplicate key envelope (3977). This verification is done by the supervisor without the presence of the clerk. This check is to insure that the envelope is sealed, the flaps are signed by the window clerk and the supervisor and the names of the window clerk witnesses are on the form 3977. Management is required to keep an inventory or log of both the key check and the 3977 verifications. The Union should request a copy of at least the last two key check logs and the last two 3977 inventories. We need to ensure that these are completed as prescribed in the F-1 Handbook.

The union must investigate whether unauthorized people are in the area. The rural carriers are the ones that continually violate this requirement. Rural carriers are not to be allowed behind the window clerks. If they must mail parcels when they return from the route or conduct other window business, management should advise them that they are required to get in the line in front of the window clerk and conduct their business or utilize the services of the accountable clerk. They are not allowed in the window area. The Union must check the security of the clerk's cash and stamp drawers when they are locked in the screen line. Can these drawers be opened by pushing them down? Are locks worn so badly that the drawer can be

opened by any key? Is there a common key available to all window clerks to lock their valuables in the screen line? If so, is there an opportunity for someone to make a duplicate key and have access to all window clerks' accountabilities when they are stored in that workstation? The Union should insure that the locks and keys are changed when a window clerk takes over a window credit. Sometimes the keys are not turned in or the window clerk has a duplicate key and if the locks are not changed, access to the credit can be gained by the window clerk that last had the credit.

The requirement to provide adequate security does not end with the window clerk and their window credit. Management is required to provide adequate security for the handling of registered mail either by the registry clerk or the accountable clerk or the window clerk. A secure compartment or vault must be provided to store registers, and a system must be in place to provide for the required signatures when registers are moved through the mail processing system.

THE INTERVIEW(s)

The Postmaster or Supervisor

- When Jane left the window unit was the vault combination changed?
- When supervisor I. Dontknow left the window unit was the vault combination changed?
- When was the last key check completed?
- Did you do the key check?
- If so, did you check all keys in all locks in the window area?
- When was the last key envelope (form 3977) check completed?
- Did you find any discrepancies with the form 3977?
- Do you have access to the Grievant's IRT access code?
- Is the access code stored in a sealed form 3977?
- Are the drawers and compartments in the screen line worn enough to allow access without a key?
- Does the grievant have adequate storage space in the vault?
- Can the grievant store all the accountable items in the vault overnight?
- Are there unauthorized employees in the window area?
- Is the building secured to prohibit the public from entering the building?
- Has the grievant or other window clerks turned in security violations?
- If so, what have you done to correct those violations?
- How frequently are the IRT's cleaned by maintenance?
- Have the window clerks reported sticky keys or some other malfunction of the IRT?
- Has the disc for the window clerk crashed?
- If so, how were the entries reconstructed?
- Have you had any complaints about the Grievant's work at the window?
- Does the grievant exercise reasonable care in the performance of his/her duties?

This interview is an attempt to get Management to admit a security issue existed and to bolster a defense of 'someone else could have done it' or that the USPS was neglectful. It is not recommended to be hostile here, as you want Management to be forthcoming.

THE DOCUMENTATION

- Letter of Demand
- PS Forms 3368 (stamp credit examination report)
- PS Forms 3294 (previous, current and recount audits)
- PS Forms 3369 (assigned credit receipt)
- PS Forms 3356 (stamp requisition bulk quantities)
- PS Forms 1628 (key inventory)
- PS Forms 3958 (supervisor's record of stamp stock)
- PS Forms 571 (report sent to postal inspectors for shortage/overage over $100)
- PS Forms 1908 (trust and suspense account adjustments sent from accounting)
- PS Forms 1412 (daily financial report) for audit period
- PS Form 2240 (if applicable)
- Money Orders, if applicable
- PS Forms 17 (stamp requisition) for audit period
- Security violation reports
- Grievant's statement or interview
- Supervisor's interview or statement
- PS Forms 3977 (properly inventoried and examined)
- Duplicate key inventory
- Work orders for all repairs or replacement of IRT, locks, etc.
- Most recent financial audit for facility (usually done by Postal Inspectors)
- POS system problems logbook
- Records of shortages/overages for other clerks and/or main stock

THE AGREEMENT

- National Agreement, Article 28
- National Agreement, Article 19
- USPS Handbook, F-1
- USPS Handbook, F-101
- JCIM, Article 28

Appropriate Remedy

The most important part of this remedy is that the Letter of Demand be rescinded, all money collected from the Grievant to be refunded and for the Grievant be relieved of any liabilities (past, present and future). In addition, any "Accounts Receivable" set-up (OIG or Eagan ACS) be removed.

Additional Tips

When most employees receive a Letter of Demand they take one of three positions. Either they are innocent, and this is a set-up, or someone else did it. The JCIM does have ample supporting language to mount such a defense, such as:

"With regard to employee accountability under Article 28, the Postal Service is responsible for the following:

- provide adequate security;
- prohibit employees from using the accountability of another employee without permission;
- provide employees with fixed credits the opportunity to be present when their fixed credit is being audited;
- relieve employees of any liability or loss for cashing checks provided established procedures are followed;
- audit fixed credits at least once every four (4) months.

In offices with Segmented Inventory Accountability (SIA), each sale and services associate's cash retained credit is to be counted randomly at least once a month.

Bargaining unit employees shall not be financially liable for the loss or damage of mails unless the employee "failed to exercise reasonable care." Bargaining unit employees shall not be financially liable for the loss or damage to other Postal Service property, including vehicles, unless the loss or damage the loss or damage resulted from the willful or deliberate misconduct of the employee."

One of the most challenging Grievances I have settled involved a Letter of Demand issued at another facility and months old. All relevant employees retired and could not be contacted. The employee never reported the security violations. The employee also claimed that theft had occurred, but it was never reported and the clerks and Management simply "used overages to fix it." The employee statement and interview were full of finger pointing but with glaring failing by the Grievant.

While the JCIM does state, "Management cannot claim immunity from its responsibility to provide adequate security solely based on an employee not notifying them in writing when the employee's equipment does not provide adequate security. The APWU security form is acceptable notification for this purpose" it is highly recommended that employees report security violations as soon as they happen. In the absence of doing so leads to a far more complicated Grievance to prove.

Interviews of Management and former/current employees are essential in this defense. Local Post Offices routinely fail to have proper security and safety protocols. They amend or ignore policy to 'make it work' all the time. A Past Practice in an office cannot supersede clear policy language. An ounce of prevention is worth a pound of cure.

Chapter Twenty-Four

THE ISSUE: LETTER OF DEMAND – PROCEDURAL ISSUES

THE DEFINITION

There are many procedural issues involved in a letter of demand. Most of the procedural issues are contained in the letter of demand. We must review the letter of demand closely to ensure that all the required language is contained in it. Article 28 requires that in advance of any money demand the employee must be informed in writing and the demand must include the reasons, therefore. The letter of demand must meet the following basic requirements; it must be in writing, it must be signed by the Postmaster or his/her designee, it must notify the employee of the existence, nature, and amount of the debt, it must specify the repayment options available to the employee.

If the letter of demand does not conform to these requirements, it is procedurally defective, and we must raise that issue at all steps of the grievance procedure. In addition, the audit must be conducted no less frequently than once every four months. This issue must also be raised at all steps of the grievance procedure.

THE ARGUMENT

A. The Collection Procedure. Management is required to issue a letter of demand to an employee prior to starting a collection action for the funds. The JCIM requires that any demand must be in writing and signed by the Postmaster or designee. In some instances, management may notify the data center of the existence of a debt. The data center will establish an accounts receivable for the employee. The computer system in effect at the data center will develop a notification to the employee of the accounts receivable in place at the data center. This bill or notification does not meet the requirements of a letter of demand. Therefore, our grievant should be advised not to pay the requested amount until they receive a letter of demand from the Postmaster.

B. The Repayment Options. The repayment options outlined in the letter of demand must meet the requirements of the ELM. The "voluntary" payroll deductions must be in the amount of 15% or more of the employee's biweekly disposable pay, or 20% of gross pay – whichever is lower. The Postmaster may approve a smaller repayment option if the employee's repayment schedule bears a reasonable relationship to the size of the debt and the employee's ability to pay. Many letters of demand have the words "hardship" in them. contained in the Handbook and would be a procedural defect in the letter of demand. Involuntary deductions cannot exceed 15% of an employee's disposable pay during any one pay period. Article 28 of the National Agreement prohibits the collection of funds for any debt of any size if a grievance is filed or a petition is

filed pursuant to the Debt Collection Act. The grievance must be disposed of before any collection procedures can begin.

C. The Signature Issue. The Employee and Labor Relations Manual (ELM) requires the Postmaster or his/her designee to sign all letters of demand. The JCIM also requires the Postmaster or his/her designee to sign all letters of demand. In most cases in offices of any size, the window supervisor or the customer services supervisor signs the letter of demand. Management argues that this is the most logical person to assume that responsibility as they are the management person responsible for the window unit. The Administrative Support Manual (ASM) however requires the delegation of that authority to be officially documented. For PNDC's or any similar Mail Sorting Facility without a Window Unit normally defaults to Eagan issuing these Letters of Demand. This is still a violation.

D. The Late Audit Issue. Article 28 requires that the accountability be audited at least every four months. The audit history (form 3368) will reveal the dates of the audits and the date the next audit is due to be conducted. The Grievant's paperwork should support the form 3368. Management consistently waits until the very last day of the four month period to conduct the audit. Then, if they miss the day, they attempt to blame the employee by saying he or she was on annual leave or unavailable. That argument does not convince many arbitrators. Arbitrators have stated that the employer controls the schedule of the employees and also controls the auditing procedure. There is no excuse for a delay beyond the four month period.

THE INTERVIEW(s)

The Postmaster or Supervisor

- Did you attempt to collect any money from the grievant?
- Did you issue a letter of demand?
- Did you (supervisor) sign the letter of demand?
- Do you have a letter delegating that authority from the Postmaster to you?
- When was the last audit conducted?
- What was the date of this audit?
- Did the grievant request a second audit?
- If so, did you do the second audit or did a different supervisor conduct the second audit?
- Did you enter the closing amount from the previous days form 1412 to the audit sheet?
- Was the audit done away from the window in a secluded area?
- Were there any interruptions during the audit?

- Did both you and the grievant count the stock individually?
- Do you allow the window clerks to verify their stock orders away from the window?
- Are the window clerks required to use form 17 for stock exchanges?
- Are the deposits counted back in the presence of the clerk?
- Is the form 1412 initialed to verify the deposit amount?
- Are the window clerks using the "error correct" on the IRT at the end of the day?
- If so, are the amounts of the "error corrects" significant?
- Does the grievant do good job as a window clerk?
- Does the grievant exercise reasonable care in the performance of his/her duties?

The beauty of procedural violations and interviewing Management to make the argument is Management often does not know the proper procedure. It is increasingly common Eagan issues the Letter of Demand or the Postmaster simply has a 'rubber stamp' approval if they do in fact sign the Letter. This interview should be inquisitory in nature.

THE DOCUMENTATION

- Letter of Demand
- PS Forms 3368 (stamp credit examination report)
- PS Forms 1412 (daily financial report) for audit period
- PS Forms 3369 (assigned credit receipt)
- PS Forms 3294 (previous, current and recount audits)
- PS Form 2240 (If applicable)
- Money Orders, if applicable
- PS Forms 17 for audit period
- Security violation reports
- Grievant's statement or interview
- Supervisor's interview or statement
- PS Forms 3977 (properly inventoried and examined)
- Duplicate key inventory
- Written delegation of authority for supervisor to sign letters of demand
- Work orders for all repairs to IRT, locks, etc.
- Canceled checks / voluntary payroll deductions / involuntary payroll deductions showing collection took place
- Documentation of any efforts to collect while grievance is processed

THE AGREEMENT

- National Agreement, Article 28
- National Agreement, Article 19
- Employee & Labor Relations Manual
- USPS Handbook F - 1
- USPS Handbook F - 101

Appropriate Remedy

The most important part of this remedy is that the Letter of Demand be rescinded, all money collected from the Grievant to be refunded and for the Grievant be relieved of any liabilities (past, present and future). In addition, any "Accounts Receivable" set-up (OIG or Eagan ACS) be removed.

Additional Tips

The above list of procedural arguments is a starting point, and not all inclusive. Letters of Demand should be picked over with a fine-tooth comb and compared to the requirements in the JCIM and ELM. It is increasingly common for Letter of Demand not to be initiated at the Post Office but initiated from a higher level. This creates its own set of violations from notice to signatures.

A frequent problem you encounter is Eagan will begin deductions prior to the appropriate appeal rights. This is a procedural violation. While it is incredibly frustrating for the membership, it must be cited.

An often-missed procedural error is found in the F-101 under 2-4.1 Daily Responsibilities. Under P, Management is required to "issue letters of demand as necessary." The Union should argue against Management waiting weeks or months to issue a Letter of Demand. Once Management conducts their required audit/count, if an issue exists, they are required to issue the Letter of Demand, daily.

While there is no requirement on timeline, our argument is that Management violated the F – 101 by waiting so long to perform their assigned responsibility. Management will often also wait until an employee bids away to take such action. You simply raise the argument that Management is responsible to issue Letters of Demand on a daily basis, and after an extended period of time the Grievant cannot recall the events or circumstances. This is bolstered in the event the Grievant does not present a defense as seen in the previous chapter.

A less common violation is a Letter of Demand pertaining to a check. Yes, customers can still use checks. If an employee accepts a check which is against policy the USPS can come after the employee with a Letter of Demand. There is a caveat in the JCIM, that collection can only be after the collection agencies attempts to recover the funds have been exhausted. This is a large burden which much be cited.

Again, with checks, Management is responsible for appraising employees of all policy changes as it pertains to acceptance of checks, per the JCIM. If Management failed to notify an employee properly of a change in policy or procedure, the employee is not responsible.

Challenge every procedural error you can find, as it can be the difference between a Grievant wrongly losing their hard-earned money.

Chapter Twenty-Five

THE ISSUE: LETTER OF DEMAND – OVERPAYMENT

THE DEFINITION

The Employer should not be permitted to devastate an employee's life by demanding repayment of monies erroneously paid to the employee, through no fault of that employee, and frequently without the employee's knowledge.

THE ARGUMENT

ELM 437 provides for the waiver of Employer claims arising out of erroneous overpayment of pay where the overpayment resulted from an administrative error and where everyone involved acted in good faith. Where the error was that of the USPS and not of the employee, the Employer should be required to honor their own regulations and waive the claim. Remember, the employee should always submit a properly completed PS Form 3074 first.

THE INTERVIEW(s)

Bargaining Unit Employee:

- How did you first become aware that USPS was overpaying you?
- Did you make any effort to notify the Employer of overpayment?
- What financial burden, if any, will repaying this debt cause at this time?
- What benefit, if any (e.g., insurance coverage, etc.) have you received from this error?
- What do you know about how this error occurred?

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- How did this error occur?
- Who was responsible for the error?
- What role, if any, did the grievant play in this error?
- How was the error discovered?
- What role, if any, did the grievant play in the discovery of the error?

THE DOCUMENTATION

- Letter of Demand
- Invoice or equivalent from PDC
- PS Form 3074 (Get a copy when submitted by the employee. However, you should also request copies of the completed form once it has been annotated by higher management in your office as required by ELM 437
- USPS action letters of waiver of claim
- All supporting documentation generated by USPS to establish alleged overpayment

- Documentation such as pay stubs, Forms 50, insurance documents, etc. available to the grievant showing Grievant's awareness (or lack thereof) of overpayment
- Subsequent invoices, payment option letters, collection efforts, etc., generated by the Employer and sent to the grievant after grievance was filed
- PS Form 2240, if applicable

THE AGREEMENT

- National Agreement, Article 28
- National Agreement, Article 19
- ELM 437
- ELM 482
- ELM 484
- Postal Bulletin 22559 - Wage Overpayment Indebtedness —Tax Treatment

Appropriate Remedy

The appropriate remedy is to grant the Grievants submitted PS Form 3074 / Approve the Waiver of Claim of Erroneous Payment of Pay.

Additional Tips

The crux of this Grievance is that of no action of the Grievants own, and no fault, Management overpaid or overcompensated the Grievant.

Once the Grievant completes the 3074, you should file a Grievance to sustain the 3074. This order of action is essential as we can waive our right to file a Grievance due to timeliness. I have had Management claim (and put in writing) a 3074 was approved, but later found out it never was. The Union was unaware as the member in question did not communicate with the Union until after a year of having money deducted. At that point it becomes an extremely difficult Grievance to win.

In the event you discover the Letter of Demand late, or the Grievant did not file a 3074, still initiate the Grievance and change the remedy to be the total amount of money originally overpaid. While this Grievance is more difficult to win than simply sustaining a 3074, it is our best option.

The burden of timeliness can be combated (Albeit poorly) by challenging how the Grievant was notified. If the Postmaster (Or designee) did not properly notify the Grievant, you would argue that the timeline did not begin as official notice was not met. This is admittingly a paper-thin argument.

The onus falls on the member to properly notify the Union for us to represent them. I still recommend filing the Grievance, it is incredibly common where the APWU is not notified until money is taken from a member.

Chapter Twenty-Six

THE ISSUE: FAILURE TO POST A 204(B) BID AFTER 90 DAYS

THE DEFINITION

The duty assignment of a clerk detailed to a non-bargaining unit position more than 90 days shall be declared vacant and shall be posted for bid.

THE ARGUMENT

When management details a bargaining unit employee to a 204(B) position for more than ninety (90) days they have forfeited that employee's right to his or her bid assignment. The National Agreement requires that the 204(B)'s duty assignment be declared vacant and that it be posted for bid. PS Form 1723 controls when determining the length of the detail. If the employee comes back to the craft early, an amended Form 1723 should be completed. Management is obliged to provide the Union with copies of every Form 1723 for 204(B) details. To the extent possible these copies should be provided in advance of the details. The employee is prohibited from returning to the craft solely to circumvent this reposting requirement.

THE INTERVIEW(s)

Bargaining Unit Employee / 204(B):

- Hi John. I guess it was pretty lucky that somebody noticed that you needed to get back in the craft in order to protect your bid.
- Were you keeping track or did somebody remind you?
- What did Supervisor Johnson tell you?
- Did she suggest how long you needed to stay in the craft before you returned to your 204-B assignment?
- Did you discuss this with anyone else in management?
- Was it your idea to come back or did Ms. Johnson suggest it?
- What did she say, exactly?
- Would it be fair to say then that the only reason you came back to the craft for Monday was to keep your bid from being posted?

It is essential to remember that a 204(B) can also be a dues paying member we will represent once their detail ends. We do not want to 'grill' the 204(B) or former 204(B) as we would a title Management official.

The Postmaster or Supervisor

- How long has John been a 204(B)?
- Why haven't you been providing the Union with all of his PS Forms 1723?
- What position is John detailed to?

- Who previously held that position?
- Why is that person no longer holding or in that position?
- Was it your understanding that John came back to the craft last week because he was getting close to the 90 days which would have caused his job to be reposted?
- Who did you replace him with as an acting supervisor?
- Was there any particularly heavy volume of mail or other pressing need why John was needed back in the craft?
- Did John remind you about his need to go back to the craft to protect his job or were you keeping track of the length of his detail?
- How long did you tell John he needed to stay in the craft to "break" his 90 days to protect his job? Will he be returning to his 204(B) assignments after that?

Management has a habit of trying to 'game the system' when it comes to 204(B)'s. While the Contract is very clear, as is the JCIM, this is an area Management will do whatever it takes to comply with frequent hiring freezes and still get the work done. The interview is designed to catch Management abusing the system. While the JCIM has ample protections, the Interview proves when Management is attempting to bypass the rules.

THE DOCUMENTATION

- PS Forms 1723
- Clock rings (back up documentation - remember - PS Forms 1723 are controlling)
- 204-B statement or interview
- Witness statements or interviews
- Supervisor interviews or statements
- 204(B)'s bid duty assignment
- Seniority list

THE AGREEMENT

- National Agreement, Article 37.3.A.8
- JCIM, Article 37
- JCIM, Article 1.6
- Clerk Craft Job MOU

CBA Remedy

The CBA has a clearly defined remedy in the following Language: "The duty assignment of a clerk detailed to a nonbargaining unit position, including a nonbargaining unit training program, in excess of ninety (90) days shall be declared vacant and shall be posted for bid in accordance with this Article. Upon return to the craft the employee will become an unassigned clerk with a fixed schedule." You should specifically reference this as your remedy in a Step 2 Appeal.

Additional Tips

204(B)'s are a controversial topic. On one hand you do not want to arbitrarily harm a member. For non-members we tend to not have this moral dilemma. On the other hand, we have an obligation to enforce the Contract. We have negotiated terms for a reason. The average unit cannot afford to be down craft employees for an extended period without the remaining employees being forced to perform the work.

The worst-case scenario is if Management learns that they do not need the employee and Overtime usage does not increase. The JCIM explicitly has language under 110:

"If a duty assignment becomes vacant as a result of an employee being detailed to a nonbargaining unit position in excess of 90 days, must the assignment be posted for bid or can the assignment be reverted?

Response: The duty assignment can be reverted. While the language in Article 37.3.A.8 states in part, "shall be declared vacant and shall be posted for bid in accordance with this Article," this does not nullify management's right to revert vacancies in accordance with Article 37.3.A.2."

This language means that Management can determine that assignment is no longer needed and should be reverted. If we do not enforce our 204-B language we are putting the entire craft at risk!

The JCIM language provides further clarifications, such as: "Beginning June 1, 2012, Clerk Craft employees will not be utilized in 204(b) details to supervisory positions except in situations involving an absence or vacancy of a supervisor of 14 consecutive calendar days or more. Normally, the usage of a 204(b) in this exception will be limited to not more than 90 days. Exceptions to this 90-day limitation would only be appropriate in very limited situations (e.g., supervisor on four (4) months maternity leave; supervisor on six (6) months military leave; or similar situations)." This language limits 204(b) usage to fill a vacancy. The Union has a strong argument to challenge why the employee is on detail and if the position existed.

Finally, we must address the break in service. The JCIM has ample language, such as clarified by 114, "How long must a clerk employee return to the bargaining-unit from their 204(b) assignment in order to prevent reposting of their duty assignment? Response: An employee detailed to a nonbargaining unit position must return to the craft for a minimum of one (1) continuous pay period to prevent reposting of their duty assignment."

115 further elaborates, "Must the one (1) continuous pay period be an actual pay period or is it merely 14 consecutive days? Response: It must be one (1) actual continuous pay period. For example, an employee returning to the craft on day 2 of pay period 12 would need to continue working in the craft continuously through day 14 of pay period 13, in order to meet the requirement."

This is where you will commonly see Management attempt to 'play the rules' by trying to make a break 14 days only. It must be a full, continuous pay period. Not piecemeal weeks to fit Managements needs.

Chapter Twenty - Seven

THE ISSUE: REVERSION OF DUTY ASSIGNMENT

THE DEFINITION

When a vacant Clerk Craft duty assignment is under consideration for reversion, the local Union President must be given an opportunity for input prior to a decision. The decision to revert or not to revert must be made within 28 days and if the duty assignment is reverted a notice must be posted advising of the action taken and the reasons why it was done.

THE ARGUMENT

While management has a right under the Agreement to revert vacant duty assignments that are no longer needed, the local Union President must be given an opportunity to provide input before a decision to revert is made. This must be a real opportunity for input, not a charade. That doesn't mean that management must always follow the Union's advice, but they must listen to and consider the Union's input. If they do decide to revert a vacant duty assignment, management must then post a notice. That notice must indicate that the duty assignment is being reverted and state the reasons for this action. If the work continues to be done by PSE's, PTFs and/or injured employees, you should argue the reversion was in name only and it continues to exist.

THE INTERVIEW(s)

The Postmaster or Supervisor

- When did you decide to revert Job #12?
- Your letter to local Union President soliciting his input appears to be dated two (2) days after that, is this correct?
- Was this just a courtesy to let him know what you were doing?
- Since you had made up your mind beforehand, there really wasn't anything the local President could have said that would have meant anything, was there?
- What specifically were your reasons for reverting this duty assignment?
- What date was the job reverted?
- Who is currently performing the work previously covered under this bid?

While there are situations where a bid is no longer needed, Management is increasingly guilty of 'shuffling' employees and responsibilities to appease the whims of higher-level Management. The Interview is to establish both the Reversion was improperly handed, and secondary that the work is still being conducted.

THE DOCUMENTATION

- Assignment changes vacating position - showing effective date
- Notice to Union of consideration for reversion and solicitation of input
- Posted notice of reversion
- Local President's statement or interviews about input provided or efforts made to do so
- Supervisor interviews or statements
- PTF / PSE workhours (timecards / clock rings) showing work continues to be done
- PTF / PSE work schedules
- Witness statements or interviews
- Overtime records

THE AGREEMENT

- National Agreement, Article 37.3.A.2

JCIM Remedy

The JCIM has a clearly defined remedy in the following Language: "What is the "normal" remedy for management exceeding the 28-day period for reverting a duty assignment?"

"Response: The assignment must be posted for bid."

You should specifically reference this as your remedy in a Step 2 Appeal. For situations outside exceeding the 28-day period, you always seek the remedy of the assignment being posted for bid.

Additional Tips

We are in a constant battle to retain and gain as much craft work as possible. When we do not challenge Reversions, we give up a job that has become increasingly difficult to get back. The Grievance should focus on the procedural hurdles.

JCIM number 68 states, "When reverting a vacant duty assignment, what steps are required under Article 37.3.A.2? Response: In order to comply with Article 37.3.A.2, management must take the following steps within the 28-day period:

1. Give the Local Union President the opportunity for input prior to making the final decision.

2. The final decision to revert must be made within 28 days of the vacancy.

3. A notice must be posted advising of the reversion and the reasons therefor. "

Chapter Twenty - Eight

THE ISSUE: DENIAL OF BID TO PERMANENT LIGHT/LIMITED DUTY EMPLOYEE

THE DEFINITION

Disabled or otherwise Handicapped employees are as interested in bidding as any other employee. The reasonable accommodation process is triggered each time an employee with a disability is under consideration for such an opportunity.

THE ARGUMENT

Management often tries to apply the so-called "Burrus Memo" (or 6-month medical documentation requirement which originated therein) to bids submitted by employees on permanent light/limited duty. This is not appropriate. It applies only to "temporary" light or limited duty employees. Provided that we can establish that the permanent light/limited duty employee is a "qualified handicapped" employee they are entitled to reasonable accommodation pursuant to Article 2, the Rehabilitation Act, ADA, and ADA Amendments Act. Handicapped employees are as interested in promotions, preferred bid assignments and conversion to FTR status as any other employee.

The reasonable accommodation process is triggered each time an employee with a disability is under consideration for such an opportunity. We must prove that grievant is a "qualified handicapped" employee and that she can perform the "core duties" of the specific bid assignment, either with or without accommodation. We must show what accommodation would be necessary in order to permit her to perform these duties and that such accommodation would be reasonable. The burden is on the Employer to establish that such an accommodation would be unduly burdensome.

THE INTERVIEW(s)

The Postmaster or Supervisor

- Why was Paula denied her bid on the window clerk assignment?
- How familiar are you with Paula's medical condition and her restrictions?
- Who determined that those restrictions were severe enough to prevent Paula from working the window?
- I guess there really isn't much question that Paula is handicapped is there?
- What consideration did you give to perhaps modifying the job slightly so that Paula could do it even with her restrictions?
- Your main concern seems to be Paula's lifting restrictions isn't that right?
- Isn't it true that there always at least two window clerks working at Xerxes Station?
- Then it shouldn't really cause a big problem if Paula got assistance from the other clerk when necessary to lift the really heavy packages should it?

- What about maybe giving her a special cart of some type so she wouldn't have to lift the packages but could just slide them off the counter? What would that cost?
- What other alternatives did you consider?
- Why didn't you talk to Paula? Don't you think she might have had some good ideas about how she could possibly do this job?
- Did anyone prepare the Management Checklist on Reasonable Accommodation?
- Why not?

This interview is to establish that Management made no real effort to make any accommodation for the Grievant. Like all Light and Limited Duty assignments, Management often makes next to no effort to accommodate employees.

THE DOCUMENTATION

- Job Posting
- Bidders list / employee's bid card
- Seniority list
- Grievant's statement or interview
- Supervisor interviews or statements
- Medical documentation / restrictions
- Evidence as to handicapped status
- Accommodation checklist (EL-307) - if used
- Position description and qualification standard
- Current light/limited duty assignment
- Documentation or statements concerning other similarly situated employees provided or denied accommodation
- Specific suggestions from the employee as to accommodation believed to be needed

THE AGREEMENT

- National Agreement, Article 37
- National Agreement, Article 2
- National Agreement, Article 19
- USPS Handbook, EL-307
- JCIM, Article 13.5.C

External Resources

- Rehabilitation Act
- ADAAA
- ADA
- 5/17/2024 EEOC Posting RE: Violation of Rehabilitation Act of 1973 (Rehabilitation Act)

Appropriate Remedy

The appropriate remedy is to grant the desired bid, with accommodation to the Grievant. If the bid has been filled, a mirror bid be established and granted to the Grievant with accommodations.

Additional Tips

This Grievance can be far more nuanced if you wish it to be. The ELM and CFR provide supporting language on applicability of the relevant laws and provisions to the USPS. This establishes a clear nexus for the APWU to argue, through Article 19, how the USPS must fully comply with relevant law.

While the Contract's intent is a make whole remedy, members have a strong secondary option to file an EEO Complaint. On May 17th, 2024, the USPS was found to be in violation of the Rehabilitation Act of 1973. The important part of the posting is the remedy, which includes:

"The Agency shall, therefore, remedy this discrimination by paying the individual back pay and compensatory damages, training the responsible management officials, and otherwise taking measures to ensure that officials responsible for maintaining a workplace free from unlawful discrimination and retaliation will abide by the requirements of all federal equal employment opportunity laws.

Further, the facility will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises their right to oppose unlawful practices or who participates in proceedings pursuant to federal equal employment opportunity law."

The intent of sharing this is not to advise requesting compensatory remedies in the Grievance – Arbitration procedure. While it can be and may be possible, depending on the harm, when the Grievant has a clear case of discrimination I strongly recommend advising them to file an EEO. It may even be beneficial for a local to file an EEO on behalf of members in the event multiple violations exist.

Like all Grievances, for repeated failure to abide by Federal Law and the Contract, the Union would and should request an escalating remedy after a Cease and Desist. The end goal is to eventually seek compensatory damages when Management continuously tramples our members' rights.

It must be noted that many Reasonable Accommodation Committees (RAC) have large delays in providing employees meetings. This should have no bearing on the employees' right to bid, and we should proceed regardless of a meeting being held. It can bolster the Grievance. If Management fails to properly explore the options available, and Management still restricts bidding rights, we can argue the decision was arbitrary in nature.

Chapter Twenty - Nine

THE ISSUE: PSE'S WORKING THE WINDOW

THE DEFINITION

The number of PSE's working in the retail unit (Window) is limited to 10 or 20% of the career retail clerks in that installation whose duties include working the window. In addition, if the hours a PSE working in a retail unit (Window) demonstrates the need for a full-time duty assignment (FTR, NTFT), such an assignment shall be posted for bid within the section.

THE ARGUMENT

Since the APWU and USPS created the PSE position, the rules surrounding PSE's have evolved. Currently, the CBA and JCIM have clear language on the use of PSEs in retail units / window operations which Management frequently violates. If a PSE is working enough hours in a retail unit to justify the need for a full-time assignment to be posted, such a bid must be posted within the section.

The burden is on the Union to prove this, as Managements tracking program often falls apart. Presidents (Or their designee) have access to MDAT (Max Duty Assignment Tool) which vastly simplifies the process for the APWU. MDAT uses the USPS own data to show the need for duty assignments and has been agreed to at the National Level. Since the implementation of MDAT, the 'game has changed' on proving Maximization Grievances. In the absence of MDAT, the Union would track the hours the PSE worked the retail unit (Window) and argue that enough hours exist to create a full duty assignment.

In addition to a clear hour limit, retail/window PSEs are limited to a 10% ratio-cap in Level 22, Function 4 Offices and a 20% ratio-cap in Level 21 and below Function 4 Offices. These two issues, while they have different remedies, have similar documentation requirements and interviews – thus they are combined for the purpose of this guide.

THE INTERVIEW(s)

Bargaining Unit Employee:

- How long have you been working the window/retail unit?
- How many hours a day do you work the window/retail unit?
- How many days a week do you work the window/retail unit?
- Do any other PSE's work the window/retail unit?
- Do you ever work distribution, or do you only work the window/retail unit?
- Were you trained to be a window clerk?
- Do you swipe on a window operation when working the window?
- Has Management ever instructed you to not swipe on a window operation when working the window?

- Do you ever work the retail unit / window in another facility?
- If yes, which facilities do you work the retail unit / window at?

This interview is designed to confirm the length and duration of PSE work in the retail unit/window. In addition, the interview is a safeguard against improper swipes and to expand the search to other PSE's who may improperly be working in the retail unit / window under the wrong designation or D/A Code.

The Postmaster or Supervisor

- How many career clerks do you have that are window qualified?
- How many bids in your installation include the retail unit / window operations?
- How many PSE's do you have in your installation?
- How many PSE's work the retail unit / window in your installation?
- How many hours a day do PSE's work the retail unit / window in your installation?
- How many days of the week do PSE's work the retail unit / window operation in your installation?
- Do you ever loan your PSE's to other installations?
- How long have your PSE's worked the retail unit / installation?
- Do your PSE's ever work in other facilities within the same bid cluster?
- Is it true that a full-time regular duty assignment could be made with the hours and off days the PSE is working in your installation?
- Do you have the authority to create such a duty assignment?
- Who do you have to get authorization from in order to create additional full-time regular duty assignments?
- Have you attempted to get additional full-time regular duty assignments and if so what happened?
- Why wouldn't a full-time regular duty assignment work?
- What changes would be necessary in order to make a full-time regular duty assignment possible?

Management can be our greatest ally in this Grievance type, as they often feel the reality of insufficient staffing and are often denied additional staffing when requested. This interview is designed to first confirm the basic facts of the facility and to determine if the Postmaster / Supervisor is aware of the relevant facts. If a dispute arises over the documentation, such as incorrect swipes or operation codes, the Postmaster / Supervisors word can confirm the improper designation. This same information is used to establish if Management is over the respective caps for PSE usage. The interview concludes with basic questions on creating a duty assignment.

THE DOCUMENTATION

- Copy of PSE Clock Rings
- MDAT Chart for PSE Hours to show work assignment (If applicable)
- Information for MDAT in .CSV and PDF format (if applicable, PDF to review for accuracy, .CSV for MDAT)

- Copy of 1412's
- Copy of work areas and work schedules for PSE's
- Any/all statements & interviews conducted
- Copy of all residual duty assignments with window duties listed on the posting (if applicable)
- Copy of all awarded duty assignments pending qualification in that unit (if applicable)
- Copy of work schedule listing qualification or job position (window qualified)
- Copy of PSEs training records
- Copy of all posted duty assignments with window qualifications;
- List of PSEs working window without training
- PSE's PS Form 50's

THE AGREEMENT

- National Agreement, Article 7
- National Agreement, Article 37
- JCIM, Article 7
- JCIM, Article 37

Appropriate Remedy

When a PSE is working hours which justify a new duty assignment, the appropriate remedy is to request the bid be posted with the hours/off days the PSE is currently working the retail unit / window. This duty assignment / bid can be a FTR or NTFT if multiple facilities are worked at.

When Management exceeds the allowed caps, the appropriate remedy is a Cease and Desist, and payment to all window qualified clerks at the appropriate overtime rate for all hours the PSE(s) worked over the cap.

Additional Tips

The reason for combining these two PSE violations is not only due to the above reason – similar information required and interviews, but also that I commonly find when Management is violating a PSE rule, several rules are being violated.

For example, the controlling document on PSE designation is their PS Form 50. A Window PSE has a designation code of 81-4 and can perform window duties. Management can train any PSE they like, but those additional PSEs cannot work the window if that would put them over the cap. For example, when I was a PSE, I was Window qualified, Passport qualified, sent to scheme training, etc. This would not be a violation until/unless Management assignment me to that unit or change my designation code.

If Management has the wrong designation code for the other PSE's, it can a violation of the Contract and put Management over their cap. The correct designation code for a Mail Processing PSE is 81 – 3. Checking the PSE's Form 50s with any related Grievance is a good

habit to get into. This is not a fishing expedition, as you can uncover PSEs with the retail unit / window designation code but are on loan, not properly coded, at another facility in the bid cluster, etc. If you are an external Steward / Officer and do not know how the facility operates, the Form 50 is an essential document as it can shape your investigation in determining both PSE cap violations and in creating duty assignments.

You can encounter PSEs with an incorrect Form 50, who were window qualified, work the window on occasion, and Management 'hides' this fact. It is highly recommended to check everything when you see issues with PSE usage and to interview any/all potential witnesses. Again, local Management is often your friend. As are career employees who are frustrated by short staffing.

When attempting to create a new duty assignment, it is highly recommended to use MDAT. MDAT uses the USPS data and information. Management can dispute the information we find and provide, such as statements, clock rings, etc. But Management cannot dispute the data they use to determine duty assignments that we presented in a different way. MDAT is an incredible program and advancement in our ability to create new duty assignments.

You do not need to establish that a PSE works 40 hours in a retail unit / window. You can 'cobble' together hours via MDAT or manually to create pool and relief assignments and NTFT assignments. Most Stewards attempt to create traditional desirable duty assignments, the purpose here is to simply prove another bid / duty assignment is needed no matter how ugly, and MDAT does this the best.

A common misconception is this is a 'loss' for the PSE doing the work. This is untrue. The Residual Vacancies – Clerk Craft MOU is still applicable. The creation of an assignment can results in a PSE conversion. Creating the duty assignment is a gain for the craft and potentially for the PSE. The same can be said for the language in 37.5.D. It is always a benefit to have new duty assignments created.

When Grieving the creation of duty assignments, you must check if the PSE(s) are not working a schedule which matches a current bid / duty assignment but is pending qualification (Window or Scheme are most common). You must also check if the PSE is occupying residual duty assignment. While it may be a violation, technically, it may be a temporary stop gap on Management part.

When dealing with caps, the violation can be designation code (PS Form 50) or it can be actual work performed. Management can and has worked PSEs on the window or in a retail unit who do not have the correct designation code. Management can and has not issued a PSE a drawer properly and had them work the retail unit / window. Management can and has loaned PSEs to another facility within the cluster and the hours are not properly designated.

When investigating it is advised not to rely upon the Form 50 or interviews / clock rings exclusively. It is advised to use both, to interview witnesses, and if possible provide your own notes / statement witnessing the work being performed.

Chapter Thirty

THE ISSUE: NON-ENFORCEMENT OF GRIEVANCE SETTLEMENTS

THE DEFINITION

The Unions and Managements designees have the authority to resolve all Grievances, and their mutual agreement shall be binding. The parties must ensure the terms agreed upon are met and upheld.

THE ARGUMENT

Management has an obligation and responsibility under the Contract to ensure lowest level resolution of Grievances. The CBA states in Article 15.4.A, "The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end."

When Management does not comply with a previously agreed upon settlement, it dissuades future resolution of Grievances at the same level. This can be common when Management refuses to write or sign Step 1 Settlements citing the verbal nature of the Step 1 meeting.

In addition, the CBA states, "Every effort shall be made to ensure timely compliance and payment of monetary grievance settlements and arbitration awards." When Management does not promptly comply with the terms of any settlement it is a violation of our Contract.

THE INTERVIEW(s)

Bargaining Unit Employee:

- On October 27th, did you file a Grievance about being forced to work your NS Day when not on the OTDL?
- Are you aware your Grievance was resolved on January 1st?
- Were you aware the Grievance Remedy was a 50% premium for the hours you were forced to work?
- Have you received the 50% premium?
- Has anyone in Management told you why you were not paid in the past six weeks?

This interview is designed to establish with the original Grievant that the remedy was not sustained. The interview ends with questioning if Management informed, or the Grievant asked Management about the pay. Management will provide the Grievant justification to an employee they would never tell the Union, and this must be on the record.

The Postmaster or Supervisor

- Were you aware that Jane Doe's Grievance (Local or GATS #) was settled on January 1st?
- Who was responsible for making the payment to Jane Doe?
- On what date was the payment input into GATS?
- Is there a reason the payment was not immediately input into GATS?
- Why has Jane Doe not been paid so far?
- How long does it normally take for Grievance Settlements to be paid?
- Have you followed up with Eagan / Accounting Services to inquire about the delay?
- When can Jane Doe expect payment?

Management at all levels tend to try to avoid being 'responsible' for a Grievance remedy or payment. The interviews intention is to get Management to admin no effort has been made to have the Grievant paid, and no effort has been made to rectify the lack of the Settlement being adhered to.

THE DOCUMENTATION

- Original Settlement
- Any/all interviews with Management and Grievant
- Any/all interviews with APWU Representative / NBA who negotiated settlement
- Any/all statements with APWU Representative / NBA who negotiated settlement
- Any related and citable Settlements / Arbitrations related to same/similar subject's compliance such as Cease and Desist

THE AGREEMENT

- National Agreement, Article 15
- JCIM, Article 15

External Awards

- May 31st, 2002 Arbitration Award Compliance Letter by Patrick Donahoe
- March 20th, 1998 by Non-Compliance with Arbitration Awards by John Potter

Appropriate Remedy

Sustain the original Grievances remedy of immediate compliance or payment to the employee(s). In addition, a 10% compensatory payment of the original amount.

Additional Tips

REFER TO KEHLERTS Compliance & Enforcement Strategy Guide

No matter how many amazing awards as we win, the reality is they are not worth the paper they are printed on unless Management complies with the settlement. I often see recurring violations in which the Union does not properly Grieve enforcement. The above remedy applies to financial violations, but this can be applied to all cases of non – compliance.

In the event the original settlement was not financial in nature, you must become creative. Using the Past Practice – Wash Up time example that appeared earlier, if Management continues to violate the Past Practice and fails to comply with your Settlement, you should file a compliance Grievance requesting 5 minutes per break/lunch to be paid the employees per day. After your first re-file, you would increase the remedy to further compensate the Grievant's.

Management has no right to delay a settlement or remedy they agreed to. Any Grievance that has a settlement that requires Management action is viable for a Grievance for compliance. It may take creativity, but this is one category the Union has consistently won compensatory remedies. Arbitrators have ruled that willful disregard for settlements is one of the most egregious offenses as it shows a clear intent to violate the Contract rather than incidentally violating while trying to conduct normal operations.

Compliance Grievances are ideal for escalating Remedies, and a Multiple Grievance Strategy. The burden becomes that the Steward must ensure the violation is proven for each different case, and the harm is argued. It is not enough to file three Grievances for each compliance violation citing different CBA provisions, you must ensure each Grievance proves the relevant violation of the specific CBA provision.

For example, let's assume you want to cite Article 1 – Union Recognition as you believe Management is undermining the Union through its actions. You must cite, in your Grievance, evidence pertaining to how the Union was harmed and to argue what the harm is to the Union. Harm can be as simple as deterioration of the members trust in the APWU as the Bargaining Unit representative. As APWU Stewards we tend to look at our ability to represent members in a microcosm, but the reality is the membership can vote to decertify the Union (Unlikely) or just stop being members. Include this in your Grievance.

A more difficult element may be a statement or interview of the individual who made the original settlement. If it is your settlement, have another Steward interview you. If it is a NBA, reach out and ask if they are available for an interview, or if they can send you a statement. For Contractual Cases or language settlements the intent of the parties can matter when a dispute arises. While this is unlikely, in such an event an interview of the parties who signed the agreement is paramount. Management is likely to cite ambiguous or confusing language as a defense to your Compliance Grievance.

Defending Against Discipline

This section will draw heavily from "Defense vs Discipline" by Jeff Kehlert. Some sections will be expanded upon and re-tooled based on additional information.

The Public, or the average person, has a negative opinion of Unions for the simple reason we are viewed as helping bad employees keep their jobs. This is a misconception. Our job is to enforce the Contract and the rights we have as Federal Employees. We have 50 years of APWU Precedence, we have decades of Just Cause Precedence, and we have over 100 years of Due Process Precedence as Federal Employees.

When we defend an employee, we are upholding these rights. Imagine we are defense attorneys for a moment. A defense attorney will never morally agree with a client who is guilty, but the defense attorney defends them to protect the publics constitutional rights including guilty until proven innocent. As a Steward that is our responsibility.

The truth is, as long as Management proves the Grievant is more likely guilty than not, follows Just Cause, allows Due Process, and follows USPS policy we likely can't win the Grievance. Our success is based on Managements failure. All we are doing is pointing out this failure. This may not make the reality easier, but it is the truth. I have defended employees with multiple Notice's of Removal in which the Grievant was abundantly guilty, and management mostly got things right. If I was able to negotiate the Supervisor into saving the persons job that is not my fault or responsibility.

If you are still not sold, I must point out the glaring truth of Discipline Grievances. Discipline acts as training wheels for APWU Stewards. Fighting discipline teaches you to use legal standards, to interpret contractual language, forces you to research and ultimately sharpens your skills of Negotiation. Most locals prefer to have new Stewards handle Letters of Warning before moving onto Contractual Grievances or Suspensions for this reason.

The standards we discuss in Defending vs Discipline cross apply to Contractual Grievances. Learning to read Arbitrations, learning to apply Due Process' Procedural Fairness, learning how to negotiate and learning Handbooks / Manuals all can be applied to several other Grievance types. Learning to fight Discipline will improve your ability to better represent our members in other areas.

We defend all discipline vigorously. Many members we represent may be guilty, but the skill set we learn is needed to defend the one out of one hundred members who are innocent. The greatest failure of a Union (both morally and legally) is allowing an innocent employee to be fired when they are innocent. Without enforcing the Contract for everyone and learning the best defenses we will be unable to save the innocent member.

This introduction will cover the core and background behind most successful arguments made to defend against discipline. The chapters will cover specific examples and defenses. It is highly recommended to reach this introduction first.

The Investigative Interview

Before we dive into defending against discipline, we must start in the Interview. Some areas call it a Pre – D or Pre – Disciplinary Interview. Others call it an Investigative Interview. While they are technically different things, and a violation to not have the two interviews held individually (Which will be addressed as a violation later in this guide), the fact remains Management typically holds one interview.

I have theories as to why. The most pervasive is what the Labor Arbitration Institute (LAI) stated in September of 2020. LAI found that over the years the value of Just Cause has changed over the years, some tests have significantly lost value such as a Complete Investigation, and others have far more value, such as the Rule must be Reasonable and fairly applied. Management's policy to dismiss holding two interviews and simply ensure the one interview they hold mentions Due Process rights is clearly intentional.

This makes our jobs as a Steward more challenging. We are commonly told that a violation of the Contract means the Discipline should be reduced or thrown out. Arbitrators do not always agree with that. I commonly see this issue with many Grievances NBA's settle. Our commonly held perceptions do not match the reality. Reality is far more complicated.

The violations we see in this guide, and all guides, have different values and applications. Due Process is the best example of this. Mathews v. Eldridge (424 U.S. 319 1976) affirms that the value of Due Process depends on the cost to the agency to afford Due Process; the impact to the Grievant to not afford more Due Process; the protections afforded by the employees Contract; and finally, the more severe the Discipline the more Due Process protections should apply. This case includes an opinion by Supreme Court Justice Powell which is where these standards are extrapolated from.

While Mathews v. Eldridge is not a Disciplinary court case, it specifically references Procedural Due Process and tends to be the standard amongst Arbitrators. When we appeal a Grievance to Arbitration what is being weighted is not if Due Process was violated, but what the impact is on the process.

When it comes to a Just Cause violation, the commonly accepted standard is that for Just Cause to be sufficiently violated enough to overturn Discipline a singular violation must be so great that the outcome has been impacted. This is the inverse of the employer's obligation under Due Process, which views the sum total of violations. While we have the 7 Tests of Just Cause, and the JCIM further defines Just Cause, the value of each element varies.

This means Just Cause violations are not cumulative, but individual. When we cite Just Cause violations we should cite as many as applicable as if appealed, you never know which violation an Arbitrator will latch onto. But do not incorrectly expect that five small violations means discipline should be overturned. Due Process is the opposite. Per Mathew v Eldridge 424 U.S. 319 (1976), it is about the total protections granted and the impact to both parties.

You just read a few hundred words about Just Cause and Due Process and I can assume you have one question. "What does this have to do with the Interview?" The answer is

simple. If you wish to raise an argument of Procedural Due Process, it must be done during the process where it would have an impact, if possible.

The value of a Due Process or a Just Cause violation can vary. The definitions of both are terms of art and subject to interpretation and the impact on the employee and employer. A simple violation of Due Process, such as the Grievant being aware of the proposed level of discipline, may not be a 'big deal' to an Arbitrator when you consider we have a Grievance Procedure, and a Reasonable Person would know if they previously received Discipline in most situations.

Now, if you raise this as a Contention during the Interview, Management has an obligation to answer. If Management states, "I don't have a proposed level of discipline" this throws the Contract out the window! Management has no idea, nor does the Grievant. A Reasonable Person would then assume Management could just investigate and have a discussion with the Grievant. A Reasonable Person would also give a far more detailed and passionate defense or explanation if they knew they could lose their job. Your Grievance now writes itself.

The same goes for Just Cause. If Management asks a Grievant, "Do you know and understand ELM 665.41 which states…", most people say yes. It makes sense, Management just read the definition! But if, as the Steward, you use your Weingarten Right to clarify the question and state, "That question is confusing, and I need to clarify. The question being asked is in the context of the alleged offense we have discussed in the interview. At the time were you aware of this rule, not if you know if now after Management told you. I recommend you answer honestly based on if you knew that ELM provision before it was just read to you." If you write down your input, Managements questions, and the Grievant's responses you have a winning case.

What you have effectively done is proven that a violation of Just Cause occurred, and Management will need to scramble to prove the Grievant knew the rule. The lynchpin is the Steward having extremely detailed notes from the Interview as Management often does not accurately record what the Union states. I have met hundreds of Stewards over the years, and my single biggest letdown is hearing that a Steward doesn't take notes in their Interview. The kids call it an 'ick'. I know that such a Steward does not really care about the membership or the Grievance. **Always take notes and challenge Management in the Investigative Interview.**

Effective Note Taking

Management has the responsibility to capture every word stated. You will find they often do not. Especially when they have a pre-printed form of questions to ask. This is a benefit, as the Union can make a variety of arguments such as, "Management did not consider the Unions input and relegated them to passive observers" all the way to, "Management did not accurately record the Interview as they had predetermined what the outcome would be."

The negative is, unless you capture what happened, and you raise the objections during the interview which the Supervisor should have recorded, you have no argument. I recommend

asking for a copy of the interview prior to walking in the room and holding a caucus to fill the Grievant in. If denied, it is no big deal.

You should accurately capture each question asked, even if in shorthand. But you must capture everything that is said by the Grievant and the Supervisor. The most important thing to capture is everything you say or ask in the interview, and the answer to it. This is often what Management excludes, in addition to excluding their 'side comments'.

A side comment is something the Supervisor states that is not a question. For example, a Supervisor may say, "I know this doesn't really apply, but are you aware of ELM 665.11?" Supervisors say things like this as they are handed questions and know they must interact with the Grievant after the interview. They want to soften the blow. When the Supervisor writes the Discipline or sends their findings off to be written by Labor Relations, you will often find that the ELM provision the Supervisor dismissed will be one of the justifications to issue discipline.

Your notes in the Interview are your first, and greatest evidence when it comes to combating the nuances of a Grievance. The Interview also will give you insight on what to dig into or investigate. If Management asks if the Grievant recalls a Discussion on a specific date, and the Grievant disagrees, you now know to validate the Discussion. If refuted, Management often will try to convince the Grievant to say yes by providing more information, which you would not ordinarily uncover. Recording this is essential.

It is recommended to take one version of notes and to revise them for your case file. While in the Interview, you will want to make notes of things you think of or your own comments. Before you include your notes in your case file you should rewrite or type the notes out excluding your personal notes.

Some personal notes I commonly make are Supervisor pauses, Grievant 'tells' such as fidgeting, or any party raising or lowering their voices. While these may not be direct violations, it helps later piece together the truth of what happened.

Weingarten Rights

Doug Tulino sent a letter to "All Managers and Supervisors" on January 19th, 2010 which clarifies Management must "permit the employee and steward to meet privately for an adequate period of time before the Meeting. During the interview, you must permit the steward to participate and advise the employee." This same letter also provides Management a training video titled, "Weingarten – What You Need to Know."

Management has no excuse to violate our Weingarten Rights, or try to make us a passive observer. It happens more often than you would imagine either directly or indirectly. Directly is telling you to wait until the end and becoming combative. Indirectly is being nice, and saying "I can answer that at the end." It doesn't matter how Management say it, either way it is a violation.

While a violation of Weingarten is a violation, and a Labor Charge, it is important we do not stop doing our job. I am not advocating arguing, or fighting. I am advocating, as needed,

interrupting to state, "I have a question" or "I have evidence" or "I need to clarify". Let Management tell you each time to wait until the end and write down what your question would have been in your own notes. This allows you to raise each question as a violation later and not just a blanket 'Weingarten' violation of Article 17.

The single best exploration of Weingarten Rights I have seen is Robert M. Schwartz' book, The Legal Rights of Union Stewards. I purchased mine through Labor Notes years ago and it serves as a useful handbook to reference, and I do recommend purchasing it. But I will borrow from the book here.

As outlined in Chapter 5, "Unions should educate their members about the advantages of having a steward present at an investigatory interview. These include the ability of the steward to:

- Serve as a witness to prevent a supervisor from giving a false account of the conversation;
- Object to intimidation tactics or confusing questions;
- Help an employee to avoid making fatal admissions;
- Advise an employee, when appropriate, against denying everything, thereby giving the appearance of dishonesty and guilt;
- Warn an employee against losing his or her temper;
- Discourage an employee from informing on other;
- And raise other extenuating factors."

Schwartz continues to state: "When the steward arrives at the meeting:

- The supervisor or manager must inform the steward of the subject matter of the interview: in other words, the type of misconduct being investigated.
- The steward must be allowed to have a private meeting with the employee before questioning begins.
- The steward can speak during the interview, but cannot insist that the interview be ended.
- The steward can object to a confusing question and can request that the question be clarified so that the employee understands what is being asked.
- The steward can advise the employee not to answer questions that are abusive, misleading, badgering, or harassing.
- When the questioning ends, the steward can provide information to justify the employee's conduct."

The book does have a Q and A, but the important question is, "Question: If management rejects a worker's request for union assistance at an investigatory interview, induces him to confess wrongdoing, and fires him, will the NLRB order the worker reinstated because of the Weingarten violation? Answer: No." I am cutting off the rest of the answer, intentionally. If the Grievant confesses, even if we are present and put into the position of being a passive observer, the NLRB will not save us. We must still try to raise contentions, try to assist the Grievant, and fight in the Grievance – Arbitration process.

It must be noted that several citations Schwartz makes to define Weingarten comes from NLRB charges and court cases against the USPS. The USPS is notorious for violating and challenging our Weingarten rights. While every local has their own process for Labor Charges, at minimum we must raise the appropriate contention in the Grievance procedure.

While the above seems exhaustive, it is not. Our rights are far more robust than is written. We have precedence, Court Rulings, Arbitrations, NLRB charges, and other agency standards which apply. One example is the FLRA, or U.S. Federal Labor Relations Authority, which has further explanations and standards than seen above.

One extremely common misconception is when it comes to objecting or clarifying questions and/or answers. Under Weingarten, we cannot tell an employee to not answer a question. But we can reword the question for understanding as clarification and clarify the Grievant's answer to Management. Clarification is the tool I use most often. If the Grievant or Management asks something confusing, you ask a question to clarify. This is where is pays to act as stupid as Management believes we may be.

In a Pre – Disciplinary or Investigative Interview, our rights are not solely limited to Weingarten. We can just do the most with Weingarten as a violation. Under Procedural Due Process we and the Grievant have the explicit right to confront and cross-examine witnesses as confirmed by Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

This is exactly why some Stewards 'get away' with telling Grievant's not to answer questions. It is important to note I do not advise you do this, but it is important to note. The Rights we have under Weingarten are the minimum we have. Any violation is against the law.

That does not mean we should not do what we can to represent our members. A second warning is warranted, it is not advised to be combative. Be assertive, ask your questions, and make notes when shut down. While you may personally get away with yelling at or arguing with Management, this is about representing the membership and building the best Grievance possible.

Types of Defenses

Four broad categories exist for defending our membership against discipline. While this guide (And most APWU training) focusses on a single facet, we would be remiss to not discuss each type of defense in at least a surface level manor. While we get tied up in nuance of procedural arguments, we can miss the most basic and simple arguments by doing so.

The first defense, which we will exhaustively explore, are procedural or technical arguments which the facts/circumstances of the Grievance do not impact. These would include Due Process, Just Cause, and Legal Standards. The basic core tenant of this defense is Management made a mistake, and it does not matter if the Grievant did what they are being accused of or not.

The second defense is one of Mitigation. Mitigating Circumstances or Factors would include any relevant information which warrants the discipline imposed as 'too harsh or severe'.

This is decisively NOT a progressive discipline argument. The argument here is a circumstance of the Grievant or Grievance means that just because Discipline may be 'progressive in nature' it may not be proper.

This second defense will be explored in a later chapter, but an example would be beneficial here. The easiest example would be an Attendance Notice of Removal. If the absences were related to a medical condition, and the Grievant had FMLA but exhausted it due to said condition, our defense of Mitigation would be that the absences were caused by a legitimate health condition. We would piggyback this mitigation by stating this discipline is not corrective in nature as Discipline cannot correct a legitimate health condition.

We strengthen this defense with medical documentation, the Grievant's previous FMLA case number, etc. You will not find this defense in Article 16, but it is a viable defense and can result in discipline being reduced. When our members complain about 'Management not caring about what I am going through' this is where we say we do care, and will raise their life events as a defense.

The third type of defense is one of Appropriateness. A Grievant can do something objectively stupid, but if it does not violate a USPS Rule or Policy, it may not be proper to issue discipline. Management can prove the Grievant did something they dislike, but it does not mean it is a violation of the ELM. Management will often try to force the offense to fit an ELM requirement or rule.

An example, albeit silly, is a hypothetical situation. You have a Grievant who receives Discipline which cites ELM 665.16. You ask the Grievant what happened and review the Interview notes. You find that Management had a conversation with the Grievant asking if they believed the earth is flat. In the "Interview" Management aggressively questioned why the Grievant was a member of a 'Flat Earth' group on Facebook.

Management then turns around and issues this discipline, claiming, "The Grievant is not honest, trustworthy or of good reputation." The scientific community may all agree that the Earth is round, but having an opinion someone considers 'stupid' is not one you can Discipline someone over. If the Grievant was berating customers about the subject then maybe discipline would be appropriate, but it may not be under ELM 665.16.

The fourth defense is often overlooked. That is one of innocence. The innocence defense is that Management cannot prove the accusation they are making. This defense can have many shapes and forms, but the easiest example is when Management relies on a USPIS or OIG investigation over their own independent review. Management cannot exclusively rely on any external investigation to justify discipline. If you remove the external investigation, we simply argue Management has not proven their case.

Now we move onto the actual defense and Chapters there-of. Not all chapters are Just Cause or Due Process. Again, many sections are directly copied from other training manuals and expanded or reformatted, but there is new and updated information making this a worthy read for any APWU Representative.

Chapter Thirty - One

THE ISSUE: PROCEDURAL DUE PROCESS – WITHIN THE INVESTIGATIVE INTERVIEW

THE DEFINITION

Federal Employees are granted Procedural Due Process rights under the U.S. Constitution (14th Amendment) which extend through the entire Grievance – Arbitration Process including prior to the initiation of Discipline.

THE STANDARD

The 14th Amendment provides Americans the basic rights of Procedural Due Process when dealing with proceedings with the US Government. This right has been granted to Public Employment, including Postal Employees, through extensive Court Cases and Legal Battles. Such cases include: LaChance v Erickson (1998); Federal Deposit Ins. Corp v Mallen (1988); Board of Regents v Roth (1972); and Perry v Sindermann (1972). These protections are not in our Contract, yet every USPS employee has the protections granted under Procedural Due Process.

Due Process is a term or work of art but can be referred to as Procedural Fairness. Famously, Judge Henry Friendly defined the elements of Procedural Due Process as the following rights:

- An unbiased tribunal
- Notice of the proposed action and the grounds asserted for it
- Opportunity to present reasons why the proposed action should not be taken
- The right to present evidence, including the right to call witnesses
- The right to know opposing evidence
- The right to cross-examine adverse witnesses
- A decision based exclusively on the evidence presented
- Opportunity to be represented by counsel
- Requirement that the tribunal prepare a record of the evidence presented
- Requirement that the tribunal prepare written findings of fact and reasons for its decision

While this list is lengthy, it is not exhaustive. Through landmark Court Cases, such as Mathews v. Eldridge 424 U.S. 319 (1976), the long-accepted standard is the amount of Due Process a person receives depends on the severity of the Discipline, the interest of the Agency, and the protections otherwise provided by the Collective Bargaining Agreement, or our Contract.

Of Judge Henry Friendly's list, Arbitrators agree that some elements have a higher importance in the Grievance – Arbitration Procedure. After reviewing hundreds of Arbitrations and Court Cases, hundreds of APWU Arbitrations, and as confirmed by the Labor Arbitration

Institute, the four most important elements are: Management must Present specific charge, Present level and type of discipline, the decision be made exclusively on the evidence presented, and allow employees explanation prior to issuing discipline.

THE RATIONALE (You Can Skip This Section)

Prior to the initiation of Discipline, Management must provide Due Process rights to the Grievant. In the Past, Management met this standard with a separate interview known as a Pre-Disciplinary Interview or PDI in addition to an Investigative Interview or II. Many Districts in the USPS have decided to hold a singular interview over two separate interviews and simply incorporate the elements of Due Process into the Investigative Interview.

The opinion has been supported by the USPS Legal Department as through legal precedence, such as Morrissey v. Brewer, 408 U. S. 471, 408 U. S. 481, the amount of Due Process afforded is subjective. If the USPS provides as much Due Process as reasonably possible, they can justify they have met the Procedural Fairness requirement. This weakens the Unions traditional argument of no Pre-Disciplinary Interview as the Investigative Interview meets some of the required elements.

Per Supreme Court Justice Powell, the Agency must provide as much Procedural Due Process as possible as long as it does not negatively harm the Agency. The USPS' best argument is holding a separate Interview is an undue burden as it costs the Agency time, money, and resources. Many Arbitrators agree with this position, yet we always argue this as a violation (See Chapter Thirty – Three). While it is a violation, it is not a substantial violation.

This is further compounded by the lessening value of a 'Complete and Thorough Investigation' required by Just Cause and the JCIM. According to substantial review of Arbitrations, and opinions by the Labor Arbitration Institute (September 2020), the value of some elements of Just Cause have lessened over the years, the most notable being a Complete and Thorough Investigation.

This is especially true under the common evidentiary standards in Arbitration. If using the Preponderance of Evidence Standard, Management must prove the Grievant is guilty in a 'more likely than not' manner. This lower threshold means that Management must investigate enough to believe the Grievant is guilty.

While we will and should argue that the failure to hold a separate Pre-Disciplinary Interview is a substantial violation, this argument is not as strong as it previously was. In addition, we are harming the membership by not invoking their rights during the Investigative Interview.

These rights are further confirmed by the landmark case, Cleveland Board of Education vs Loudermill (1985), "The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity for him to present his side of the story." According to Arbitrator Marlatt, "Perhaps if the Postal Service is unwilling to listen to the views of arbitrators, it should at least defer to that six-hundred-pound gorilla known as the Supreme Court of the United States."

If the APWU raises both the more substantial elements of Due Process, the rights not covered by a Pre-Disciplinary Interview, and the rights incorporated into our CBA / JCIM during the Investigative Interview, the argument / violation becomes more substantial. This is supported with substantial Legal Precedence of Cleveland Board of Education vs Loudermill (1985), Morrissey v Brewer, LaChance v Erickson (1998); Federal Deposit Ins. Corp v Mallen (1988); Board of Regents v Roth (1972); Perry v Sindermann (1972); and Mathews v. Eldridge (1976).

THE ARGUMENT

We have the Representational Right and Responsibility to invoke the Grievant's Procedural Due Process rights during the Investigative Interview when Management does not or will not hold a separate Pre-Disciplinary Interview. If Management does hold a separate Pre – Disciplinary Interview, we must invoke the Grievant's rights to ensure they have Procedural Fairness. If Management fails to properly grant the essential rights of Procedural Due Process, it is a violation, and the discipline should be expunged.

It costs Management no time, money, or resources to simply ask additional questions in their Interview or show the Grievant the evidence Management is considering. After all, Management should have the information available prior to the issuance of Disciplinary Action.

The Union should raise the following rights and questions during the Pre-Disciplinary Interview / Investigative Interview once Management invokes Due Process:

1. What is the violation the Grievant is being accused of? (Failure to Adhere to Attendance Regulations, Insubordination, etc.)
2. What is the proposed level of discipline? (Letter of Warning, Seven Day Suspension, Fourteen Day Suspension, or Removal)
3. What evidence is the basis of this discipline? (Such as 3971s, 3972's, Statements of Witnesses, etc.)
4. Seek inclusion of the Grievant's evidence into the record (Such as asking if the Grievant has any documentation to provide and asking Management to allow the Grievant time to attain such evidence).

When applying Due Process, unlike Just Cause, Arbitrators look at Due Process as a Sum Total, or as a Summation. Referred to as the Eldridge Test(s), the standard applied is have the amount and types of Procedural Due Process violations been so great the outcome has been impacted. Like any Federal Right, such as the Right to Remain Silent, is only applicable and valuable if exercised in the moment it would be relevant and impactful on the process itself. Similarly, the denial, in the appropriate moment (In the Investigative Interview / Prior to the issuance of discipline) the harm to the Grievant is more severe. The Union must exercise and codify these rights (and any violation) in the Investigative Interview.

The argument becomes that a violation of the Grievant's Procedural Due Process rights in total is so great that the outcome of the Grievance has been negatively altered. Due Process violations are cumulative, so cite each violated element and argue that in total, the violation of the Grievant's Due Process rights has been so great that the discipline must be reduced or

expunged. You must also argue that the lack of Procedural Due Process has been so great that a Reasonable Person would not issue the discipline as initiated. Let the Arbitrator decide if the summation is great enough to overturn Discipline but always argue the violation is so great discipline must be expunged / reduced.

THE INTERVIEW(s)

Bargaining Unit Employee:

- During your Investigative Interview (II), did Management tell you a proposed level of discipline? If so, what was it?
- During your II, do you recall the Union asking, "Do you have a proposed level of discipline?" If so, how did the Supervisor respond?
- During your II, did the Supervisor identify a specific charge or accusation?
- What evidence did Management provide in the Interview?
- During your II, did Management ask if you had evidence to present?
- During your II, do you recall the Union asking, "Can the Grievant have time to gather his/her medical documentation to present in his/her defense?" If so, how did the Supervisor respond?
- During your II, did Management ask your side of the story or ask your rendition of events?

This interview is to confirm violations which you raised in the Investigative Interview. This interview is advised to be held immediately after Management finishes their Investigative Interview to confirm the information while it is 'fresh' in the Grievant's mind.

The Supervisor

- On December 1st, you held an Investigative Interview with Jane Doe, is this true?
- During this II, Steward John Doe was present, is this true?
- At the beginning of your Interview, you stated this is a Due Process Interview, and it is the employees day in court, is this true?
- The Union asked, "Do you have a proposed level of discipline" you responded, "I do not have a proposed level of discipline, this is an II." Is this true?
- Why did you not have a proposed level of discipline for the Grievant?
- During the II, did you begin the interview with a specific charge, such as, "You are accused of violating ELM 665.16?"
- Why did you not present a specific charge prior to asking the Grievant questions?
- During the Investigative Interview you stated that we would review the Grievant's 3971's but presented a list of dates, is this true?
- When the Union asked to review the 3971's, is this true?
- Why were the 3971's not presented?
- During the Interview the Union asked why the 3971's were marked as Unavailable to Sign, what was the reason provided?
- During the Investigative Interview, the Union confirmed that all you had provided all evidence the Grievant needed to review, is that correct?

- Why were the only documents reviewed in the Investigative Interview the 3971's if Managements Discipline Packet includes the 3972, the Grievant's Medical Documentation, etc.?
- During the Interview, the Union asked for time for the Grievant to go to their locker to grab medical documentation for the absences discussed, why didn't you allow them to gather these documents?
- During the interview you asked if the Grievant had any Administratively Acceptable reasons for their absences. Were the reasons the Grievant gave Administratively Acceptable?
- If no, what reasons would be Administratively Acceptable?
- If the Grievant had Administratively Acceptable reasons, would you not have issued this Discipline?

You must make every effort to 'trap' the Supervisor into confirming that they failed to meet the main Procedural Due Process protections the Grievant has in addition to failing to allow the Grievant to review all evidence being used against them. Management is unlikely to know Due Process, or how this Constitutional protection applies to the USPS thusly will not be prepared with answers the way they are with Just Cause. In fact, the opposite is true. With Just Cause Management is coached and prepared on how to not answer questions, and these same prepared answers often help prove a violation of Due Process.

THE DOCUMENTATION

- Witness statements & interviews
- Supervisor statement or interview
- Management's copy of their Investigative Interview
- Union's notes from Managements Investigative Interview

NATIONAL AGREEMENT

- National Agreement, Article 16
- JCIM, Article 16
- National Agreement, Article 3

EXTERNAL SOURCES

- Judge Henry Friendly's Some Kind of Hearing
- Supreme Court Rulings
- Supreme Court Opinions
- Legal Precedence
- Labor Arbitration Institute
- Procedural Due Process by Rhonda Wasserman
- Discipline and Discharge in Arbitration by Anne Draznin

Appropriate Remedy

Per the standing Legal Standard, the appropriate remedy depends on the severity of Discipline and the number of Procedural Due Process violations. If Management violated each of the above primary criteria, the Remedy is to Expunge the Discipline and make the Grievant whole. For a lesser violation or a less severe level of Discipline, the remedy is to reduce the severity of the level of proposed discipline.

Additional Tips

REFER TO CHORNOBY TRAINING – FAIRNESS: Due Process and the Legality of Disciplinary Action & INTERVIEW: Using Weingarten, Due Process and the Douglas Factors

Due Process is the difference between Government and Non – Government employees and we are extremely fortunate to have these protections. Due Process has proven to be my true hidden weapon when defending against Disciplinary Action. The difference is so substantial that it is akin to Union and Non – Union workers. Public Sector employees do not have the same Procedural Due Process Rights despite what private sector employees believe.

While you should always challenge any potential Due Process violation, the strongest arguments are to question the level of discipline, to attempt to grant the Grievant the ability to introduce evidence, to ensure all evidence is reviewed and cross-examined. The remaining elements of Procedural Due Process are far less valuable in the APWU.

The importance of the additional tenents of Procedural Due Process are lessened due to the protections we have in the CBA and JCIM. The fact we have a Grievance – Arbitration procedure meets many of the Due Process standards as it is. Due Process is not explicitly in our Contract and does not have a specific provision to cite. You would cite 16 and could cite 3 as Management is required to abide by the applicable Laws and Regulations.

Some Due Process protections are not evident during the investigative interview. Such rights, as an unbiased tribunal, should be argued once Management selects their designees (And appear later in this guide). For example, I had a Harassment Grievance in which Management designated that the Step 2 designee would be the individual accused of Harassment. When appealing the case, I added the Contention as Management violated the Grievant's right to an unbiased tribunal, and clearly the designee would be biased to their own defense and exoneration. This argument would be in addition to citing any relevant Contractual Provision.

We can see 'Due Process' as common sense in many situations, but it took 150 years for these rights to become Legel Precedence. It is essential to note that this Precedence was in part formed after the APWU was established, which explains why our Contract does not more strongly reference these rights. Prior to the 1972 cases, the applicability to Federal Employees was still subjective at best. Throughout the years our rights have been more strongly confirmed in Court, and we must exercise these rights regardless of the Contract.

At the beginning of each investigative or Pre – D interview, you usually will have the opportunity to raise the question asking if Management has a proposed level of discipline. Management should have an answer. Management should also at least indicate to you and the Grievant at the beginning of the Interview what the subject is.

It is essential to know what the subject of the interview is and be knowledgeable what typically would be in Managements Discipline Packet, or what should be, prior to the initial Investigative Interview. Any evidence which would be cited as evidence against the Grievant should be reviewed by the Grievant. You have two options, to ask to review the information and let Management deny this request or annotate the violation later.

The recommended approach is to ask to review the information. While it makes sense to let Management 'hang' themselves, but the reality is Management will not have the information available with them, strengthening our argument.

It does not matter if Management has it or not. For an attendance Grievance, you traditionally can expect to review, at minimum, 3971's, the 3972, Dates/Subjects of Discussions, and finally any/all Medical Documentation. If Management challenges the absences, such as claiming they are or should be AWOL, you should request to review the determining officials' statement and/or question the Supervisor about any evidence they used to determine the absence should be AWOL.

The largest elements of Procedural Due Process not covered under a Pre-Disciplinary Interview, and not covered by the CBA, are the Grievant's right to review all evidence which would be used against them, the right to cross-examine or question witnesses / their statements, and finally the right to present evidence.

The failure to provide any evidence Management uses to determine discipline within the Interview should be issued is a violation. The Grievant has a right to review the information and provide an explanation. The Unions additional argument is that a Reasonable Person would not have issued discipline if they previously heard the Grievant's explanation or defense against the evidence presented.

We must also raise the right to cross-examine witnesses. When Management is providing evidence, we can simply state, "Is there any statement we need to review from the witness / Supervisor / Manager." If the Supervisor is the witness, the Grievant and the Union have the right to question them. This is the most frustrating element for Supervisor's, when we raise legitimate questions. We can question the date or time they witnessed something. We can question how they know. Management will often try to shut you down, and if so, just make note and move on.

When introducing evidence, or requesting Management introduce evidence, what matters is you asked. Your preferred answer is for Management to say no. I strongly recommend making a log of all Evidence provided in the Interview and I use the form **#6 Sample Document – Evidence in II**, which appears in the back of this guide. This acts as organization as well as a citable element in your Grievance to prove the violation has occurred.

If Management states it can be submitted later, ensure you question how long the Grievant will be provided. You can always argue the time allowed is not reasonable or it was not allowed in the Interview. I have encountered several situations where a Supervisor will state, "You can provide it by the end of the day." But the Discipline will have been typed, issued, or mailed on the same day – that is a violation.

We must be aware Management is woefully unaware and undertrained on Procedural Due Process. Unlike Just Cause, which has ample training for Management. You are likely to face Supervisors who have no idea what Due Process is. The lack of knowledge allows us to push our rights in the Investigative Interview further.

For example, when challenging the documentation Management shares, you would say, "The Grievant has the Due Process right to review all evidence against them. We need to review anything you may consider including the 3971's." You would be shocked how often Management does not have every piece of evidence they are citing.

In addition to viewing the evidence, it must be reviewed for accuracy. If Management accuses the Grievant of AWOL and provides a denied 3971, it is entirely appropriate to question, in the moment, if the Grievant has previously received the denied 3971. In addition, it is appropriate to question if the 3971 has a reason for denial. While it may be untimely to challenge the AWOL, we can and should challenge the validity of it.

In the event Management attempts to shut the Union down when the Union raises any contentions or objections, you have no need to fight. You must make note of your question, and the fact that Management relegated you to a passive observer. This is as strong of a violation.

The very best way to raise these contentions and arguments in the interview is to wait for Management to naturally bring up the appropriate topic. For example, at the beginning of the interview, you can ask, "What is the alleged charge you are investigating today?"

Once Management invokes Due Process or 'Day in Court' we raise, "Since you mentioned Due Process, what is the proposed level of Discipline?" Once Management begins showing evidence, or making accusations, you state, "We will need a moment to review this information" and begin challenging. Then we can ask, "Is this all the evidence the Grievant needs to review?"

At this point you will ask the Grievant if they have any evidence about this topic by saying, "The Grievant may have evidence to their defense, may the Grievant have time to gather such information?" Likewise, if Management makes a claim such as, 'You were witnessed…' or 'You failed to meet the USPS standard of…' you ask, "Can the Grievant review the witness statements which claim this?"

Your questions should follow the normal flow in Managements Investigative Interview. To properly enforce the Grievant's Procedural Due Process rights the Steward (You) must be an active, attentive participant during the Investigatory Interview. The failure to do so results in a Grievant feeling and being underrepresented and leaving a strong violation on the table which could overturn Discipline.

Chapter Thirty - Two

THE ISSUE: JUST CAUSE

THE DEFINITION

All discipline must meet the basic tests of Just Cause.

THE ARGUMENT

One of the most misunderstood concepts and requirements of our Collective Bargaining agreement is the Just Cause mandate under Article 16. The USPS often take a 'rubber stamp' approach to Just Cause which often ignores the nuances which are covered under the Contract. The Union, to its detriment, often does not properly investigate and cite Just Cause violations.

We begin where Just Cause first appears in our Collective Bargaining Agreement:

"ARTICLE 16 - DISCIPLINE PROCEDURE

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." (Emphasis added.)

The above quoted provision mandates that Management must have Just Cause to issue discipline, but the provision does not explain what just cause is. In Collective Bargaining Agreements throughout the United States, ours may be unique in that we have a clear definition of what just cause is via the JCIM and EL - 921. That definition is found in the EL-921 Handbook, "Supervisor's Guide to Handling Grievances," under Article 19 of the Collective Bargaining Agreement:

"**Just Cause**

What is just cause? The definition of just cause varies from case to case, but 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.

- 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 that usually administered, as well as to the seriousness of the employee's
- past record?
- Was the disciplinary action taken in a timely manner?"

The EL – 921 more closely references and quotes the original source of our modern definition of Just Cause by Arbitrator Carroll R. Daugherty in the Grief Brothers Cooperage Corp. decision in 1964 and in a later decision, Enterprise Wire Company (1966) than the CBA or the JCIM.

The JCIM summarizes mutually accepted definitions of the tenants of Just Cause formed between the APWU and USPS. It is important to note this is what the APWU and the USPS agreed to. The Original 7 Tests were not 'law' and the inclusion in the JCIM is a great benefit we have, and the tenants listed in the JCIM will be your strongest Just Cause arguments as the parties have already agreed. Very few Unions have been able to negotiate the tenents directly into their Bargaining Agreements.

The JCIM states the following:

"**Is There a Rule?**

If so, was the employee aware of the rule? Was the employee forewarned of the disciplinary consequences for failure to follow the rule? It is not enough to say, "Well, everybody knows that rule," or, "The rule was posted ten years ago." Management may have to prove that the employee should have known of the rule

Certain standards of conduct are normally expected in the industrial environment and it is assumed by arbitrators that employees should be aware of these standards.

For example, an employee charged with intoxication on duty, fighting on duty, pilferage, sabotage, insubordination, etc., would generally be assumed to have understood that these offenses are neither condoned nor acceptable, even though management may not have issued specific regulations to that effect.

Is the Rule a Reasonable Rule?

Work rules should be reasonable, based on the overall objective of safe and efficient work performance. Management's rules should be reasonably related to business efficiency, safe operation of our business, and the performance expected of the employee.

Is the Rule Consistently and Equitably Enforced?

A rule must be applied fairly and without discrimination. Consistent and equitable enforcement is a critical factor, and claiming failure in this regard is one of the union's most successful defenses.

The Postal Service has been overturned or reversed in some cases because of not consistently and equitably enforcing the rules.

Consistently overlooking employee infractions and then disciplining without warning is one issue. For example, if employees are consistently allowed to smoke in areas designated as No Smoking areas, it is not appropriate suddenly to start disciplining them for this violation.

In such a case, management may lose its right to discipline for that infraction, in effect, unless it first puts employees (and the union) on notice of its intent to enforce that regulation again. Singling out an employee for discipline is another issue. If several similarly situated employees commit the same offense, it is not equitable to discipline only one.

Was a Thorough Investigation Completed?

Before administering the discipline, management should conduct an investigation to determine whether the employee committed the offense. The investigation should be thorough and objective.

The investigation should include the employee's "day in court privilege." The employee should know with reasonable detail what the charges are and should be given a reasonable opportunity to defend themselves before the discipline is initiated.

Was the Severity of the Discipline Reasonably Related to the Infraction Itself and in Line with that Usually Administered, as Well as to the Seriousness of the Employee's Past Record?

The following is an example of what arbitrators may consider an inequitable discipline: If an installation consistently issues seven calendar day suspensions for a particular offense, it would be extremely difficult to justify why an employee with a past record similar to that of other disciplined employees was issued a fourteen day suspension for the same offense.

There is no precise definition of what establishes a good, fair, or bad record. Reasonable judgment must be used. An employee's record of previous offenses may never be used to establish guilt in a case you presently have under consideration, but it may be used to determine the appropriate disciplinary penalty.

Was the Disciplinary Action Taken in a Timely Manner?

Disciplinary actions should be taken as promptly as possible after the offense has been committed."

While the language we have in the CBA, the JCIM and Handbook EL – 921 is incredibly powerful, enforcement relies on properly documenting your Grievance. The strongest documentation to prove such a violation is to use the rights enumerated in Article 17 and 31 of Interviewing Management.

The Unions' most successful Just Cause arguments will be found in the JCIM. The best way to develop solid defenses vs. disciplinary actions is to specifically utilize the authority of Articles 17 and 31 for interviews in conjunction with the EL-921s Just Cause definition. The following is illustrative of that process:

THE INTERVIEW(s)

This section has several interviews for each violation and will be labeled individually.

The Supervisor Interview

Is there a rule?

- What is the rule?
- Is the rule posted in the Post Office?
- If yes, where is it posted?
- If yes, when was it posted?
- If yes, who posted it?
- If yes, were you present when it was posted?
- Was the rule related to the grievant by you?
- If yes, when?
- If yes, where?
- If yes, who else was present?
- Was the grievant informed of the rule when he/she was hired?
- If yes, were you present?
- If yes, who told you?
- How do you know if you weren't there and no one told you?

Is the rule a reasonable rule?

- Is this rule related to the job?
- Is that relationship stated within a regulation? Identify the regulation.
- Is this rule related to safe operations?
- Is that relationship stated within a regulation? Identify the regulation.
- What caused the creation of this rule?
- When was the last updating of this rule?
- When did you inform the grievant of this update?
- Who informed the grievant of this update?
- You don't know whether the grievant was informed of any update?

Is the rule consistently and equitably enforced?

- How many people have violated the rule?
- How often is it violated?
- How many employees have you disciplined for violating the rule?
- When was the last violation of the rule of which you are aware?
- When did you last issue discipline for a violation of the rule?
- Have you made a comparison of other employees' records who violated the rule?
- Did you consider the Grievant’s violation in comparison to others?

- Why haven't other employees received the same degree of discipline for similar infractions?
- Why haven't you issued discipline to others for similar infractions?

Was a thorough investigation completed?

NOTE: This interview is covered later in this guide.

Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?

- Others have not received so severe discipline, have they?
- Isn't the Grievant's record very similar to others under your supervision?
- Doesn't employee Doe have more absences than the grievant and yet no discipline?
- Other employees were all issued letters of warning for this particular infraction, and the grievant was suspended?
- Doesn't the Grievant's past record reflect no discipline?
- Did you check that past record?
- No employee has ever been fired for taking a break outside the building?
- Was the grievant the first to be fired for that conduct?
- Why did you issue the Grievant a Letter of Warning / Suspension / Removal?
- Is the only reason you issued that level of Discipline because it is progressive?

Was the disciplinary action taken in a timely manner?

- Was the last absence you cited in the removal May 5, 2024?
- You issued the removal on July 15?
- What new information came into your possession between May 5 and July 15?
- When did you make the decision to remove the grievant?
- When did your investigation begin? End?
- When did you initiate the removal?
- How is a delay of 71 days timely?

Each interview can be combined for multiple Just Cause violations. The intent of each interview is to either confirm the violation, or to establish the Negative / Adverse Inference that Management did not consider information. These interviews must be held prior to Step 1 and are not things you ask during the Step 1 meeting!

THE DOCUMENTATION

- Discipline notice
- Prior discipline notices cited as past elements
- Grievant's statement and/or interview
- Witness statements and/or interviews
- Supervisor's interview

- Posted or published work rule alleged to have been violated
- Any other applicable employee work rules
- Postal Inspector's Investigative Memorandum with all exhibits
- All documents, records or exhibits being relied upon as evidence
- Settlements and/or grievance files for all cited past discipline
- Discipline proposal or request for discipline, if used
- All available documentation as to other employees/supervisors who have been treated differently after similar infractions

THE AGREEMENT

- National Agreement, Article 16.1
- National Agreement, Article 19
- JCIM, Article 16
- EL - 921

Appropriate Remedy

The remedy for any singular, strong Just Cause violation is to expunge the discipline and remove it from all USPS records. For multiple minor violations you would seek lessening the severity or level of discipline as well as time on record.

Additional Tips

As stated, multiple times, each Just Cause violation must be argued individually. As opposed to Procedural Due Process, in which we argue the sum of the violations would overrule the Discipline issued, Just Cause must stand on its own.

This is a common mistake Stewards make. They will argue that minor violations, or Management did not do a great job to meet each element of Just Cause, justifies a remedy in which Discipline is overturned. This is not how Arbitrators typically rule. While some in Management may believe us if we combine the elements at a lowest level, at Step 2 and beyond, we must focus on strong, singular arguments.

Over the years the way we fight Cause, or Just Cause has evolved. Prior to the JCIM including the current Language, some would blindly argue Discipline was not for Cause and argue that the 7 Tests were prevailing. Now that we have such strong language it is highly recommended to argue that each specific element of Just Cause as outlined in the JCIM was violated and provide evidence for this.

Refer to this guide's introduction under 'Contentions at Step 2' on formatting Step 2 Appeals. You Contention would be: "The Union Contends Management violated the Just Cause principle of "Is there a rule" found under Article 16 of the JCIM and CBA." The arguments would follow the same format: "The Union asserts that Management has not posted the rule, nor was the Grievant notified of this rule." Combining and adding citations/exhibits, it would look like: "The Union Contends Management violation the Just Cause principle of 'Is there a

rule' found under Article 16 of the Collective Bargaining Agreement/JCIM. The Union asserts that Management has not posted this rule (Exhibit A - Interview with Supervisor) nor was the Grievant notified of this rule (Exhibit B - Grievant Statement, Investigate Interview, and Steward Notes)."

If Management has violated another Just Cause provision, you would raise a second contention, such as, "The Union further Contends Management violated the Just Cause principle of 'Was the disciplinary action taken in a timely manner?' found under Article 16 of the Collective Bargaining Agreement/JCIM. The Union asserts that Management…." This bears repetition, each element of Just Cause must stand on its own merit.

Many Stewards attempt to argue Just Cause without an interview. This is fundamentally flawed. Unlike other violations in which we can cobble together information from the Investigative Interview, the RFI, and the Grievant's Statement, without an interview Management can easily refute the Grievant's claim or provide counter evidence.

Experienced Stewards are aware that Management is subject to 'confirming their stories' after the fact. This includes filling in the gaps on things such as dates, times, and subjects of a 16.2 or Documented Discussion. Your Request for Information can confirm information, but Management may creatively add an alleged Discussion, through Interview you may uncover it was not a Discussion. It was a service talk where the Grievant asked a question in public.

Take caution when arguing a violation of a 'Complete and Thorough Investigation.' Substantial precedence exists that Management must simply reasonably believe the violation is true. The burden Management has is to a 'Preponderance of Evidence' which means more likely than not. Many Stewards rely strongly on this element and conduct their own Investigation and argue that Management should have made an exhaustive effort to Investigate. This is untrue.

This position has been parroted several times in this guide. But cannot be stressed enough. The correct way to argue a failure of the investigatory element of Just Cause is to connect it to a strong missing element of the Investigation that is so obvious it was missed intentionally. This normally would entail proving that no witnesses were interviewed or spoken to. The argument for this violation should be raised beginning in the Investigative Interview.

An example of this would be if Management issues Discipline and you uncover the Discipline is based on a rumor, and no Investigation has occurred. You would vigorously interview the Supervisor to uncover why they believe the allegation is true.

Focus on the six questions listed in the JCIM (And Above) and shape your Contentions and arguments around these questions. While it may be tempting to quote the original 7 Tests of Just Cause and their notes, it is a far weaker argument than quoting the JCIM. The information is nearly identical, and while arguing you may a unique position based on the original 7 Tests such arguments do not stand up in Arbitration.

Many of the older Arbitration Awards which mention the 7 Tests of Just Cause by Arbitrator Carroll R. Daugherty occurred prior to the inclusion of Just Cause in the JCIM. Any argument which can be directly supported by the JCIM or CBA is superior to an argument made by an external source.

Chapter Thirty - Three

THE ISSUE: NO PRE – DISCIPLIINARY INTERVIEW

THE DEFINITION

The Pre-Disciplinary interview is the multi-element due process right of each employee to be:

1. Forewarned of the specific charge in the intended disciplinary action;
2. Forewarned of the degree and nature of the intended disciplinary action;
3. Presented with the alleged evidence the intended discipline is based upon; and
4. Asked for his/her side of the story.

This is the employee's "Day-in-Court"

THE ARGUMENT

All the above is required before the disciplinary action is initiated. Management must conduct a pre-disciplinary interview; that is, forewarn the employee that discipline is being contemplated, what the discipline will be, the charge the discipline is based upon, the evidence supporting the intended discipline and ask the employee for his/her side of the story. Whether or not management utilizes a written request for discipline, the pre-disciplinary interview must be conducted prior to the initiation of any request for discipline. The request for discipline is the initiation of discipline.

Must the pre-disciplinary interview be done in person? No. Management may conduct a pre-disciplinary interview over the telephone or even through correspondence, informing the employee of the charge, nature, and degree of the intended discipline and soliciting the employee's side of the story. However, if there is no in-person interview, we must then argue that the employee has not been presented with the employer's evidence.

A typical pre-disciplinary interview should be conducted as follows:

Supervisor: Mr. Doe, I am considering issuing you a Notice of Removal for "Failure to be Regular in Attendance." Your attendance record is as follows. This is your chance to respond to that intended action. I want any information you may have from your side of the story prior to making my final decision.

In this manner, management has forewarned the employee and solicited the employee's side of the story. If management conducts an "interview" with an employee immediately prior to issuing a disciplinary action, i.e., at the same meeting in which the employee receives the disciplinary notice, then that is not a pre-disciplinary interview. As the manager already has prepared the Notice, discipline has already been initiated. To hold otherwise is both illogical and unreasonable. Pleadings from management that they had not yet made a final decision on issuance are irrelevant as **the pre-disciplinary interview must occur prior to initiation, not issuance.**

THE PRE-DISCIPLINARY INTERVIEW vs.

OFFICIAL DISCUSSIONS AND INVESTIGATIVE INTERVIEWS

Managers often attempt to misrepresent their obligations to a due process, pre-disciplinary interview by claiming that official discussions and/or investigative interviews are also pre - disciplinary interviews.

The following are distinctions between definitions: official discussions or investigative interviews and the pre-disciplinary interviews as discussed above.

OFFICIAL DISCUSSION

Under Article 16.2 of the Collective Bargaining Agreement, management has the responsibility to discuss minor offenses with employees with the purpose being to correct whatever behavior/deficiency the employee has demonstrated:

> "Article 16 DISCIPLINE PROCEDURE
>
> Section 2. Discussion For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable."

A proper official discussion goes as follows:

Supervisor: Mr. Doe, this is an official discussion. The rule against being in the employee parking lot while on rest break is posted on the offices three bulletin boards. In addition, you were notified when hired of this prohibition. Last night, I had to call you into the Post Office from the parking lot while you were on your rest break. I am telling you that if this occurs again, I will be initiating disciplinary action against you. If there is any problem I am unaware of or if I can assist you in any way to prevent this from happening again, please let me know now.

That is an "official discussion" which complies with the Collective Bargaining Agreement-- provided it occurs in private between the supervisor and the employee. It is not disciplinary in nature nor is it a fact gathering exercise. It occurs after a minor offense by an employee, not as a preemptive measure.

INVESTIGATIVE INTERVIEW

Unlike a discussion, an investigative interview is a fact gathering effort by management to investigate a situation prior to coming to any decision as to whether or not discipline should be initiated. Unlike a pre-disciplinary interview, the investigative interview does not forewarn an employee or solicit a response as to any intended discipline because the investigative interview occurs as part of management's fact gathering investigation. This is before any intent is established toward possible discipline.

An investigative interview goes as follows:

Supervisor: Mr. Doe, I have some questions concerning your presence in the parking lot last night.

- What time did you leave the building?
- What time did you return?
- For what purpose did you leave the building?
- What were you doing in the parking lot?
- Were you on rest break when you left the building?
- Who was with you?

This is an investigative interview--no forewarning or opportunity to respond to possible intended discipline.

BOTH AN INVESTIGATIVE INTERVIEW AND A PRE-DISCIPLINARY INTERVIEW? YES!

Management has an obligation to conduct a thorough, fair, and objective investigation prior to disciplining an employee. Investigative interviews, including an interview with a potential recipient of discipline, are essential elements of the investigation process. The predisciplinary "day in court" forewarning and opportunity to respond follows the fact gathering investigation and is the last check and balance investigative step prior to initiation of discipline.

WHEN MANAGEMENT COMBINES THE TWO

Management has combined the two elements into one, by calling it an Investigative Interview, but attempting to meet the requirements of Procedural Due Process. This gives us two violations. One is that Management did not complete any objective Investigation and made no effort to attain the Grievant's side of the story. This violation will be discussed in the next chapter in more depth.

Two is that the interview Management held did not meet the requirements of a Pre-Disciplinary Interview. Our argument would be that no dedicated Pre – Disciplinary Interview was held which violates the Grievant's Procedural Due Process rights. We would argue, from the previous chapter, that the Interview Management did hold failed to meet the requirements of Procedural Due Process.

THE INTERVIEW(s)

The Supervisor

Crucial in establishing the fact that no pre-disciplinary interview was conducted is our own interview of the manager responsible for the initiation of the discipline. The following are illustrations of how such an interview may proceed:

- Did you initiate the discipline against Mr. Doe?
- When did you decide to initiate that discipline?
- Did you submit a written request for discipline?
- When?
- To whom?
- Between the last absence cited in the Notice of Removal and the date you submitted your written request for discipline, did you meet with employee Doe?
- Did you call employee Doe at home to discuss the possibility of discipline with him between the last absence you cited and your submission of the request for disciplinary action?
- Did you write to employee Doe regarding the possibility of discipline with him/her between the last absence cited and your submission of the request for disciplinary action?
- Did you have contact with employee Doe regarding the possibility of discipline between the last absence cited and your submission of the request for discipline?
- The first contact you had with employee Doe regarding this removal for the charge you included was when you gave him the Notice of Removal?

In this manner, the steward establishes that no pre-disciplinary interview was conducted. Notice that at no time were overly obvious questions asked such as, "Did you conduct an investigation?" Did you conduct a pre-disciplinary interview?," "Aren't you required to conduct a pre-disciplinary interview?" Obvious questions will generate obvious responses which are, at best, other than useful ones, or worse harmful, for the steward's purpose. The steward must skillfully craft the questions so as to illicit responses supporting our arguments. The steward must orchestrate the interview through careful planning of the questions and in preparation for various responses.

For example, should the manager being interviewed answer that a pre-disciplinary interview has been conducted, then the steward must have detailed questions prepared to test the manager as to the veracity of that answer. Such questions may go as follows:

- During your interview, you told employee Doe the charge was going to be Failure to be Regular in Attendance?
- During the interview, you told employee Doe the discipline was going to be a Notice of Removal?
- During the interview, did employee Doe tell you anything regarding those absences? o If so, what?
- During the interview, you went over the 3971s for absences cited with employee Doe?
- Did you receive any information from employee Doe regarding any of these absences during the interview?
- Where was the interview held?
- When was the interview held?
- Who else was present?

These questions will limit later deviations should arbitral testimony occur from the Supervisor. If the Supervisor does deviate, then serious credibility breaches will occur. In addition, the interview and eventual arbitral testimony of the grievant (and steward if one was present during the pre-disciplinary interview) can refute the testimony of the Supervisor, even when the Supervisor does meet with the employee in a pre-disciplinary setting. Should the Supervisor not forewarn the employee of the detailed charge and the nature/degree of the discipline and solicit the employee's "side of the story", that exercise is not a pre-disciplinary interview.

The questions previously included are examples of suggested questions for stewards. Each steward must rely upon his/her own intuition, knowledge of fact circumstances, individual personalities, and history to develop questions which will best result in answers most useful in proving management violated its obligation to the pre-disciplinary interview as due process.

In the event Management holds one singular interview, and claims it meets the requirements of both, your interview of Management becomes even more important. This interview is both that Management did not seek the Grievant's side of the story and that they did not meet the elements of a Pre – Disciplinary Interview. The fact that Management calls their Interview Investigative or Pre – Disciplinary is not enough, it is about the questions asked.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Grievant's statement and/or interview
- Steward's statement and/or interview
- Supervisor's interview and/or statement

THE AGREEMENT

- National Agreement, Article 16.1
- National Agreement, Article 19
- JCIM, Article 16

Appropriate Remedy

The lack of a singular, dedicated Pre – Disciplinary Interview is minimal if Management met the requirements through an alternative interview. You still argue a separate interview did not occur, and that the interview conducted did not meet the Procedural Due Process Requirements. The appropriate remedy for no Pre – Disciplinary Interview, when none of the criteria were met elsewhere, is to expunge the Discipline. When Management met some of the requirements elsewhere the remedy is to expunge Discipline or to lessen the severity of Discipline if less requirements were met.

Additional Tips

It becomes convoluted when we have so many different violations of essentially the same thing. This advice can be District subjective. Some Districts use Investigative Interviews and attempt to shove in Procedural Due Process elements. Other hold a Pre – Disciplinary Interview and attempt to make it investigatory.

What matters is that Management:

1. Attempt to gain the Grievant's side of the story before making the decision to issue Discipline.
2. Attempt to uncover the truth prior to assuming the Grievant's guilt.
3. Meet the elements of Procedural Due Process in a dedicated interview.

The common issue becomes how to effectively make the distinction when making arguments. The best way to argue these violations is to argue one or more of the following:

1. Management must conduct a complete and thorough investigation (Just Cause) and a separate PDI (Due Process) prior to issuing discipline.
2. When Management combines the two elements and holds a singular Interview, the conditions of both cannot be met and both Due Process and Just Cause were violated.
3. An investigative interview does not assume guilt and is to find the truth / employees side of the story. A PDI has a presumption of guilt and contains leading questions.
4. The Interview Management held failed to meet the requirements of Procedural Due Process.

The reason this and so many guides list alike violations separately is also to illustrate the severity of the violation. The US Constitution and Supreme Court Rulings are not a low or de minus bar for Management to meet. This is the law of the land. Regardless of what the CBA, JCIM, or ELM state, it cannot overrule the law.

This makes Procedural Due Process unquestionably the strongest of our arguments you can make when defending discipline. If unsure how to argue the distinction, raise all the various Contentions and trust your National Business Agent to make the distinction. Our responsibility is to raise the violation and provide the Business Agent with the evidence to prove the violation.

It is perfectly fine to argue that Management did not hold a dedicated Pre – Disciplinary Interview in addition to not meeting the requirements of Procedural Due Process during the Interview they did hold.

Management will commonly argue that they do not need to hold a Pre – Disciplinary Interview and the Investigative Interview meets the requirement. You just agree to disagree at the lower levels. You should attack both the fact that no dedicated Interview was conducted, and that the Interview that was held did not meet the requirements of Procedural Due Process.

Chapter Thirty - Four

THE ISSUE: INVESTIGATION PRIOR TO DISCIPLINE

THE DEFINITION

Management must conduct a thorough, fair, and objective investigation prior to initiating disciplinary action.

THE ARGUMENT

One of the areas of Just Cause in which the Union is particularly successful is the failure of Management to meet its obligation to conduct a fair, thorough, and objective investigation prior to initiating discipline. Management must establish the facts not through presumption or assumption or reliance on other investigations. The supervisor who initiates discipline through a written request for discipline or drafts a disciplinary notice without such a request is the manager responsible for having investigated prior to the initiation.

Checking records, reviewing statements and documents, interviewing witnesses, reviewing video tapes or photographs, listening to audio recordings, these are all elements of a supervisor's investigation. Many times, a supervisor does a minimal--at best--review of the situation which may include almost no first-hand investigation. When this occurs, **that supervisor has violated one of the most basic and important due process rights of an employee subject to discipline**.

When management fails to uncover evidence and facts related to circumstances which result in discipline, they clearly fall short in their Just Cause obligation. However, the efforts management employs to attempt to uncover evidence and facts is extremely important to our Just Cause defense-- no matter what those efforts would or would not have revealed.

An employee is removed for sexual harassment of a customer. That removal is based upon a written letter received from the customer. In addition, the supervisor receives two letters from two other customers corroborating the first customer's letter. The supervisor fires the employee based upon the three letters. If the supervisor did not personally speak with those three customers whose letters he is relying upon to impose removal, then the investigation is inadequate and does not meet the Just Cause requirement. That supervisor had an obligation to contact and inquire. That is the "thorough investigation" obligation. It is not enough to simply read letters and rush to judgment. Discussion with the three customers would have fully supported the letters and the action. No matter, the failure to thoroughly establish the facts renders the investigation less than is necessary to prove Just Cause.

When arguing that no Just Cause exists due to lack of a thorough, fair, and objective investigation, the steward must construct every avenue the supervisor could have, and reasonably should have, explored prior to initiating discipline. All the documents, records, video/audio tapes, witnesses, etc., that could have been reviewed and interviewed prior to a decision must be listed by the steward in the context of a management obligation to leave no

stone unturned in the investigation. This is the only way to establish the supervisor's investigation does not meet the requirements of Just Cause.

POSTAL INSPECTION SERVICE INVESTIGATIONS AS SUBSTITUTES FOR MANAGEMENT

Increasingly, arbitrators are supporting the Union contention that total reliance by management on the Postal Inspection Service Investigative Memorandum for investigative purposes- -prior to discipline--falls short of management's investigatory obligations. Since the Postal Inspection Service is not permitted to recommend, request, initiate, or issue discipline, they cannot be a proper substitute for management. The EL-921, "Supervisor's Guide to Handling Grievances", specifically requires that management conduct the investigation.

This is not to say that a Postal Inspection Service Investigative Memorandum cannot be an element of a management investigation- -it can and often is. But it is to say that the Postal Inspection Service Investigative Memorandum cannot solely be the only element of investigation management substitutes for its own. Since management has the responsibility for discipline in the Collective Bargaining Agreement, it is management that must balance all of the facts, all of the evidence, and all existing mitigating factors in determining whether to initiate discipline and how severe it should be.

Level of Discipline

One of the most important portions of Managements investigation is to determine the appropriate level of Discipline to issue. It is not enough for Management to issue a Seven Day Suspension because the Grievant previously received a Letter of Warning. Management must consider:

- The nature and seriousness of the offense.
- The past record of the employee and/or other efforts to correct the employee's misconduct.
- The circumstances surrounding the particular incident.
- The level of discipline normally issued for similar offenses under similar circumstances in the same installation.
- The employee's length of service.
- The effect of the offense on the employee's ability to perform at a satisfactory level.
- The effect of the offense on the operation of the employee's work unit; for example, whether the offense made coverage at the overtime rate necessary, whether mail was delayed, etc.

Some of the above elements are known as Mitigating Circumstances and will be explored as a defense later in this guide. Management has the burden to justify why an employee with four absences deserves a Notice of Removal, while another received a Letter of Warning. This is what makes discipline corrective, and only employees who cannot be corrected are terminated. The best way to prove that Management did not conduct this investigation appropriately is to interview the issuing Supervisor.

THE INTERVIEW(s)

As previously stated, the steward must establish all the information which should have and could have been explored by the supervisor in management's investigation. Moreover, the higher-level reviewing and concurring official also has an obligation to at least review what the supervisor investigated and concur in the result.

Many of the example questions below can and should also be asked of the higher level reviewing and concurring official in that context: "Did Supervisor Jones contact Dr. Miles prior to initiating the Notice of Removal?, Did you ask Supervisor Jones whether or not he contacted Dr. Miles prior to initiating the Notice of Removal?" In this way, we are establishing what investigation the higher-level reviewing and concurring official made as part of his required review.

The Supervisor

- Did you review the 3971s?
- You were aware the 3971s were not completed properly?
- You were aware the 3971s did not reflect scheduled/unscheduled?
- You were aware the 3971s were not signed by management?
- You were aware the 3971s were neither checked approved nor disapproved?
- You were aware the 3971s were designated FMLA?
- You were aware the 3972 listed disciplinary actions and official discussions on the form?
- You were aware each absence you cited in the removal notice was documented with a medical certificate?
- You were aware the past elements of discipline were not yet adjudicated?
- You were aware the past elements of discipline had been modified?
- You were aware the past elements of discipline had been expunged?
- You did not interview the Postal Medical Officer prior to initiating the Notice of Removal?
- You did not attempt to interview the Postal Medical Officer prior to initiating the Notice of Removal?
- You did not interview the Grievant's personal physician prior to initiating the Notice of Removal?
- You did not call the Grievant's personal physician to attempt an interview prior to initiating the Notice of Removal?
- You did not interview the customer who wrote the letter of complaint prior to issuing the Notice of Removal?
- You did not attempt to contact that customer prior to initiating the Notice of Removal?
- You did not attempt to contact any of the other customers prior to initiating the Notice of Removal?
- You did not review the video tape prior to initiating the Notice of Removal?
- You did not attempt to review the video tape prior to initiating the Notice of Removal?
- You did not review the audio tape prior to initiating the Notice of Removal?
- You did not attempt to review the audio tape prior to initiating the Notice of Removal?

- You did not interview the Postal Inspection Service prior to initiating the Notice of Removal?
- You did not contact the Postal Inspection Service to interview them prior to initiating the Notice of Removal?
- You did not interview the grievant prior to initiating the Notice of Removal?

The list can go on and on. We must establish not only that the investigation did not occur, but that no investigation was attempted. Many times, only a small portion of the potential investigation may have been attempted or have occurred. It is still important to clearly establish what did not. And each question can and should be asked of the alleged reviewing and concurring official to determine whether that individual fulfilled the "check and balance" role.

Without the interview, the steward can expect - and the advocate will be faced with glowing accounts by supervisors and higher-level managers of the thorough extent of their "investigation." While some of this testimony will be refuted, too many times that testimony stands because no interviews exist by the Union to establish the facts and prevent the management's recreation at arbitration.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Grievant's statement and/or interview
- Steward's statement and/or interview
- Supervisor's interview and/or statement
- Witness interviews and statements
- Request for Information seeking "all information, interviews and documentation relied upon"
- Management's response
- Postal Inspector's Investigative Memorandum and exhibits

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921
- JCIM, Article 16

Appropriate Remedy

The appropriate remedy when Management does not complete a thorough, fair, and objective Investigation is to expunge or reduce the severity of the Discipline issued.

Additional Tips

While it is true that the value of the complete and thorough investigation as required by Just Cause and the JCIM is less strong today than it has been previously, it does not mean it has no value. We must pivot the argument from a simple Just Cause violation to that of a Just Cause violation and a violation of Corrective Discipline. We also must raise this violation as early as possible in the process, normally the investigative interview. The Collective Bargaining Agreement requires that Discipline must be corrective in nature, and not punitive.

The Supervisors Investigation must determine if the Discipline issued is appropriate. This means considering Mitigating Circumstances such as the Grievant's record as it compares to other employee, as well as considering factors such as the impact to the USPS for committing the alleged infraction. Mitigation will be further explored under the chapter on Douglas Factors (Chapter 55).

Management will often rely upon a singular form of evidence to justify issuing discipline, such as a report by the Postal Inspectors, or the word of another Supervisor / Manager / Postmaster. While these may be pervasive elements, the issuing Supervisor must perform some base level investigation on their own. The standard is Preponderance of Evidence, meaning that if Management can prove that it is more likely than not the Grievant is guilty, they have met their burden of proof.

It is an effective argument to establish that no investigation was conducted. Or that a singular form of evidence was used. This applies to all forms of discipline, weather Attendance or Conduct related infractions.

Another common scenario is that the order to issue Discipline came from a higher level, such as a Postmaster, or a Manager. It is also a violation for Management to only conduct a surface level investigation based on the findings of someone else. This is the same premise of not using the Investigation of the Postal Inspectors.

Even if the issuing Supervisor is provided a substantial case file from a higher level, such as a Postmaster, which confirms guilt, the Supervisor must verify the information found within it and seek to confirm its accuracy.

The Contract which we have is unique in the world of Collective Bargaining as most other Union employees, and Federal Employees, do not have the mandate that the immediate Supervisor should be the one who issues Discipline and conducts this investigation. This argument is especially strong in our Grievance – Arbitration Procedure as it is unique to us.

While it remains true the value of a complete and thorough Investigation as a Just Cause violation has been diminished by Arbitrators, when framed correctly it can remain as strong. It is essential that we also incorporate that the Supervisor did not properly investigate the appropriate level of Discipline and point out any reliance of another parties Investigation other than the Supervisors own.

Chapter Thirty - Five

THE ISSUE: HIGHER LEVEL REVIEW AND CONCURRENCE

THE DEFINITION

All suspensions and removals proposed and issued by a Supervisor must first be reviewed and concurred by the installation head or that person's designee.

THE ARGUMENT

The installation head or designee of the installation head must review and concur in a proposed suspension or removal prior to the issuing manager's issuance of the action. This "review" must not be just a perfunctory glance and nod, but rather an actual review and investigation to ensure the conclusions the issuing manager is proposing are accurate. The reviewing official must also ensure the issuing manager has conducted an investigation which meets the requirements of the Just Cause process including a pre-disciplinary interview. If the reviewing official does nothing more than glance and nod with no questions, no checking, no effort to ensure accuracy and due process, then Article 16.8's requirements for higher level review and concurrence are violated--and the employee's due process rights are violated--regardless of the extent to which the initiating manager did meet due process and Just Cause requirements. The employee is not entitled to due process from just the initiating manager or the reviewing authority--the employee is entitled to due process from both and anything less violates the Just Cause benchmark.

Coupled with the above stated due process issue is the circumstance in which discipline is ordered or "recommended" from a higher-level official down to a lower level manager for issuance. When this occurs--and independent authority to initiate or not initiate discipline is diminished or eliminated entirely--then true higher-level review and concurrence as required by Article 16.8 cannot occur. The following is illustrative of this:

> Level 20 Manager Smith "recommends" to Level 16 Supervisor Jones that employee Doe be issued a removal. Level 16 Supervisor Jones issues the removal after obtaining review and concurrence from Level 22 Postmaster Bing. Although the Level 22 Postmaster did review and concur, he did not review and concur in any action proposed by Level 16 Supervisor Jones. His review and concurrence was for an action initiated by another manager. Article 16.8 requires that in no case may a supervisor impose suspension or discharge unless the proposed disciplinary action has first been reviewed and concurred by the installation head or designee.

In the scenario described, the "supervisor" referred to did not initiate and impose the removal because a higher-level manager "recommended" and thus initiated it. There was no actual "proposal" from Level 16 Supervisor Doe thus there can be no true review and concurrence for Level 16 Supervisor Jones' "action".

In other cases, the higher-level manager, say a Level 21 postmaster or Level 20 labor relations specialist, will "recommend" removal to a Level 17 floor Supervisor. Then the Level 17 floor Supervisor seeks and obtains "review" and "concurrence" from the same individual who recommended or "advised" removal in the first place. Whenever a manager reviews and concurs in the action he or she initiated, the check and balance requirement of Article 16.8's review and concurrence is fatally damaged--along with an employee's due process rights.

THE INTERVIEW(s)

Again, the interview is our key method of establishing the review and concurrence process was violated. When conducting our investigation, we can develop questions to pit the initiating manager's story against the alleged reviewing and concurring officials' version of his/her role, participation and investigation. It is also important to note that most managers, including management arbitration advocates, will resist the concept that the reviewing and concurring authority must conduct more than a glance and nod at the proposed action.

Nevertheless, a reasonable reading of Article 16.8 clearly tells us that review is required. Review is defined in **Webster's Dictionary** as follows:

1. To inspect; to make formal or official examination of the state of;
2. To notice critically.

The Initiating Supervisor

- Did Postmaster Sims ask you who you interviewed prior to initiating the removal?
- Did Postmaster Sims ask you what your investigation consisted of prior to your initiating the removal?
- Prior to issuing the Notice of Removal did you speak to anyone in management about removing employee Thomas?
- Prior to issuing the Notice of Removal did you properly follow Postmaster Sims' instruction to initiate the removal?
- Were you required under the Collective Bargaining Agreement to follow the Postmaster's instructions and remove employee Thomas for theft? Drug use? (Best for this question to be utilized in serious offense situations in which the steward believes the lower-level manager had little or nothing to do with the decision to issue.)
- Did you meet with anyone in management prior to issuing the Notice of Removal? (If the two managers did not meet then a true review and concurrence would have been more difficult.)
- What documents did Postmaster Sims review upon your presentation of the proposal for discipline?
- What documents did you present to Postmaster Sims for his review prior to your receiving concurrence?
- Who instructed you to seek concurrence from Manager Smith?
- Was that instruction in writing?
- Who designated Manager Smith as the Higher-Level authority for you in this discipline?
- Was that designation in writing?

- Does Manager Smith always review and concur on discipline on tour 3 in the Anytown Post Office?
- Did you seek Higher Level concurrence prior to initiating your request for discipline?
- Did you seek Higher Level concurrence after you received the removal notice from labor relations? Personnel?
- How long did your meeting with Postmaster Sims take at which time the discipline was reviewed and concurred?
- Where did the review and concurrence meeting take place?
- Were you present when Postmaster Sims reviewed and concurred?
- Did you leave Postmaster Sims the removal for review and concurrence in his mail receptacle?
- You don't know what his review consisted of do you?
- You don't know what information he reviewed do you?
- You don't know whether Postmaster Sims reviewed any information other than the disciplinary notice, do you?
- As far as you know, Postmaster Sims only reviewed the disciplinary notice and nothing else?
- Did Postmaster Sims speak to employee Doe, who is being removed prior to concurring?
- What Level are you?
- What Level is the concurring official?

The Concurring Official / Manager

- Who presented this removal to you for concurrence?
- Was it presented in person?
- What documents were presented with the removal notice?
- Was the proposal presented before the actual notice of removal was formulated?
- What documents did you review prior to concurring?
- Who did you speak with regarding the removal prior to concurring?
- Did you speak with employee Doe, who is being removed, prior to concurring?
- Didn't you think it important to speak with employee Doe prior to concurring?
- Did Supervisor Jones speak with employee Doe prior to concurring?
- Who did supervisor Jones speak with prior to initiating this discipline?
- Was a pre-disciplinary interview conducted by supervisor Jones before this action was initiated?
- Do you know whether supervisor Jones interviewed anyone prior to initiating this disciplinary action?
- Did you interview anyone prior to concurring with this disciplinary action?
- Did supervisor Jones provide you with any information when he sought review and concurrence from you?
- What information did supervisor Jones provide you with when he sought review and concurrence?
- Did you meet with supervisor Jones prior to concurring?

- Did you question supervisor Jones prior to concurring?
- Did you ask Supervisor Jones whether or not he had conducted a pre-disciplinary interview with employee Doe prior to initiating the removal?
- Did you ask supervisor Jones what documents were reviewed prior to his initiation of the removal?
- Did you ask supervisor Jones who he had interviewed or spoken to regarding employee Doe prior to initiating the removal?
- What information did supervisor Jones review before he initiated the discharge?
- Did you ask supervisor Jones what information he reviewed before he initiated discharge?

The questions asked of both the alleged initiating supervisor and alleged higher level authority will be very revealing and crucial to the establishment that proper review and concurrence does not exist. Many of the questions can be asked of both individuals and by changing elements within the questions serious breaches in credibility can be uncovered. Cross checking questions when dealing with these two major protagonists of the disciplinary process will almost certainly reveal differing answers which prove due process violations. Many of the questions will also be useful in arguing the lack of investigation issue.

Without the interviews--and this cannot be overemphasized--management will be able to patch up the violations and, at the arbitration, the true nature of the discipline's initiation, actual authority in issuance, and whether or not true review and concurrence occurred will be lost to the Union as due process arguments and violations.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline
- Supervisor's interview and/or statement
- Reviewing authority's interview and/or statement

THE AGREEMENT

- National Agreement, Article 16.8
- National Agreement, Article 19
- USPS Handbook, EL-921
- JCIM, Article 16

Appropriate Remedy

This is a strong procedural, Due Process violation. A failure to properly review and concur with the Discipline renders the Discipline procedurally deficient, and it must be expunged.

Additional Tips

Management has a bad habit of attempting to bypass our Contractual Right of review and concurrence. The review and concurrence cannot be a rubber stamp and must be, at least, a re-review of the information. This is affirmed by Arbitrator Edmund W. Schedler, Jr. This means that the Reviewing Official should not just concur if they agree with the outcome. An actual review of Management Request for Discipline must occur.

It must similarly be noted that a review is just that, and not an independent investigation. Arbitrator William J. LeWinter ruled that review does not mean a new, independent investigation. It does mean a substantive review which entails more than just reviewing the Supervisors Statement or their summary.

While Arbitrators have been illusive in defining what exactly proper review and concurrence should be, they have set the above basic guidelines and prefer to take a 'we know it when we see it' approach. The best standard to apply is that the Reviewing Official should review the entire casefile, or Request for Discipline, in its entirety.

If the Reviewing Official draws the same conclusion as the initiator, then they should sign off. By making the argument this way, you avoid pushing the boundaries of how Arbitrators rule and have a clear violation to argue.

Interviews are paramount to determining if the Discipline was properly reviewed and concurred. While it may be challenging to determine who to interview when you are presented with multiple potential violations, this remains one of the few violations that cannot be proven otherwise unless you do interview.

In smaller offices, such as a level 18, in which the Reviewing Official is a POOM or such higher-level designation, the odds exponentially increase of a 'Rubber Stamp' review of the Discipline. The more levels of insulation within a facility the more likely they have time to review the information properly.

Management is as overworked as we are. In a large facility you could have an Attendance Control Officer (ACO), an independent Labor Relations Department, etc. In a smaller facility you simply do not have the luxury of someone reviewing who does not have their own substantial responsibilities. In such a case, you can win a Grievance exclusively on the fact that deem themselves too busy to properly review the case.

It should also be noted that in small offices you are more likely to experience a situation where a higher level does not want to 'question' the work of their subordinates. To rephrase this point, let's say you have a POOM over exclusively smaller Post Offices. The POOM has hired the Postmasters and has some connection or relationship to them. They are far less likely to go to their subordinate and pick apart their work even if there are errors.

In large offices, while review could still be a rubber stamp, odds are more likely that while the Reviewing Official did some sort of review, it was minimal at best. When interviewing, shape your questions to which is more likely and be prepared to pivot as needed.

Chapter Thirty - Six

THE ISSUE: IMMEDIATE SUPERVISOR NOT INITIATING DISCIPLINE

THE DEFINITION

It is normally the responsibility of the immediate supervisor to initiate disciplinary action.

THE ARGUMENT

The intent of the Collective Bargaining Agreement is to enforce a 'bottom – up' form of Supervisor, in which the Immediate Supervisor is the decision maker and initiator of issuance of Discipline. Further, the JCIM states, "It is normally the responsibility of the immediate supervisor to initiate disciplinary action." This provision is a strong protection for the employee as the employees immediate Supervisor is the individual aware of the work performance and personal situation of the employee being Disciplined. This position is supported by the Supervisors substantial duties and responsibility in the ELM.

When Management has another individual initiate Discipline they must establish a legitimate service need for it not being the immediate Supervisor. The service need could be an emergency in which the Supervisor is off, a Supervisor off for illness / injury for an extended period of time, etc. It should not be due to Management wanting another individual to initiate the Discipline for convenience.

Das Award

This violation has been underutilized due to the Step 4 Das Award in case Q98C-4Q-C 01059241. In this case the Union challenged Management utilizing ACS's (Attendance Control Supervisors) to initiate Discipline. Das ruled against the Union in this instance. This has changed over the years, but has not been relitigated at Step 4 yet.

Regional Arbitrations have ruled contrary to the Das ruling. Such as Regional Arbitration C15C – 1C – D 19069068 TNJ18-537C stemming from the Trenton P&DC in New Jersey. The ruling, by Randall M. Kelly addresses several elements that made the standard set by Das no longer binding. These elements include:

1. Since 2019 Attendance Control Officers are no longer 'Supervisors' but a level 19 District Position
2. ACO's are now a higher level than 'floor Supervisors' and have a different job description than in 2006 when Das ruled
3. The ACO in question did not consult the opinion of the Floor Supervisor

The Regional Arbitration further opinions that the intent of Article 16 is to prevent 'top-down' Management, and a per Article 15, the Immediate Supervisor is highly unlikely to 'overrule' the decision of a higher level, District EAS employee.

The Unions argument is both that the language of 16.8 is binding as the term 'immediate Supervisor' as it relates to the issuance of Discipline. This position is supported by the usage of 'immediate Supervisor' several times in the CBA / JCIM, such as JCIM Chapter 15, JCIM Chapter 17, etc.

THE INTERVIEW(s)

The Initiator of Discipline

- Are you Jane Doe's regular Supervisor?
- What is your title?
- What is your level?
- Does your job description include Supervision of employees?
- What is the job description of your position?
- Why did you decide to initiate Discipline?
- On what date did this occur?
- Why didn't the Jane Doe's Regular Supervisor initiate this Discipline?
- Did you conduct an investigation?
- Did your investigation include interviewing the Grievant?
- Did you investigation include interviewing the Grievant's Immediate Supervisor?
- What input did the Grievant's Supervisor have on you initiating Discipline?
- Did you consult the Grievant's immediate Supervisor prior to issuing Supervisor?
- Did the Grievant's immediate Supervisor agree with the decision to issue Discipline?
- If yes, why didn't the Grievant's immediate Supervisor initiate Discipline?

This is a remarkably simple interview designed to confirm who initiated Discipline and to establish if they had the authority to do so under their job description. Apart from this, the interview establishes if the immediate Supervisor had input in the decision-making process.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline
- Supervisor's interview and/or statement
- Reviewing authority's interview and/or statement
- Job Description of EAS Employee who Initiated Discipline

THE AGREEMENT

- National Agreement, Article 16.1
- JCIM, Article 16.8

Appropriate Remedy

The appropriate remedy is to expunge the issued Discipline and make the Grievant Whole. This is a Just Cause violation as well as a direct violation of Article 16.8 of the JCIM.

Additional Tips

Under normal circumstances, the Grievant's Immediate Supervisor must initiate Discipline. This is contrary to the vast majority of Union Contracts in which a higher level, such as the Supervisors Manager, can prepare the discipline and instruct the Grievant's Supervisor to take the action. This is a 'bottom-up' managerial style which is almost exclusive to the USPS and a strong right and precedence we have.

We argue the reason for this is multi-fold. One is several provisions of the ELM require Supervisor evaluations of employees, including ELM 370 performance evaluations, ELM 500 Series Review of Attendance, etc.

We also have substantial supporting language found in other areas of the JCIM. We can also rely on the language in the 2006 Das Award to support out position. Like the advice in this guide, it is not recommended to cite any Arbitration unless it fully supports your position. The exception to this general rule is if Management cites something incorrectly.

In this case, if Management raises the Das Award at Step 2, you must include in your Additions and Corrections that the Das Award supports the Unions position several times (Quote the Award) and the Das Award also deals with a defunct position no longer in existence. Management, by citing Das to defend themselves, have helped prove your violation.

The argument we make is the immediate Supervisor has the most information and experience pertaining to the employee. No other party will be aware of their performance, their personal life / mitigating circumstances, or the Discussions had with the Grievant.

In the event another floor Supervisor conducts the interview, it is incumbent on the Steward to raise the argument that the issuing Supervisor must have first conducted their own 16.2 Documented Discussion with the Grievant for the same alleged infraction. Per the Record Control Schedule and 1980 USPS Position Letter (Concerning APWU Cases A8-E-0471, E8C2FC-2033), Supervisor Notes are strictly personal, shall not be passed between parties, and cannot be retained for more than one year.

If another Supervisor initiates Discipline and relies on a Discussion, or any private information only the employees immediate Supervisor would have, it is a violation of the CBA and Just Cause.

Chapter Thirty - Seven

THE ISSUE: NO APPROPRIATE NOTICE FOR INVESTIGATORY INTERVIEW

THE DEFINITION

Employees and Union must receive appropriate notice prior to a Due Process hearing.

THE ARGUMENT

Procedural Due Process requires appropriate notice of a hearing. As this applies to the USPS can be found by the standard of Cleveland Board of Education v Loudermill (1985); Panozzo v Rhoads (1990); Kelly v Smith (1985), etc.

The Supreme Court determined the standard in 1950 in Mullane v Central Hanover Bank & Trust Company. The standard set is that Due Process requires "notice reasonably calculated, under all the circumstances, to appropriate interested parties of the pendency of the action and afford them an opportunity to present their objections."

The interpretation of these standards and decisions is that for an employee currently working in the facility, being pulled from the floor, and informed they will be having a hearing (Or Pre – Disciplinary Interview) may be fully appropriate and reasonable.

Similarly, it would be inappropriate to mail an employee who is on Vacation and schedule an Interview in two days. That is unreasonable and not proper notice. This is a subjective standard.

Unions also have this protection when a Grievant invokes their Weingarten Rights. If Management is aware no Steward is in the facility it is unreasonable to expect a Steward to have the ability to drop everything in another facility to represent a member. It becomes the burden of the employer to put the Union on notice about a desired time or date of the interview and the Unions availability except in an emergency.

When Management attempts to place an unrealistic demand on the employee or the Union, it is a violation of Procedural Due Process, Just Cause's Complete Investigation and potentially the Unions Right to Representation in 17.

THE INTERVIEW(s)

The Supervisor

- When did you decide to interview Jane Doe?
- How did you notify Jane Doe of the interview?
- On what date did you send the letter to Jane Doe?
- Did the letter include a way to reschedule?

- What date was the letter delivered?
- Was the letter tracked?
- Why did you not wait to hold the interview until Jane Doe returned to work?
- When did you notify the Union of the intent to interview the Grievant?
- What was your plan if the Grievant requested a Steward?
- At what point would you contact the Union?
- If no Steward were available, how would you proceed?

Supervisors do not have a contractual obligation to give the Grievant advance notice in most situations and for good reason. The interview is to establish if this is a unique circumstance or not in addition to Union notification.

THE DOCUMENTATION

- Discipline Notice
- Supervisor's Interview
- Letter Mailed to Grievant (Including Tacking, if applicable)

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 17

JCIM Remedy

The Appropriate Remedy depends on the severity of the violation and the impact. In a case where Management placed an unreasonable expectation on a Grievant to attend a meeting without notice (Letter sent day before, letter not tracked, etc.) the Remedy is to expunge Discipline.

Additional Tips

This is a highly specific and rare violation of Procedural Due Process. Under normal circumstances, Management only needs to provide the Grievant minimal notice. If an employee is on extended leave, Management will provide ample notice.

This chapter was included to address a common problem found in small offices in a MAL structure or with Area Stewards / Field Stewards. Management will often wish to hold 'immediate' interviews where they do not provide the Union notice. In those situations, we often see Grievant's being pressured to continue an interview or an aggressive demand on the Union.

It is recommended to cite this violation as needed, but to use the legal standard discussion in a Labor – Management meeting to deter Management from making demands on the Union.

Chapter Thirty - Eight

THE ISSUE: AUTHORITY TO RESOLVE GRIEVANCE AT THE LOWEST POSSIBLE STEP

THE DEFINITION

A lower-level manager discusses a disciplinary grievance at Step 1 or 2 after a higher-level manager either issued the discipline or actually made the decision to issue. Simple reality says that he didn't have the authority to overrule his superior.

THE ARGUMENT

An offspring of the Higher-Level Review and Concurrence due process issue is whether the manager discussing the resultant grievance for the discipline has actual authority to resolve the grievance. Often a lower-level manager, usually the issuing supervisor, meets at Step 1 of the Grievance/Arbitration process. That Supervisor may have been instructed by the MDO, Plant Manager, or Postmaster to issue the discipline. If so, then no reasonable expectation can exist that lower-level managers have or will have true independent authority to resolve the grievance. It is not a reasonable expectation to believe a subordinate will overturn the decision of his boss.

Through interviews and investigation, it may be determined that the alleged higher level concurring official was the impetus behind the issuance of the discipline. While management may claim the lower-level supervisor initiated and issued, the steward has ascertained that in reality the decision to initiate and issue was that of the higher-level manager--not the lower level supervisor. Now the grievance is presented at Step 1 with the lower-level supervisor. That manager cannot reasonably, or in any way, be expected to possess the actual authority to resolve the case at Step 1. Such authority requires a measure of independence, and that independence simply does not exist in the USPS management structure when the true decision comes from the top to a lower level.

Once a lower-level manager without the authority by the Collective Bargaining Agreement discusses a grievance and inevitably issues a denial, the due process rights of the grievant and of the grievance--and of the Union--for full, fair, lowest possible step resolution are lost forever. This breach cannot be repaired. If independent authority does not exist, then it cannot be created.

The basic principle of Article 15 is commitment of the parties to lowest possible step resolution as stated in Article 15.4A. That principle cannot be achieved whenever higher level managers take actions and the charade of lower level managers discussing grievances occurs. This makes Step 1 or Step 2 a "sham."

THE INTERVIEW(s)

Many of the same questions the steward uses in his investigation of the higher-level review and concurrence issue will be revealing and pertinent to our argument that authority to resolve their grievance does not exist. There will even be instances in which lower-level supervisors admit they have no authority because they "were ordered" or the decision "came from the top." The following examples will assist in eliciting beneficial responses:

The Supervisor

- You did not initiate a request for discipline?
- Do you normally initiate a request for discipline?
- The Notice of Removal was prepared by personnel/labor relations and presented to you for your signature?
- You knew nothing of this action prior to being presented with the prepared notice?
- You really don't know much about the circumstances leading to this action, do you?
- What did you know prior to issuing the removal?
- What does the manager know about the circumstances?
- This really came from up the chain of command?
- From whom?
- You signed it because you are employee Doe's immediate supervisor?
- You will be meeting at Step 1 because you are employee Doe's immediate supervisor?
- What Level are you?
- What Level is the Postmaster? MDO? Plant Manager?

Questions during the Step 1 Meeting (Not Before)

- Can you resolve this?
- Could you resolve this if you wanted to?
- You can't really resolve this or attempt to resolve it because the Postmaster made the decision?
- This removal really came from the Postmaster to you, isn't that correct?
- Since this wasn't your decision, you can't seriously consider resolving it can you?
- They don't expect you to resolve this since it wasn't your decision?
- (Why are you) You are stuck with discussing this when the Postmaster made the decision?

With regard to this last group of questions, be careful not to tip your hand too much until you are actually discussing the grievance at the grievance meeting. If you do, you may see management change who is going to meet with you. Even if the Postmaster did issue the notice and is going to meet with you, it does not mean the real decision was made by the Postmaster. Often, and especially in cases involving the Postal Inspection Service, the decision comes from the district and/or labor relations or even through pressure from the Postal Inspection Service. The local Postmaster may still be willing to admit he had nothing to do with actually making the decision to issue the discipline and/or wanted no part in it.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Supervisor's interview and/or statement
- Higher level authority's interview and/or statement
- Correspondence or records
- Step I discussion notes

THE AGREEMENT

- National Agreement, Article 15
- National Agreement, Article 19
- USPS Handbook, EL - 921
- JCIM, Article 15

Appropriate Remedy

A Supervisor or designee not having the authority to settle discipline is so contrary to the intent of the CBA that it demands expunging the Discipline and rescinding the order to issue Discipline.

Additional Tips

This violation can take many shapes and forms. The issue is proving the violation occurred. As discussed in previous chapters, the intention of the CBA is a 'bottom – up' decision making process, and any higher-level interference must not be tolerated.

The issue becomes the nuance of this violation. Unless you capture a Supervisor admitting they do not have the authority to settle you are making accusations and presumptions. We often hear (and see) logical declarations from a higher level to focus on attendance, or conduct, but this is not enough to prove this burden.

A real example is the Customer Care Centers, who report to Headquarters (HQ). HQ will often contact the floor Supervisor with a directive to 'review employee Jane Does conduct and take action.' It does not specify what action, but the Union can infer the action is to issue 'corrective action.' This argument has failed at Arbitration as the instruction does not explicitly state Discipline must be issued, and ultimately the Supervisor still had the authority to make the decision.

It becomes essential, when arguing this violation, to create the evidence via interview to prove the Supervisor did not have the authority to settle as they did not initially make the decision or are being ordered to issue Discipline. This argument can be strengthened by emails between EAS employees but that is subject to knowing the existence of such directives.

Chapter Thirty - Nine

THE ISSUE: TIMELINESS OF DISCIPLINE

THE DEFINITION

The issuance of discipline must be reasonably timely in relation to the date of the alleged infraction, or the date of the last absence cited.

THE ARGUMENT

While there is no defining line in our Collective Bargaining Agreement which states, "discipline must be issued within 30 days of the infraction or last absence cited," a general rule of reason applies those 30 days is the normal standard as the time frame for issuing discipline. This is not to say that discipline issued beyond 30 days will automatically be deemed procedurally defective by an arbitrator. But once disciplinary issuance goes beyond that 30 days, the Union's argument becomes increasingly stronger that the Just Cause test of timeliness is defective and violated.

THE INTERVIEW(s)

The interview for timeliness of discipline will not be dispositive of fact circumstances so much as intent, involvement, and authority. We must try to discover why a delay occurred, who was involved in the delay and whether the issuing supervisor actually had any say in causing or preventing the delay.

The Supervisor

- When did you make the decision to initiate disciplinary action?
- When did you finish gathering all the facts which went into your determination to initiate disciplinary action?
- When did you last contact the Postal Inspection Service regarding Mr. Doe?
- When did you receive the Postal Inspection Service Investigative Memorandum?
- What information did the Postal Inspection Service Investigative Memorandum reveal to you other than what you already possessed prior to receiving the Investigative Memorandum?
- What caused the five-week time period from Mr. Doe's last absence and your initiation of the request for discipline?
- You could have initiated this discipline sooner than you did?
- You were only told of the decision to remove two days before your issuance?

The interview in timeliness argument circumstances becomes valuable due to its ability to limit later revisions by management for untimely initiation and/or issuance of discipline. Again, questions on timeliness can reveal lack of involvement, intent, and authority of the issuing supervisor.

Like most people, many supervisors do not want to be blamed for that which they were not responsible. If a timeliness delay in conjunction with the Just Cause element is the subject of interview questions, it is probable a supervisor not responsible for the delay may reveal much helpful information on other aspects of the issuance of the discipline.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Attendance records, correspondence, Investigative Memoranda, or other documents which establish timelines of management's becoming aware of alleged infraction
- Grievant's statement and/or interview
- Supervisor's interview and/or statement
- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921
- JCIM, Article 16

Appropriate Remedy

The legal maxim, 'Justice delayed is justice denied' applies here. Discipline is not for Cause when Management waits an abnormal amount of time without reason and the remedy to is rescind or expunge the Discipline.

Additional Tips

While the suggested remedy is to expunge the Discipline, this is a graduated scale. Even if Management waits an extreme amount of time, it may be justifiable. This will often be a minor violation you cite and not your strongest argument.

The argument does have a glaring weakness, and that is when the moving party, the Union, fails to properly move their case. For example, if the Union requests an extension, or waits until the time limits to move their case, it becomes far more likely an Arbitrator will just deem this violation as a non – factor.

You should argue this in two ways. One is that Management waited an extreme amount of time from the last occurrence (Attendance) or the last cited instance (Conduct), two is that Management waited an extreme amount of time since their interview to issue Discipline.

Chapter Forty

THE ISSUE: DISPARATE TREATMENT

THE DEFINITION

Issuance of discipline in a manner which is different, and/or unfair, and/or inequitable.

THE ARGUMENT

Whenever the USPS administrates a disciplinary action, a critical facet of our investigation must be whether the grievant is being treated in a disparate or different manner than other employees. Should other employees, regardless of craft, have similar attendance records and/or similar progressive disciplinary histories, or have committed similar infractions, then such employees should have been subject to similar, if not the same, discipline as the grievant.

The standard also applies to supervisors--although the USPS will strenuously object to comparison of a craft employee to a manager. Despite Managements objects that we cannot compare craft to non-craft, we must fully develop all comparisons to uncover evidence of disparate treatment. If we can establish our grievant is treated unfairly, with disparity, then we have established management has failed to meet one of the critical tests of Just Cause.

THE INTERVIEW(s)

Either before our initial review of others' records and/or circumstances or after our review, the interview is valuable in establishing whether the supervisor issuing the discipline even checked others' records/circumstances (this again goes toward the supervisor's involvement and investigation), has any knowledge of disparity or rejected any evidence uncovered.

Usually, an issuing supervisor will make no effort to ensure disparity does not exist. If the supervisor makes no effort, then the investigation is flawed. If the supervisor has no knowledge yet disparity exists, then the Just Cause test is not met. If the supervisor uncovered evidence of disparity and rejected it, we want to ensure the supervisor admits the same--and establish the test is not met. Some disparate treatment questions are as follows:

The Supervisor

- Prior to issuing the discipline did you compare the Grievant's attendance record to other employees?
- To other supervisors? Do any other supervisors that you know of also do this type of work?
- To your own record?
- Are you aware of other employees having records similar to the Grievant's? Worse?
- Are you aware of other supervisor's having records similar to the Grievant's? Worse?

- Is your own record similar to the Grievant's? Worse?
- You found records similar to the Grievant's--were those employees also disciplined?
- You found records similar to the Grievant's--were those supervisors also disciplined?
- You did not treat the grievant the same as other employees are treated under similar circumstances? With such records?

As previously stated, getting the supervisor's testimony through interviews at the earliest possible stage will enable us to limit editorial deviation of that same supervisor in arbitration.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- All documentation, grievance records, etc., regarding any other employees or supervisors who have been treated more favorably after committing similar infractions
- Requests for information for additional documentation
- Management's response
- Follow-up correspondence and/or grievances if information is denied
- Witness' statements and/or interviews
- Grievant's statement and/or interview
- Supervisor's interview and/or statement
- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921
- JCIM, Article 16

Appropriate Remedy

With a clear and convincing violation of Disparate Treatment, the only remedy is to Make Whole and Expunge Discipline.

Additional Tips

This Just Cause defense is the most pervasive when Management is attempting to 'make an example' of someone. When a rule is not enforced for an extended period, we have the clear argument that the rule was not being enforced, but also that others were allowed to follow such misconduct without punishment.

This violation includes Lax Enforcement, as Lax Enforcement is not specifically identified in our CBA or JCIM but has substantial Just Cause and Arbitral Precedence. Management is unlikely to be able to explain why two employees, who acted in a comparable way, did not both receive a similar penalty. Or why one employee received a penalty and 30 others did not.

The Unions burden becomes when so many variables exist such as tenure, circumstance, and mitigation, no two cases should be alike. If Management can prove that the cases are dissimilar, the Lax Enforcement subset of Disparate Treatment is weakened. This has been confirmed several times and has precedence such as Cumberland Elec. Membership Corp., 109 LA 60, 64 (Cantor, 1997).

The burden becomes the Unions to affirm to the Preponderance of Evidence that the situations were similar in the cases. This includes both Lax Enforcement and Disparate Treatment. Cases, such as Beta Steel Corporation, 112 LA 877, 881 (Brookins, 1998) firmly established that when the misconduct is similar, yet substantially different (Oral vs Written Misconduct) the premise of Disparate Treatment does not apply.

The above should not prevent the use of this argument. If, in your Request for Information, you request anything and everything Management used to determine discipline should be issued, the inference is that is the sum of what was used and excludes nothing. We can affirmatively argue the factors, such as length of service, were not considered.

This makes the argument far stronger. The correct order of action for the Steward in this situation is an initial Request for Information seeking 'anything and everything Management used to determine discipline should be issued / Managements discipline packet.' Second would be to interview the Supervisor as seen above. This establishes and confirms the violation.

A strong, singular, violation is strong enough to overturn the discipline entirely on its own. The time spent interviewing in this situation is well worth it for the Steward. Unlike other violations that have caveats, the precedence in the APWU is also abundantly clear.

While Management has a clear defense to this argument, it must be entered before your finish meeting at Step 2. Management cannot raise this argument in Arbitration without context. Local Management is far more likely to ineffectively argue against you with excuses. Their excuses are effectively eliminated when you include the effective interview and Request for Information (RFI).

When Management does properly raise that Mitigating Circumstances justify the difference in discipline, we must argue that the differences were not so great to justify a difference. For example, Management may claim that an EAS employee should not receive Discipline for the same infraction due to not being customer facing, but we would argue that the harm is greater for a Supervisor to act this way to the USPS as the higher-level position increases the harm on the reputation of the USPS.

This is one of the few arguments you should think like Management, when combating their defenses. Management cannot have their cake and eat it to. If Management wants an environment in which they do not Discipline their own, they should simply not enforce the rule on anyone.

This is one of the more technical 'additional tips' sections in this guide. I must reiterate there is absolutely no need to cite the cases above, it is to illustrate a point. Make the argument, submit the RFI, and interview the Supervisor. You will win this argument.

Chapter Forty - One

THE ISSUE: DOUBLE JEOPARDY / RES JUDICATA

THE DEFINITION

An employee is disciplined twice based upon the same fact circumstances. This is prohibited by the principle of **Double Jeopardy**.

An employee is disciplined again following resolution of grieved discipline for the same infraction/fact circumstances. This is prohibited by the principle of **Res Judicata**.

THE ARGUMENT

An employee may only receive discipline once for an infraction. Any time an employee is disciplined twice, that employee is subject to "double jeopardy." Black's Law Dictionary defines Double Jeopardy as:

> "Double jeopardy. Common-law and constitutional (Fifth Amendment) prohibition against a second prosecution after a first trial for the same offense. People v. Wheeler, 271 Cal. App. 205, 79 Cal. Rptr. 842, 845, 271 C.A.2d 205. The evil sought to be avoided is double trial and double conviction, not necessarily double punishment. -- Breed et al. V. Jones, 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed. 2d 346."

An employee receives a letter of warning for "Failure to be Regular in Attendance". A month later, the employee receives a seven-day suspension for the same charge. In the suspension notice of the 11 absences cited, 8 were also cited in the prior letter of warning. The employee is being disciplined twice for what are essentially the same fact circumstances and instances of attendance irregularity. This violates the Double Jeopardy principle.

The principle of "Res Judicata" is also applicable in disciplinary instances in that once an employee receives discipline and the matter is resolved through resolution with the Union, the employee may not be disciplined again for the identical infraction/fact circumstance or record of absences. Black's Law Dictionary defines Res Judicata as:

> "Res Judicata. A matter of adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. Matchett v. Rose, 36 Ill.App.3d 638, 344 N.E.2d 770, 779."

An employee receives a letter of warning for "Failure to be Regular in Attendance." A grievance is filed and resolved by reducing the Letter of Warning to an official discussion. A month later the employee receives another letter of warning citing the same absences along

with additional occurrences. Resolution of the prior discipline bars management from disciplining the grievant for the previously cited record--this is the Res Judicata principle.

The principles of Double Jeopardy and Res Judicata often are interrelated, and both should be cited when management issues discipline based upon that which was previously resolved and/or when management disciplines twice for the same infraction/fact circumstances.

THE INTERVIEW(s)

As with many of our due process interviews, this interview under Double Jeopardy/Res Judicata will not so much establish the fact that Double Jeopardy/Res Judicata exists as establish the intent of the supervisor as well as his role, involvement, and investigation:

The Supervisor

- You issued Mr. Doe a fourteen-day suspension one month ago citing the same absences you now have cited in this Notice of Removal?
- Were you aware you had cited these absences previously when you included them?
- You intended to discipline Mr. Doe twice for these absences?
- You did not intend to discipline him twice?
- You did not check the record carefully enough?
- You were given the Notice to sign and did not believe the record included previously disciplined absences?
- You believed because the suspension had been reduced to a letter of warning that Mr. Doe had not received enough punishment for the absences?
- You believed another discipline citing the same absences would better correct Mr. Doe's attendance irregularity?
- You rescinded and reissued this removal because the Union made you aware Mr. Doe was being disciplined again based upon absences for which he had already received discipline?
- You knew the previous discipline was resolved with the Union, yet you issued further discipline based upon the same infraction?

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Previous discipline notices
- Moving papers of previous discipline grievances
- Previous settlements and/or arbitration awards
- Grievant's statement and/or interview
- Supervisor's interview and/or statement
- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921
- JCIM, Article 16

Appropriate Remedy

Double Jeopardy / Res Judicata are clear inferences of Discipline being 'Punitive' and not Corrective. The only acceptable remedy is to Expunge Discipline and Make the Grievant Whole.

Additional Tips

Double Jeopardy / Res Judicata mandates that no employee may be disciplined for the same offense twice. Not only does discipline twice for the same offense violate the definition of Double Jeopardy / Res Judicata, but it also renders the Discipline Punitive and not Corrective. Your argument should include all three.

Article 16's Discussions are a common source of confusion as they are strictly 'non-Disciplinary.' Some legal precedence exists, such as under Meijer and Grievant "H", 120 LA (BNA) 700 (Obee, 2004), the Arbitrator held that the employer did not have Just Cause to terminate a Supervisor for making inappropriate comments as the same Supervisor was already 'disciplined' and required to view a CD about said misconduct and had to read the companies related policies. The Arbitrator ruled that Double Jeopardy prevented further Discipline and it the recommended application.

No employee should have a Discussion for an issue and later receive further Discipline for the same issue. This also applies when a Supervisor intends to issue a Discussion but fails to meet the elements of a proper Discussion. For example, Management could argue a conversation was not a discussion because it happened on the shop floor. This is called bad Management and does not absolve Management of their responsibility to not take any corrective / adverse action against an employee, and then rediscipline them for the same charge.

A second confusing situation is an Emergency Placement. It is universally accepted that the employer can place an employee in an off – duty status while investigating the offense. While this may be a separate violation, it does not apply to Double Jeopardy / Res Judicata.

Substantial Precedence exists to establish our right to Double Jeopardy / Res Judicata as it pertains to Management rescinding Discipline once the Union makes its contentions. Management has rescinded discipline to reissue is a more complete state. This is entirely improper. Once Management issues Discipline, they are stuck with it and cannot get another 'crack' at issuing Discipline.

Chapter Forty - Two

THE ISSUE: DISPARATE ELEMENTS OF DISCIPLINE RELIED UPON FOR PROGRESSION

THE DEFINITION

When management relies upon elements of discipline--not of a like nature--to create a progressive disciplinary history against an employee.

THE ARGUMENT

An example of this issue is as follows: An employee has a letter of warning and a seven day suspension for "Failure to Meet the Attendance Requirements of the Position." Now the employee receives a fourteen-day suspension for parking in a supervisor's parking space. A disciplinary history of attendance is in a category separate from instances of "misconduct" or "offenses." So too would be a disciplinary history for out of tolerance results due to a window clerk's overage/shortages. Neither the attendance nor the overages/shortages can reasonably be considered misconduct--or offenses--and these, at least, reasons for discipline must not be lumped with misconduct or offenses in any progressive disciplinary history.

THE INTERVIEW(s)

The interview should be used to establish that the supervisor gave no consideration to the disparate nature of the past disciplinary record of the employee versus the current "offense" or record or occurrence. The interview should also draw the supervisor into a position where we are assisted in establishing the punitive intent of such coupling of disparate elements of record. Some examples are as follows:

The Supervisor

- When you formulated the Notice of Removal, you included the past elements of discipline cited on page 2?
- And none of those elements of record were related to either Charges 1 or 2 in your Notice of Removal?
- Has Mr. Doe ever been disciplined in the past for an offense similar to Charges 1 or 2?
- You didn't consider any past elements of discipline related to Charges 1 or 2 did you?
- These charges--1 and 2--have no prior disciplinary history of a similar nature on which they were based?
- If these past elements were unrelated what role did they play in your disciplinary decision?
- If the grievant has never been disciplined for any infraction even remotely related to Charges 1 or 2, how can this removal for Charges 1 or 2 be considered progressive by you?

Through his interview, we are building the foundation for our disparate elements of record argument.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- All cited discipline notices
- Moving papers of grievances for cited discipline notices
- Grievant's statement and/or interview
- Supervisor's interview and/or statement
- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921
- JCIM, Article 16

Appropriate Remedy

The heart of this violation is one of Just Cause and Corrective Discipline. When Management uses disparate elements, the only remedy is to expunge the Discipline as issued.

Additional Tips

On my website I have a copy of 'Management for Dummies' and this violation is one of the reasons why. While we may not have a specifically written 'two-track' Discipline structure, it is implied through Corrective, and not Punitive as a premise. The USPS agrees with this position, as the US Law Departments Training for Supervisors explicitly recommends following a two – track system.

I fully recommend leaning hard into the fact that discipline must be corrective when arguing against Discipline being issued referencing disparate elements. For attendance, it is also recommended to look at related handbooks that may describe some attendance related issues are conduct problems which should not be included with Attendance regulations.

One such example could be extended lunch times. While Management could cite this as Attendance, it may more strongly fit as misconduct. The main reason for this is that an employee procrastinating and not returning to their assignment on time is misconduct. We can and should always argue against Management citing such elements together.

Chapter Forty - Three

THE ISSUE: PAST ELEMENTS OF DISCIPLINE NOT ADJUDICATED YET RELIED UPON IN SUBSEQUENT DISCIPLINE

THE DEFINITION

When management issues discipline and in that disciplinary notice it includes, as an employee's past record, elements of discipline which are still in the Grievance/Arbitration process and "live" pending adjudication.

THE ARGUMENT

Whenever management issues discipline and bases that decision on elements of discipline record not yet finalized, management does so at its own peril. For example, management issues a fourteen-day suspension for "Irregular Attendance" and for progressive disciplinary purposes, relies on two previously issued actions; a seven-day suspension and a letter of warning. Both disciplines were also issued for irregular attendance, but neither has been adjudicated. Both were grieved, have not been resolved, and are waiting arbitration. Management, in relying on these non-adjudicated past elements of the Grievant's record, is gambling that the disciplines will be upheld and not modified or overturned either through grievance resolution or in arbitration.

Should, for instance, the letter of warning be upheld in arbitration, but the seven-day suspension be overturned, then management would have an employee with a fourteen-day suspension pending discussion in the Grievance/Arbitration procedure, or pending arbitration, with only a letter of warning as a past element of progressive discipline. In that case, the Union is arguing that, at worst, the fourteen-day suspension should be a seven and any discussion or resolution of the fourteen day should really be discussion or resolution of a seven day down to a lesser penalty.

At arbitration, the Union must address the fourteen day as a seven day and argue that the arbitrator must view, at the least, that the fourteen should be a seven and any reduction by the arbitrator should be from seven days down; not from fourteen days down.

In those instances, in which, say, a removal is heard before an arbitrator prior to "live" past elements of lessor discipline being adjudicated, then the Union's argument is that the arbitrator must consider any "live", un-adjudicated past elements of discipline in the removal notice as non-existent. The reasoning being that without knowing the final adjudication and with the challenge(s) to the elements of discipline being live, the employee may not suffer as if those elements were part of the employee's record.

Although the employee has been issued the discipline and although the employee has served the prescribed penalties of those actions, the propriety of the actions has not been determined. Our Collective Bargaining Agreement provides for deferment of the validity determination on all Discipline until adjudication. Because of that deferment, management's

reliance on unadjudicated discipline creates a due process argument in the Grievant's favor that a record unadjudicated cannot be held against an employee in subsequent disciplines.

THE INTERVIEW(s)

The Local Union's grievance records will tell the steward what elements of discipline have not yet been adjudicated. Questions concerning the past record will assist more in the areas of failure to investigate, lack of firsthand knowledge, and involvement in issuance of the discipline.

The Supervisor

- You checked the employee's past record prior to issuing this discipline?
- Were all these past elements adjudicated?
- Were any of these past elements adjudicated?
- What was the final disposition of the (date) letter of warning? 7-day suspension? 14-day suspension?
- You don't know what the final disposition will be for the suspension dated _____?
- You included a past record of discipline which you are not sure will exist when this removal is heard in arbitration?
- You were aware when you included these past elements that they had not been adjudicated?

Again, interview questions will greatly assist in determining the true involvement of the issuing supervisor.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- All cited discipline notices
- Moving papers of grievances for cited discipline notices
- Grievant's statement and/or interview
- Supervisor's interview and/or statement
- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 15
- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921
- JCIM, Article 16.10

Appropriate Remedy

The heart of this violation is one of Progressive Discipline, and at minimum, the Discipline level must be reduced to the appropriate level. Always argue the core violation of Punitive Discipline should result in the Discipline being expunged.

Additional Tips

This is a violation Management makes often. The presumption is their Discipline will 'stick' at Arbitration. While I understand that delusional confidence, I also understand that Management must 'proceed' with some employees. Nevertheless, that position should never be in our Grievances. The position we take is that Management made a fatal error by skipping progression.

The normal remedy is to treat the new Discipline at the correct level and begin negotiations from that point. While this is not satisfactory, in the vacuum of only one violation, that tends to be how Arbitrations rule. Exceptions exist, and we can strengthen our argument. It is recommended to learn on the fact that:

1. Management (Issuing Supervisor and reviewing Official) failed to properly investigate the Grievant's record (Just Cause).
2. Management issued Punitive Discipline as the Grievant never faced a 'penalty' from the previous, unadjudicated Discipline (Direct Violation).
3. No Notice / No Discussion occurred, which means the Grievant was entirely unaware they could face the increased level of Discipline as they never served or received a settlement on the previous, unadjudicated Discipline (Just Cause).

When you argue the violation three ways you prevent Managements common defense of the necessity to progress Discipline to maintain operations. You will find when Management is on the path to terminating an employee, they often skip Discussions between levels of Discipline. Combine this with failing to properly inform a member, in their interview, the proposed level of Discipline the entire process is tainted.

The Union can use this violation to their advantage when Management rapidly issues Discipline, or when Discipline is tied up at Arbitration. Where we have multiple Arbitration Panels, and most regions are behind in hearing cases, open up the opportunity to remand previous Grievances or 'play the system' to the member's advantage.

While this is possible, I urge against this. Our responsibility is to enforce the Contract and not get 'members off'. The intent is to have the Discipline argued at the appropriate level and make the parties whole.

It must be acknowledged that the NALC Contract / JCAM has far stronger language than we do, and the NALC JCAM cites National Arbitrator Snow (E94N-4E-D 96075418, April 19, 1999, C-19372). This is not our Arbitration, and the NALC takes a different approach in this Arbitration. It is advised to not make arguments outside the above as you could win up with an award like the NALC received, where we get a continuance over expunging the Discipline.

Chapter Forty - Four

THE ISSUE: MODIFIED PAST ELEMENTS OF DISCIPLINE MUST BE CITED IN MODIFIED STATE IN SUBSEQUENT DISCIPLINE

THE DEFINITION

The citation of modified disciplinary actions in their original form as elements of past record relied upon and included in subsequent discipline.

THE ARGUMENT

Management often cites past disciplinary actions as elements of record which were considered in taking a subsequent disciplinary action. In doing so, management cites a fourteen-day suspension even though that fourteen-day suspension was reduced to seven days previously. Another example would be management citing a "fourteen-day suspension reduced to seven days" thereby including the modification of seven days and the original fourteen day.

A National Level Step 4 interpretive decision requires only management's inclusion of the modified discipline, not the original discipline. Inclusion of both or of only the original is a violation of the parties' mutual agreement in the Step 4 decision. Further, inclusion of the full discipline demonstrates punitive intent rather than a corrective attempt because management is attempting to justify its action through inclusion of more severe discipline when it does not exist. Should management claim it was unaware of the modification, then management admits it failed to conduct a thorough, objective, and fair investigation before initiating and issuing discipline. Based upon the Step 4, it must also be argued the disciplinary notice is fatally and procedurally defective and in violation of the Step 4.

THE INTERVIEW(s)

Like the interview for "past elements not adjudicated," the interview here will reveal intent, involvement, and investigation on the part of the supervisor:

The Supervisor

- You included this discipline record in the Notice of Removal?
- Prior to initiating and issuing this removal, did you check Mr. Doe's past discipline record?
- Did you know Mr. Doe's fourteen-day suspension has been reduced to seven days?
- You included it anyway? Why?
- When you checked Mr. Doe's past discipline record, how did you check it?
- With whom did you check?
- You considered the fourteen-day suspension, is that correct?
- If you did not consider the fourteen-day suspension, why did you include it?

- You relied in this Notice of Removal on past elements which were modified after their original issuance?
- You knew about the modification and still cited the original discipline?

Questions like these can be revealing and may trap the supervisor into responses which uncover lack of investigation, or involvement and/or punitive intent.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- All cited discipline notices
- Moving papers of grievances for cited discipline notices
- Settlements of previous discipline grievances
- Request for Information seeking management's copies of past discipline cited in discipline notice
- Management's response
- Grievant's statement and/or interview
- Supervisor's interview and/or statement
- Steward's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- USPS Handbook, EL-921
- JCIM, Article 16.10

Appropriate Remedy

This is a clear violation and is an intentional Aggravating Circumstance. The only appropriate remedy is to Expunge Discipline and make the Grievant Whole.

Additional Tips

This is one of our few 'gotcha' violations. Management cannot cite, in most circumstances, anything except the adjudicated Discipline with no reference to the original, unmodified version. Many APWU – USPS Settlements reference the original, unaltered Discipline. It is improper for Management to reference that Settlement.

The core of this violation is Management attempting to use the employees' Past Record to justify the current Discipline. This is considered an Aggravating Circumstance. The intent is clear, because the employee previously had a removal clearly there is a problem, and Management already gave the employee another chance. This is untrue and we must cite this violation every time it occurs.

Chapter Forty - Five

THE ISSUE: OFF DUTY MISCONDUCT AND THE "NEXUS" REQUIREMENT

THE DEFINITION

Some nexus or connection between off-duty misconduct and postal employment must exist for Just Cause to be present when an employee is disciplined due to off-duty misconduct.

THE ARGUMENT

To establish nexus the record must establish that the misconduct is somehow materially job-related, i.e., that a substantive nexus exists between the employee's crime and the efficiency and interests of the Service. Such a nexus may be demonstrated through:

1. Evidence that the crime has materially impaired the employee's ability to work with his fellow employees.
2. Evidence that the crime has impaired the employee's ability to perform the basic functions to which he is assigned or is assignable.
3. Evidence that the employee's reinstatement would compromise public trust and confidence.
4. Evidence that the employee is a danger to the public or customers.

Additionally, the record must establish that the Service has fairly considered the seriousness of the specific misconduct in light of mitigating and extenuating circumstances.

The Union argument in an off-duty discipline case--usually a removal or indefinite suspension-crime case--is straightforward--that management had failed to prove any nexus or connection between an employee's off-duty conduct and that employee's Postal employment.

No matter what the employee has done off-duty, we must put forth our argument that the conduct has nothing whatsoever to do with the employee's employment. The charge could involve drug use, drug trafficking, violence, theft, or a multitude of other serious offenses. Regardless of the charge, unless there can be established a nexus between conduct away from the clock, the job and employment, our position is Just Cause cannot exist.

This is not to say that we will be successful in every defense using the nexus argument; we will not. Arbitrators often excuse themselves with decisions wrapped with "moral judgment" or "societal concerns." It is also evident that some Arbitrators will view increasingly serious offenses with less and less emphasis on the nexus principle. Despite these pitfalls, we must ensure that the due process nexus protection is pursued and developed to the fullest--in every case. We must ensure that our own personal opinions concerning particular offenses are never factors in our pursuit of the nexus argument.

Remember, provisions of the Collective Bargaining Agreement permit the hiring of individuals with criminal histories. Further, managers are not necessarily treated so similarly as are our own Union members when off-duty misconduct occurs.

Our jobs as stewards and arbitration advocates are to provide the best possible defense. The nexus argument is a major required element in providing that defense.

THE INTERVIEW(s)

It is important to establish (1) that no nexus existed, and (2) that there was no reliance on a nexus by the issuing supervisor and concurring official when the case is being investigated at the earliest stages. Management advocates will invariably attempt to establish some post disciplinary nexus at arbitration--even though the issuing supervisor probably hadn't a clue as to what the nexus principle was--much less what nexus may have existed--when the discipline was initiated and issued. Even if a management advocate can produce newspaper article after newspaper article stating the disciplined employee's name, Post Office of employment, etc., at arbitration--if the issuing supervisor did not rely upon those articles, then there was no nexus when the discipline was initiated and issued. However, without clear establishment of what the supervisor relied upon and what reasoning was behind the decision to discipline--through the interview--then management will testify at the arbitration hearing all about the nexus that is then claimed to be the reason the action was initiated.

The interview is as important in a nexus case as it is in any element of due process and Just Cause. Some examples of the interview in a nexus case are as follows:

The Supervisor

- Robert Green's conduct occurred off the clock?
- Robert Green's conduct occurred off the premises?
- Were you present when this alleged misconduct occurred?
- How did you find out about this misconduct?
- Did you read about Robert Green in the newspaper? What newspaper? When?
- Do you have these articles?
- Did you hear about Robert Green on the radio? What radio station? When?
- Do you have audio tapes of these reports?
- Did you see Robert Green on television? What television station? When?
- Do you have videotapes of these reports?
- Did you receive customer complaints about Robert Green's continued employment? From whom? Names? In writing? When?
- Do you have these written customer complaints?
- Did Robert Green make any arrangements for the sale (which occurred off the clock) while he was at work?
- What evidence do you have of such arrangements? Taped telephone calls? Taped conversations?
- You based this removal solely on Robert Green's behavior off the clock?
- What evidence did you rely upon connecting Robert Green's conduct to his postal job?

We must limit management's ability to justify a discipline after the fact through establishment of a post discipline nexus. In this regard, the interview may be our only tool.

THE DOCUMENTATION

- Discipline notice of Discipline proposal or request for discipline, if used
- Postal Inspectors' Investigative Memorandum and exhibits
- Police reports of Indictment and other court records
- Newspaper stories, tapes of radio or TV accounts
- Request for Information seeking all documentation or information relied upon by management
- Management's response
- Grievant's statement and/or interview
- Co-workers' statements and/or interviews
- Supervisor's interview and/or statement

THE AGREEMENT

- National Agreement, Article 16
- JCIM, Article 16

Appropriate Remedy

In a case where the Grievant acted in a way Management disproves of, off the clock, should be Expunged with the Grievant being made whole.

Additional Tips

We see this with ELM Subchapter 665, where Management will connect a perceived offense, such as having another job and citing ELM 665.11 or being on social media partying and citing ELM 665.16. Management has an obligation to prove how the alleged offense impacts the Grievant's ability to work or the public's trust or reputation of the USPS. This is a high bar. Someone doing something morally questionable is not enough of a reason.

This is more pervasive in the age of Social Media, where bored EAS employees can be 'friends' or 'followers' of someone and see every little bit of questionable behavior. This is even more pervasive among newer employees. While you can argue nuances, such as a Social Media post could be scheduled, reused, etc., the fact remains the strongest defense is simply placing the burden back on Management that they must establish a Nexus.

It is advised that members keep their job title and position from Social Media. It is also recommended not to post pictures in Uniform. Despite the warning we give to members this violation will happen, and our strongest defense is one of Nexus.

Chapter Forty - Six

THE ISSUE: EMERGENCY SUSPENSION - PLACEMENT IN OFF-DUTY STATUS OUTSIDE REASONS IN ARTICLE 16.7

THE DEFINITION

Whenever management places an employee in Off-Duty Status utilizing the Emergency Procedure of Article 16.7 for a reason other than those specifically negotiated into Article 16.7 by the parties.

THE ARGUMENT

Management cannot, in accordance with Article 16.7 of the Collective Bargaining Agreement, properly place an employee on emergency off-duty status if such placement is for a reason other than one of those specifically included in Article 16.7. Examples of improper reasons for Emergency Placement in Off-Duty Status would be insubordination, conduct unbecoming an employee, failure to follow instructions, or no work performed.

Any reason for Emergency Placement in Off-Duty Status outside the six stated reasons included in Article 16.7 is a violation of the Collective Bargaining Agreement.

THE INTERVIEW(s)

Clear establishment of the reasons for Emergency Placement in Off-Duty Status should come from the required written notice soon after the Emergency Placement. However, in instances in which the reasons as stated in that notice are not clear, the interview becomes the necessary tool to establish the crucial point that Emergency Placement was not imposed for an Article 16.7 reason:

The Supervisor

- You placed Mr. Doe in off-duty status for insubordination?
- He refused to report to the window area?
- He refused your direct order?
- He threatened you?
- What did he say?
- Who else was present?
- He did not threaten you?
- Mr. Doe refused to perform any work?
- You placed him off-the-clock for that reason? Any other reasons?

It is important to close the door on management efforts to revise their reasons for Emergency Placement in Off-Duty Status which will occur at arbitration. If "Insubordination" is the stated reason in writing for the Emergency Placement in Off-Duty Status a management

advocate will attempt to expand on that term to include "threat," "dangerous to self or others" or some reason under 16.7. Insubordination, in particular, can have varied slants in its meaning.

THE DOCUMENTATION

- Emergency placement notice
- Discipline proposal or request for discipline, if used
- Grievant's statement and/or interview
- Witness' statements and/or interviews
- Supervisor's interview and/or statement
- Postal Inspector's Investigative Memorandum and exhibits
- Threat Intervention Team reports

THE AGREEMENT

- National Agreement, Article 16.7
- National Agreement, Article 19
- USPS Handbook, EL-921
- JCIM, Article 16
- ELM 651

Appropriate Remedy

The remedy is to return the employee to work and to Expunge any related Discipline, plus making the Grievant Whole.

Additional Tips

Management has a bad habit of placing employees on an EP without knowing the full story and assuming that they can indefinitely let someone stay out waiting for an investigation to conclude. This is improper. The issue becomes that our Contract does not have a set time limit for an EP. Other Unions do have upper limits, such as a 30-Day Time Limit to an EP. This weakens our Argument.

We can also cite the Doug Tulino Letter from October 29th, 2009 which clarifies the usage of Emergency Placements. The fundamental purpose of an EP is to protect the USPS' interests as well as its operations and employees. The burden is on Management to prove this is why the employee was placed.

The interview is essential prior to the Step 1. The moment you even notify Management of your intent to file a Grievance over an EP they will begin to 'get their stories straight'. Interview as soon as possible.

Chapter Forty - Seven

THE ISSUE: EMERGENCY SUSPENSION - PLACEMENT IN OFF-DUTY STATUS WITHOUT POST PLACEMENT WRITTEN NOTIFICATION

THE DEFINITION

Whenever management places an employee on off-duty status under Article 16.7, management is required to notify the employee in writing of the reasons and date of said placement within a reasonable period of time following the Emergency Placement in Off-Duty Status.

THE ARGUMENT

Arbitrator Mittenthal in a National Level arbitration case set forth the principle that management is required to issue a written notification to an employee following an Emergency placement in Off-Duty Status stating the reasons for the placement. Without this mandatory, written notice, management's placement is procedurally defective in that the emergency placement does not comply with Arbitrator Mittenthal's National Level award and since there is no written reason, the required reason as set forth in 16.7 cannot exist.

The JCIM also clarifies, "However, the employee is entitled to written notice stating the reasons for such placement within a reasonable time frame."

THE INTERVIEW(s)

In this circumstance, our interview simply solidifies the violation of the National Award:

The Supervisor

- You placed Mr. Doe off the clock on (date)?
- You did not send him a written notification of your reasons for this Emergency Placement in Off-Duty Status?
- Aren't you required to send him such a notice?

THE DOCUMENTATION

- Request for Information seeking copy of emergency placement notice and management's response
- Discipline proposal or request for discipline, if used
- Grievant's statement and/or interview
- Witness' statements and/or interviews
- Supervisor's interview and/or statement
- Postal Inspector's Investigative Memorandum and exhibits

- Threat Intervention Team Reports

THE AGREEMENT

- National Agreement, Article 16.7
- National Agreement, Article 19
- USPS Handbook, EL-921
- JCIM, Article 16.7

Appropriate Remedy

The appropriate remedy is to return the employee to work, Expunge any related Discipline, and make the Grievant Whole.

Additional Tips

This violation happens more often than one would think. I have seen this is more common when an EAS employee does not know they need to send notice or how; or when an EAS employee does something in the heat of the moment and attempts to justify the decision after the fact.

In a situation of 'he said – she said' it is recommended to also interview the Grievant to get on the record their side of the story while it was fresh. It would also be helpful to expand your interview of the Supervisor / EAS employee to include questions about what did happen prior to the employee leaving. Even if the answer is a lie, Management will always try to shore up their excuse late. It is preferable to have an excuse to pick apart rather than give Management time to find a better excuse.

The issue becomes arguing what is a reasonable time. In situations where Management can claim they just have not sent the notification yet. The prevailing standard is Management should have sent notice as soon as it was reasonable to do so. Reasonable is subjective, but we should always argue the next day, or week of, is perfectly reasonable.

This notice if different than issuing Discipline. Management has the right to still investigate a situation, issue Discipline if appropriate, etc. But the employee must be made aware, as soon as possible, that they are placed and why.

It must also be noted, like all Grievances related to an EP, a Separate Grievance can and should be filed. After Step 2, this Grievance directly appealed to the Regular Arbitration panel. Due to this, it is important to not sit on or delay this Grievance. The Union does not get a crack at this during Step 3 and we must fully develop our case at Step 1 and Step 2.

Chapter Forty - Eight

THE ISSUE: EMERGENCY SUSPENSION - PLACEMENT IN OFF-DUTY STATUS AFTER TIME LAPSE BETWEEN INCIDENT AND ACTUAL PLACEMENT

THE DEFINITION

Whenever management invokes the Article 16.7 emergency procedure for Emergency Placement in Off-Duty Status, that placement, by definition, is to occur immediately--without delay.

THE ARGUMENT

Again, it was Arbitrator Mittenthal in a National Level award that defined the Article 16.7 Emergency Placement in Off-Duty Status as an immediate action which would occur without hesitation or delay. The usual purpose of the Emergency Procedure was for immediate diffusion of a possibly violent situation--as an emergency. Management, on the other hand, often misapplies the emergency procedure. An example would be:

> Supervisor Jones witnesses a heated verbal altercation between two employees at 7:30 a.m. Jones then orders employee Smith to work in the box mail section and employee Doe to work distributing parcels. The two workstations are approximately 70 feet apart and separated by Letter Carrier cases. He further instructs the two employees to have no contact with one another. At 11 a.m. the Postmaster reports for duty, at which time Supervisor Jones relates what occurred at 7:30 a.m. After consultation, either the Postmaster or Supervisor places both employees off the clock through utilization of Article 16.7.

This is procedurally defective Emergency Placement in Off-Duty Status. The immediate dismissal intent of Article 16.7 is not in existence at 11:00 or 11:15 a.m. The Supervisor must have utilized 16.7 at the time the altercation occurred; not hours later.

Once a reasonable period has elapsed, say an hour (although a shorter period could be argued), the suspension of employee(s) cannot properly fall under Article 16.7. Since other suspensions of, for example, seven or fourteen days must occur after ten day notification, any "emergency" suspension would be procedurally defective and in violation of Article 16 of the Collective Bargaining Agreement.

THE INTERVIEW(s)

Developing the reasoning behind delays in an Emergency Placement in Off-Duty Status will protect the Union and grievant against management conjured reasoning at a later time. Although time records will reflect when an employee was actually placed off duty, the time frame of the decision is crucial because slight delays such as trips to the lavatory, locker room,

etc., may be used as management excuses for lack of immediacy. The interview is our excellent tool to nail down the facts:

The Supervisor

- What time did the incident occur?
- Were you present during the incident?
- Did you witness the incident?
- Did you instruct the employees to separate work areas following the incident?
- You did not send them home when the incident occurred?
- How long did you send them home after the incident?
- What other information did you obtain between the time of the incident and the Emergency Placement in Off-Duty Status which affected your decision?
- What subsequent incident occurred after the first incident which affected your decision to place them in Emergency Off-Duty Status.
- At what time did you make the decision to place them in Emergency Off-Duty Status?
- Did the Postmaster tell you they should be placed in Emergency Off-Duty Status?
- Did the Postmaster agree that they should be placed in Emergency Off-Duty Status?
- Since you did not witness the incident, did you speak to each employee before the Emergency Placement in Off-Duty Status?
- Why didn't you immediately place them in Emergency Off-Duty Status?

Determining the reasoning and time frames for the incident, the delay and the decision will prove the difference between a successful due process argument and a failed one when the Emergency Placement in Off-Duty Status is not immediate.

THE DOCUMENTATION

- Emergency placement notice
- Discipline proposal or request for discipline, if used
- Grievant's statement and/or interview
- Witness' statements and/or interviews
- Supervisor's interview and/or statement
- Postal Inspector's Investigative Memorandum and exhibits
- Threat Intervention Team reports

THE AGREEMENT

- National Agreement, Article 16.7
- National Agreement, Article 19
- USPS Handbook, EL-921
- JCIM, Article 16.7

Appropriate Remedy

The appropriate remedy is to return the employee to work, Expunge any related Discipline, and make the Grievant Whole.

Additional Tips

This provides the Union its strongest logical argument as it relates to Emergency Placements. If it were an Emergency as defined by the ELM and CBA, the employee would be told to leave immediately. The CBA states:

> "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."

It is essential that we raise the argument immediately and move the case forward. The Unions position that even a minute at the facility past the aggravating incident proves it is not a real Emergency. A real Emergency is one in which the USPS cannot afford to have the employee on the premises. This is a high bar for Management, as it should be.

Management will often throw unrelated excuses at the Union in these cases to establish how their inaction is reasonable. I have commonly seen that the time clock is far away, the Grievant had to close their till / register, or even excuses such as the Grievant walked away before they could be told to leave.

The argument is not one of intentions, but facts. The reason is an EP bypasses the protections we are afforded under Due Process and Just Cause. This is a last resort only. It is not an action Management can do willy – nilly.

Witness statements or interviews can be the strongest element of this case. Even a Supervisor who themselves are upset and walks away to 'cool off' indicates the placement was not possible. Do not limit your search to Clerks. Management will often be emboldened when they believe no other APWU or Craft employee is nearby.

MVS, Maintenance and Custodial employees should be your first wave of interviews or solicitation of statements as they are APWU members. Next, it would be advised to expand your search to Mail Carriers (Both Rural and NALC), and Mail Handlers. The next level would be contractors who were in the building or nearby such as cleaners, other companies dropping off packages, etc. Finally, other EAS employees. You must move quickly before Management can get their stories straight.

Chapter Forty - Nine

THE ISSUE: 30-DAY ADVANCE NOTICE FOR REMOVAL

THE DEFINITION

The Collective Bargaining Agreement requires management to provide advance written notice of charges in removal instances and 30 days either on the job or on the clock prior to the removal taking effect. (In cases in which the employer has reasonable cause to believe guilt for a crime, the 30-day notice is not required.)

THE ARGUMENT

Often management fails to provide the required 30 days' notice. As an example, management issues an employee a Notice of Removal for failure to meet the attendance requirements of the position or for "Insubordination." In the Notice issued on May 1, management states the employee will be removed on May 29. Or the employee may be out on an Emergency Suspension and management provides a thirty day notice period but fails to return grievant to an "on the job or on the clock" status during this period. Management has failed to provide the required 30-day advance notice either on the job or on the clock. Management has violated Article 16.5 of the Collective Bargaining Agreement and issued a procedurally defective Notice of Removal.

THE INTERVIEW(s)

Since the date of the Removal's issuance and its effective date will most likely not be in dispute, the interview again will focus most on the supervisor's involvement, role and knowledge of the removal provisions for which he is responsible. In the event there is a dispute as to the date of issuance, our questions should resolve this. Some examples are as follows:

The Supervisor

- Your removal is dated May 1--did you issue it on May 1?
- If not, on what day did the grievant receive the Notice of Removal?
- Do you have proof of receipt by the grievant?
- Following the Grievant's receipt he was not kept either on the job or on the clock for 30 days? Why?
- Are you aware of the 30 day requirement?
- Did you include this effective date in the removal?
- Who did? o Did you check the removal after you received it from the Postmaster? Labor Relations?
- The MDO? The Plant Manager?
- If this removal had been your decision you would have made sure the 30 day rule was properly followed?
- Who was responsible for not providing the 30 day notice?

As with all interviews provided in this Handbook, the steward's orchestration is the key to eliciting the most favorable responses.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Supervisor's interview and/or statement
- Clock rings or timecards
- Grievant's statement and/or interview

THE AGREEMENT

- National Agreement, Article 16.5
- National Agreement, Article 19
- USPS Handbook, EL-921
- JCIM, Article 16.5

Appropriate Remedy

The lack of 30-Day Notice renders the Discipline procedurally defective. The Discipline must be expunged and the Grievant Made Whole.

Additional Tips

The 30-Day Notice requirement is a protection fundamental to the protections we have as APWU members. The language in the JCIM is clear, we also have a logical argument to uphold. If Management does not retain the Grievant for the full 30 days, the process is fatally harmed.

The nuance is the 30-day notice is not an arbitrary date. It is at least 30 days of actual notice to the Grievant. If Management mails Discipline and it does not arrive for a week, this could put the notice under 30 days. It is advised to copy and print the tracking information for your Grievance under such a dispute.

Management may try to cover this up. I have seen Management argue that they verbally informed the Grievant verbally prior to the Discipline being received. This is also improper. The JCIM language is clear and states, "Employees must be given thirty (30) days advance written notice prior to serving a suspension of more than fourteen (14) days or discharge. During the notice period, they must remain either on the job or on the clock at the option of the Postal Service."

This is also a case where Management cannot retroactively correct this deficiency. Once the Discipline is issued it is a done deal. It is Managements responsibility to ensure the Grievant is properly notified.

Chapter Fifty

THE ISSUE: INCOMPLETE / NO DENIAL

THE DEFINITION

Management must provide the Union representative with a written decision within ten (10) days of the Step 2 meeting unless time limits are mutually extended. The decision shall include: 1) all relevant facts; 2) contract provisions involved; 3) and detailed reasons for denial; 4) USPS Grievance Arbitration Tracking System (GATS) number.

THE ARGUMENT

Management is required to provide the Union with a written decision, known as a Denial, within 10 days of the Step 2 meeting. A proper denial includes the following:

1. All Relevant Facts
2. Contractual Provisions Involved
3. Detailed Reason for Denial
4. GATS Number

In some Districts / Offices Management does not provide a separate written denial, but a PS Form 2609 – and this is acceptable via their JCAM. The general consensus is a 2609 can be used as a Denial if it meets the requirements of a Denial. When Management uses a PS Form 2609, you will commonly find that they did not write the GATS number as there is no box for it, explicitly. The PS Form 2609 also does not leave ample space to fully list all relevant facts or a detailed reason for denial.

A proper denial does not simply have one sentence stating, "Article 3 Allows Management to Manage." A proper denial provides a "Detailed Reason for Denial." Anything less is a violation of our Collective Bargaining Agreement.

THE INTERVIEW(s)

The Step 2 Designee

- On what date did you provide the Union a denial on John Doe's Grievance?
- The Union received a 2609, is this the denial you are referencing?
- What are the requirements for a Denial?
- Why did you use a 2609 and not write a separate denial?
- Why was the GATS number not listed on the Denial?
- The Union submitted a five – page Step 2 as its position. How did you fit all of the Unions contentions on the 2609?

This interview should be conducted after the Step 2 Meeting, and after Managements timeframe to submit a Denial have passed. This would be included in your Additions and Corrections.

THE DOCUMENTATION

- Discipline notice
- Copy of PS Form 2609
- Supervisor's interview and/or statement

THE AGREEMENT

- National Agreement, Article 15
- JCIM, Article 15

Appropriate Remedy

The remedy is to add to your Additions / Corrections that Management failed to render a denial, and any/all arguments raised in Managements denial are improper and cannot be considered in the Grievance – Arbitration Procedure.

Additional Tips

This is a minor violation, but still a violation. Some offices take the easy way out when it comes to a denial and will only provide a 2609. On one hand, this makes strategic sense. The less Management gives the Union to rebut, the better is it for Management.

On the other hand, Management has basic requirements under Article 15 which often leaves the Union with several basic arguments. The GATS number must be handwritten or typed in somewhere on the 2609 when Management uses it for their denial. This does not mean a separate email or verbally telling you. It must be in or on the denial.

All relevant facts including both the Unions and Managements positions. If you raise a 'fact' such as Management did not solicit Overtime properly via a Statement from an employee, this relevant fact must be included. It is not enough for Management to simply write on a 2609, "The Union claims an Overtime violation." This is not a detailed list of facts by any stretch of imagination.

Management will frequently fail to include a 'detailed reason for the denial.' According to Merriam Webster, Detailed means, "marked by abundant detail or thoroughness in treating small items or parts." The denial should be very specific and address the facts/circumstances the Union raised as contentions.

This is not a violation which typically forces any reduction in Discipline. In most circumstances it can for Managements contentions, evidence, etc., raised at Step 2 to be omitted from the record, strengthening the Unions odds of success.

Chapter Fifty - One

THE ISSUE: STATEMENT OF BACK PAY MITIGATION INCLUDED IN NOTICES OF REMOVALS & NOTICES OF INDEFINITE SUSPENSIONS CRIME SITUATION

THE DEFINITION

Whenever management issues a Notice of Removal or Notice of Indefinite Suspension-Crime Situation to an employee, that disciplinary letter must include a statement informing the employee that any backpay they may be entitled to is subject to scrutiny as to what efforts the employee made in seeking work.

THE ARGUMENT

A National Level pre-arbitration agreement between the APWU and USPS requires each Notice of Removal and Notice of Indefinite Suspension-Crime situation to include the back pay notification. Should either disciplinary notice fail to include the notification, two arguments arise:

1. The disciplinary notice is fatally, procedurally defective and must be nulled.

2. Should the employee be granted back pay through a subsequent settlement or arbitration award, then that back pay is not subject to scrutiny as to whether the employee sought employment.

Argument #1

Many arbitrators may not hold that failure to include the mandatory notification renders a discharge or Indefinite Suspension-Crime Situation null and void. That does not diminish the Union's responsibility to raise and pursue the argument in our effort to provide the best possible defense and leave no argument undeveloped. Moreover, the failure by management to include the mandatory notification will only assist other Union arguments such as the degree of the supervisor's involvement and actual role in the issuance.

Argument #2

Should the arbitrator not be persuaded as to the null and void nature of the notice, the Arbitrator may very well be persuaded that failure to provide the mandatory notification directly affects the employee's back pay entitlements. Without notification, which is required, an employee cannot be held to the obligation to mitigate under Part 436 of the Employee and Labor Relations Manual. Had there been no agreement of the parties for notification, then the general rule of implied knowledge for each employee would apply. However, with the parties

agreement on inclusion, the logical conclusion is no employee who is not informed may be held responsible for failure to mitigate.

THE INTERVIEW(s)

To establish lack of knowledge and/or involvement of the issuing supervisor and the alleged higher level concurring official, we must normally conduct an interview.

However, due to the nature of this argument--the procedurally defective notice--management, if they are informed of the defect prior to Step 2, will probably rescind the defective notice and reissue a corrected one. Once we make an appeal to Step 2 in writing and include the argument in that appeal, management is severely limited in its ability to correct the defect.

A detailed analysis of the principles behind management' limitation to rescind and reissue based upon information provided by the Union as part of a Step 2 appeal is found in arbitration Case No. C90C-1C-D 94017643. In that decision, Arbitrator Loeb addressed the issue of management reissuing a defective notice through its utilization of the Union's grievance appeal to Step 2 as the investigative engine.

In this due process issue, no interview should be done prior to the Step 2 appeal and since Step 2 is our "full disclosure" step, none would be provided thereafter.

THE DOCUMENTATION

- Notice of Removal
- Notice of Indefinite Suspension

THE AGREEMENT

- National Agreement, Article 16
- JCIM, Article 16
- ELM 436
- National Arbitration H4C-NA-C 82

Appropriate Remedy

The appropriate remedy is to make the Grievant Whole and Expunge Discipline.

Additional Tips

This procedural violation requires Management fully appraises the Grievant of their responsibilities in the event they are returned to duty. It is advised to go over a Notice of Removal with a fine-toothed comb.

Chapter Fifty - Two

THE ISSUE: USPS WITNESS AS INITIATOR OF DISCIPLINE

THE DEFINITION

The Supervisor/manager who initiates a disciplinary action cannot serve as a witness against the defendant.

THE ARGUMENT

Under the Just Cause test umbrella of the required thorough and objective investigation, a management representative who is witness to an alleged act of misconduct cannot be expected to possess the necessary objectivity required by management's obligation to thoroughly and objectively investigate before the initiation of discipline. This is particularly true when the supervisor/manager is the subject, or alleged "victim" of the employee's act.

It is unreasonable to believe the "victim" could step out of that role to – with any semblance of fairness and balance – gather all the evidence and weigh that evidence in a potential disciplinary scenario and make an unbiased decision to either initiate – or not initiate – discipline.

ILLUSTRATION:

Supervisor Jones requests that Clerk Beck report to the Window area to assist customers. Clerk Beck approaches Jones and states, "Get someone junior to me. I'm not going and I'm sick of all your bull - - - - about requiring me to go do junior employees' jobs. Clerk Beck is very heated, very loud and within inches of Jones while he yells all this.

Later that day, Jones issues a 14-day suspension to Beck charging "Conduct Unbecoming a Postal Employee;" "Violation of USPS Standards of Conduct" and "Insubordination."

Obviously, Supervisor Jones – berated and humiliated on the workroom floor in front of staff and customers can now objectively investigate, consider potential mitigating factors and make an unbiased, fair and balanced decision about Beck's disciplinary fate.

NOT! Such a presumption of balance is unreasonable and unrealistic. Mr. Jones – to be in compliance with the thorough and objective Just Cause mandate – would have to turn over the investigation to another, not involved, non-witness-to-the-event management representative. That USPS representative then would be charged with gathering all the facts – through evidence – to make an informed, fair, objective and thorough investigation and ultimate decision.

THE INTERVIEW(s)

Establishing lack of objectivity is possible – and very important – utilizing the interview of the USPS management representative who is serving as both witness against the employee and as investigator, initiator and decision maker for the discipline:

The Supervisor / Initiator

- You were the subject of Mr. Beck's outburst?
- Was he insubordinate to you?
- This happened in front of other employees?
- This happened on the workroom floor?
- You felt no need to interview Beck because you saw his behavior firsthand – as the victim?
- You knew he was guilty of insubordination because you were witness to his refusal to report to the Window?
- You initiated the 14-day suspension based upon his actions and behavior?
- You conducted the Pre-disciplinary Interview?

It is reasonable to expect that a "victimized" manager/supervisor will not resist attesting to his/her involvement in the investigation and initiation of "Just" discipline. The inescapable conclusion, however, derived from the "victim's" interview, will be an almost total lack of objectivity, fairness and balance.

If the USPS representative is not the "victim" but is a witness to the event or conduct, our argument still holds. That USPS representative would properly be an element of the USPS investigation but would not properly be the investigator and initiator of discipline. Someone who was not a witness would always be the fairer, more objective and unbiased individual.

THE DOCUMENTATION

- Discipline notice
- Discipline proposal or request for discipline, if used
- Supervisor's interview and/or statement
- Grievant's statement and/or interview
- Witnesses statement and/or interview

THE AGREEMENT

- National Agreement, Article 16.
- JCIM, Article 16

Appropriate Remedy

The appropriate remedy is to Expunge discipline and make the Grievant Whole.

Additional Tips

This is a direct violation of Article 16's Just Cause protection. The JCIM states, "The investigation should be thorough and **objective.**" The Unions main contention is any investigation in which the issuing Supervisor is the alleged victim or witness, and the initiator of Discipline cannot be unbiased or objective.

This position is further supported in the Original 7 Tests of Just Cause which states, under Note 1, "At said investigation the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employee." The intention of Just Cause is clear.

This is also a violation of the core principles of Procedural Due Process which requires an Unbiased Tribunal. We can clearly and strongly argue that Management clearly is biased in this situation.

It must be noted that, on its face value, is a violation of a 'weaker' Just Cause element. While this is true, this is also an element of Procedural Due Process. While we would cite Article 16.1 as our main violation, we would argue that Management designating the initiator of Discipline being the victim is a violation of the employees Due Process rights. When you combine the arguments, it overcomes the weakening elements of Just Cause.

Management will often refuse the Unions position by quoting the Contractual Language pertaining to the Grievant's immediate Supervisor should be the initiator of Discipline. While this is true, it does not supersede the Grievant's Just Cause and Due Process rights. It must also be noted what the exact language is. The JCIM states, "It is **normally** the responsibility of the immediate supervisor to initiate disciplinary action."

Emphasis placed on normally. This would be one of the situations in which 'normally' does not apply. The nearest parallel would be an Investigation for Harassment, specifically the IMIP process. It would be improper for the accused individual to conduct the IMIP investigation. The Union would be unable to trust the findings and would need to file a Grievance.

You will commonly be able to find additional violations in the process when the alleged victim or witness is the initiator of Discipline. Management will often not collect Statements, or Interview witnesses. Management will rely exclusively on the eyewitness account. To further cement this, the witness / alleged victim will often not write a Statement and simply make accusations.

In such a case it becomes essential to argue during Managements Investigative Interview / Pre – Disciplinary Interview that the Grievant has the right to review all Statements being used against them.

Chapter Fifty - Three

THE ISSUE: LETTER OF WARNING / SUSPENSION / REMOVAL - ATTENDANCE

THE DEFINITION

All employees are expected to maintain their assigned schedule and to make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for their absences when required. Although it is not part of ELM 510's leave regulations as incorporated by Article 10, management will also cite the ELM 666.81 requirement that employees "be regular in attendance."

THE ARGUMENT

All discipline must be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause. For minor infractions, such as attendance irregularities, management has a responsibility to discuss such matters with the employee before resorting to discipline. "Regular in attendance" is a vague and uncertain term. The employee deserves to be cautioned as to the expectations of management.

Although it is now routinely accepted by arbitrators that employees may be disciplined for excessive absenteeism, even where such absences have been approved by their supervisors, and even where due to legitimate emergencies or incapacitation, such discipline still is subject to all the tests of just cause and must be progressive or corrective instead of punitive. (See succeeding chapters for discussion of many of the just cause and procedural defenses.)

In addition to these procedural and/or Just Cause defenses, examine the merits carefully. Why was the grievant absent? Is there a pattern? Is there anything in the record to suggest a problem, such as chemical or alcohol dependency, which isn't being discussed. Not only are these legitimate issues which must be raised with management, they are also legitimate issues which must be discussed with the grievant.

Many absences are legitimate and cannot be avoided. Be prepared to document our claims. Are they FMLA protected? Or should they have been, if properly documented? Perhaps the employee needs to be educated to protect himself from further discipline through appropriate documentation. While dependent care leave is also provided for in the Agreement it differs from FMLA in that it can be subject to discipline. Of course, some dependent care leave also qualifies for FMLA protection.

THE INTERVIEW(s)

The Supervisor

- How did you happen to issue this Letter of Warning to Tommy?
- Did someone suggest that it would be appropriate?

- When was the last time you discussed Tommy's attendance with him prior to issuing this LOW?
- Have you ever given Tommy an official job discussion on his attendance?
- What exactly does "just cause" mean to you?
- What does "regular in attendance" mean to you?
- How many absences would it take to "irregular in attendance?"
- When did you discuss your concept of "regular in attendance" with Tommy?
- For which of these absences that you have cited did Tommy submit medical documentation?
- Wouldn't it be more "corrective" to give Tommy another job discussion or maybe a Letter of Warning instead of suspending him for seven (7) days?
- Don't you think that losing a week's pay is rather punitive?
- What do you think that Tommy could do, given his current medical condition, to satisfy your attendance expectations?
- Have you discussed these possibilities with him?
- Do you think there may be any other problems which may be the real reasons for Tommy's unacceptable attendance? What have you done to explore those possibilities?

These are just a few of the possible questions you can pose to the supervisor in investigating an attendance discipline. Let your imagination go and explore every avenue. Additionally, never forget that your interview of the grievant may be the most important of all. Why is he missing so much work? What does he indicate is the problem? What is the real problem? What can be done about it?

Do not wait for the removal to begin to explore the real problems involved in attendance deficiency cases. Management is often reluctant to confront the employee and the employee is often satisfied to accept the suspension - thus getting more time off work rather than deal with the causes of their absenteeism. If the steward does not force the employee to confront the real problem, we'll just be back again in a short while defending the next progressive step of discipline.

THE DOCUMENTATION

- Discipline notice (and decision letter where applicable for MSPB eligible)
- All prior discipline notices cited as past elements
- Discipline proposal (if used)
- Grievant's statement
- Supervisor's interview
- PS Forms 3971
- PS Forms 3972 (current and for at least 2 prior years)
- PS Form 3956, medical unit slips
- Medical documentation
- Settlements and/or grievance files for all prior discipline
- Discussion date (supervisor's notes if possible)

- Request for information ("everything relied upon")
- Review grievant's OPF (any favorable awards/documents)
- FMLA documentation (if applicable)
- Documentation of any legitimate emergencies
- Supervisor's notes/records of investigation and day in court

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 10
- National Agreement, Article 19
- Employee & Labor Relations Manual, Parts 510, 512, & 513
- Record Control Schedule
- JCIM, Article 16

Appropriate Remedy

In the case where Discipline is Punitive and not Corrective should be Expunged and the Grievant made whole.

Additional Tips

This is a catch-all for Attendance. Several nuances exist in which you make further arguments. The strength of these arguments varies. As general rules, their should be no predetermined number of absences which triggers Discipline. Supervisors can use eRMS to set a predetermined number of absences and this is a violation.

Also thoroughly investigate Managements use of Discussions. Management cannot pass Supervisor notes. A Discussion is not just a requirement under our Contract, it also has an inferred element of Just Cause. Discussions can be used to ensure the Grievant was aware of the rules at your facility. By not having the Discussion, you have a violation under Article 16 and 19, which incorporates the Record Control Schedule.

Finally, strong protections exist when considering Managements obligations under the ELM. 511.1 requires the employee's welfare to be considered. ELM 511.21 requires Management to keep employees abreast of their leave balances, which can be a protection against AWOL for insufficient leave. 511.21 also requires leave to be administered in accordance with the F – 21.

ELM 511.42 further enforces Managements responsibilities. Such as informing employees of leave regulations, discussing attendance regulations with the employee, and maintain and review PS Form 3971 and PS Form 3972. Any failure of Management to follow the ELM should result in Discipline being expunged.

Chapter Fifty - Four

THE ISSUE: LETTER OF WARNING / SUSPENSION / REMOVAL - MISCONDUCT

THE DEFINITION

The Employee & Labor Relations Manual contains a Code of Conduct applicable to all postal employees. In addition, the Employer has any number of published or posted work rules with which the employees are expected to comply. Furthermore, certain types of misconduct, such as hitting the boss or theft are so commonly understood as being prohibited that they may result in discipline even without specific published work rules.

THE ARGUMENT

All discipline must be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause. Discipline for alleged misconduct is subject to all the tests of just cause and must be progressive or corrective instead of punitive. (See succeeding chapters for discussion of many of the just cause and procedural defenses.)

The first test is defending discipline for alleged misconduct must be: can the Employer prove that the alleged misconduct occurred? What evidence exists? What exculpatory evidence exists for our side? The very best defense still is the "I just didn't do it" defense. Interview all potential or alleged witnesses. Get statements whenever possible. Just because management already has got a statement doesn't mean you should fail to interview this witness. Maybe they forgot something or slanted their statement the way they thought management would want them to. What do they say now? Get the facts. All the facts.

In any case never fail to also examine all the elements of just cause and other procedural defenses available, as well.

THE INTERVIEW(s)

The Supervisor

- I see you issued this notice of removal to Susie TooGood. Why did you decide to do that?
- Why not a suspension or a letter of warning? Did anyone suggest that a removal may be inappropriate?
- What exactly did you understand happened?
- On what did you rely in determining that?
- Who did you interview? What other witnesses do you understand might be possible?
- What documents did you have available?
- Did you complete this discipline proposal, or did someone send it to you for your signature? What parts, if any, did you complete?

- What prior discipline record did you review before you decided to issue this discipline? Can you give me copies of each of those?
- What does just cause mean to you?
- Do you consider this discipline corrective or punitive and why?
- Who did you consult with before issuing this notice of removal?
- Wouldn't it be fair to say that once you received the Postal Inspector's Investigative Memorandum you knew that it was "expected" that Susie would be removed?
- Since you had the I.M. it really wasn't necessary to do any other investigation was it?
- Why didn't you call the employee in for a pre-disciplinary interview? Was there any explanation they could have given that could have changed the outcome?
- Are you aware of any other employees who have been charged with similar infractions?
- Isn't it true that several of them weren't removed?
- What do you understand was different in those cases?

There are any number of additional questions which the attentive steward will immediately identify as appropriate based upon the specific allegations of their case and potential issues which may be identified. Be sure to review the tests of just cause in Chapter 30 as well as the other affirmative procedural or due process defenses discussed below. Are any of them applicable in your case?

THE DOCUMENTATION

- Discipline Notice (and decision letter where applicable for MSPB eligible)
- Prior discipline notices cited as past elements
- Grievant's statement and/or interview
- Witness statements and/or interviews
- Supervisor's interview
- Posted or published work rule alleged to have been violated
- Any other applicable employee work rules
- Postal Inspector's Investigative Memorandum with all Exhibits
- All documents, records or exhibits being relied upon as evidence
- Settlements and/or grievance files for all cited past discipline
- Discipline proposal or request for discipline, if used
- Review grievant's OPF for commendations or awards
- Request for information ("everything relied upon")
- Supervisor's notes/records of investigation and day in court

THE AGREEMENT

- National Agreement, Article 16
- National Agreement, Article 19
- JCIM, Article 16

- Employee & Labor Relations Manual, Subchapter 370

Appropriate Remedy

In the case where Discipline is Punitive and not Corrective should be Expunged and the Grievant made whole.

Additional Tips

The Union has strong Mitigating Factors when it comes to ELM Subchapter 370. I often see guides like this skip the basic principles of Sound Supervisor and Performance Evaluations. The correct argument is the requirements of ELM 370 are in addition to Article 16.2's Documented Discussion.

Supervisors should have daily evaluations and feedback of their employees. Issues should not raise to the level of even a Discussion. Especially as it comes to Misconduct. Unlike Attendance, of which Management has employees complete 3971s, has Attendance Reviews, some areas have Welcome Back Packets, etc. These are all strong Mitigating Circumstances to defend against Discipline.

The argument becomes that Management failed to effectively do their job, which aggravated the situation and directed contributed to the situation the Grievant find themselves in.

If Management was only forced to follow the terms of the Contract when instructing employees, the USPS would be a discipline factory. This opinion flies in the face of Just Cause as well. If Management is going to discipline, they must ensure the employee knew the rule to a reasonable degree. This means knowing the expectations placed upon the employee.

The applicability of the ELM provisions in the 660 Sub Chapter is also relevant. For example, ELM 665.11 is commonly cited by Management. This provision comes from the CFR or Code of Federal Regulations. This is directly referenced by ELM 661.2 C. When Management raises this as a violation, the employee is being accused of disloyalty to the United States Government **and** not upholding the regulations of the USPS. It is not mutually exclusive.

It is in the members' best interest if you dissect every allegation and charge Management raises. Management will often try to find the closest provision possible to justify the decisions they make. Each USPS employee has their Procedural Due Process rights and the right to see all evidence against them.

Finally, when it comes to Misconduct, Management often will skip the steps of Progressive Discipline. The onus is on Management to prove why the offense is so egregious that skipping progression is warranted. Our position is Discipline and is never warranted and this must always be cited, even if conduct is itself egregious.

Chapter Fifty - Five

THE ISSUE: THE DOUGLAS FACTORS

THE DEFINITION

In 1981, Douglas vs. Veterans Administration, 5 M.S.P.R. 280, established that the Federal Government must consider Mitigating Circumstances when determining the appropriate penalty.

THE ARGUMENT

In the landmark case Douglas vs. Veterans Administration, it was ruled the Government Agency must consider the following factors when determining the appropriate penalty:

- The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional, technical, or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- The employee's past disciplinary record;
- The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
- Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- Consistency of the penalty with any applicable agency table of penalties;
- The notoriety of the offense or its impact upon the reputation of the agency;
- The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- Potential for the employee's rehabilitation;
- Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

President John F Kennedy's Executive Order 10988 "extend to all employees in the competitive civil service rights identical in adverse action cases to those provided preference eligibles." This is the Nexus connecting the USPS to the Douglas Factors.

Some of these elements are codified in the EL 921, on pages 33 and 34, which states:

- The nature and seriousness of the offense.
- The past record of the employee and/or other efforts to correct the employee's misconduct.
- The circumstances surrounding the particular incident.
- The past record of the employee and/or other efforts to correct the employee's misconduct.
- The circumstances surrounding the particular incident.
- The level of discipline normally issued for similar offenses under similar circumstances in the same installation.
- The employee's length of service.
- The effect of the offense on the employee's ability to perform at a satisfactory level.
- The effect of the offense on the operation of the employee's work unit; for example, whether the offense made coverage at the overtime rate necessary, whether mail was delayed, etc.

The EL – 921 also states, "Rather, certain factors should be considered in assessing discipline and disciplinary action should be tailored to the particular circumstances."

The argument is Management must consider the above circumstances prior to issuing Discipline when determining the level of Discipline. This means the level of Discipline is not exclusively about being progressive in nature.

THE INTERVIEW(s)

The Supervisor

- How did you happen to issue this Seven Day Suspension to Sarah?
- How did you determine a Seven Day Suspension should be issued?
- Are you familiar with the EL – 921?
- How long has Sarah been an employee?
- How well does Sarah work with her coworkers?
- How did the alleged violation impact Sarah's ability to perform her job?
- Has Sarah ever served as a 204B?

The above as just sample questions. The questions should be expanded based on what you know of the Grievant and their personal circumstances.

THE DOCUMENTATION

- Discipline Notice
- Grievant's statement and/or interview
- Witness statements and/or interviews
- Supervisor's interview

THE AGREEMENT

- National Agreement, Article 16
- JCIM, Article 16
- EL - 921

Appropriate Remedy

The appropriate remedy is to reduce the Discipline to the appropriate level.

Additional Tips

The best way to use Douglas Factors is to raise them as Mitigating or Aggravating Circumstances. The value of raising the Executive Order can be limited, but per the EL – 921 and Just Cause the Union can easily argue these are all factors which mitigate the severity of Discipline.

Often Stewards get 'lost' when arguing Mitigation and do not know what elements to argue. This is where the Douglas Factors as a list comes into play. It is highly recommended to contend that Management did not properly consider the Grievant's Mitigating Circumstances and include as many elements as possible. It is important to note that not all elements of the Douglas Factors are Mitigating, some are Aggravating.

Aggravating Circumstances are essentially the opposite of the Mitigation. These are factors which make what the Grievant did worse. When selecting what to argue, ensure you include only the elements which defend the Grievant.

When you interview Management, your intent is to catch Management 'slipping'. The outline above is designed to force the Supervisor to admit they did not know the appropriate Mitigating Circumstances which would have benefited the Union. This gives us a strong argument that Discipline is Punitive and not Corrective in Nature.

A secondary interview may be necessary to confirm the Grievant made Management aware of the information, such as medical information. You can also submit an RFI for Any/All Medical Documentation submitted to Management by the Grievant. Management should be aware of the Grievant's health condition if the Grievant submitted medical documentation.

Far too often our members feel that Management does not listen or care about them. That when they share things with Management it is only used against them. While this is not the strongest argument we have, and it will not force Discipline to be expunged, these arguments are pervasive.

Argue all three elements. One, Management did not properly consider the appropriate Mitigating Circumstances prior to issuing Discipline. Two, Just Cause via a complete investigation and the seriousness of the offense. And three, Corrective and not Punitive.

Chapter Fifty - Six

THE ISSUE: PAPER / WORKING SUSPENSIONS

THE DEFINITION

Article 16 of the Collective Bargaining Agreement requires all discipline is corrective in nature, and not punitive. The APWU has no language on "Paper" or "Working" Suspensions, nor should any employee be placed on a "Paper" or "Working" Suspension.

THE ARGUMENT

Management in small offices is increasingly likely to confuse the APWU and NALC Contracts in the process of issuing discipline. The NALC Contract and JCAM state in article 16:

"In the case of discipline involving suspensions of fourteen (14) days or less, the employee against whom disciplinary action is sought to be initiated shall be served with a written notice of the charges against the employee and shall be further informed that he/she will be suspended. A suspended employee will remain on duty during the term of the suspension with no loss of pay. These disciplinary actions shall, however, be considered to be of the same degree of seriousness and satisfy the same corrective steps in the pattern of progressive discipline as the time-off suspensions. Such suspensions are equivalent to time-off suspensions and may be cited as elements of past discipline in subsequent discipline in accordance with Article 16.10."

The APWU does not have such language. If Management issues a Suspension which is working, no time served, or paper, it is procedurally defective. In the APWU, the core principle of Corrective and/or Disciplinary Action is that the penalty must be corrective in nature, and not punitive. The act of being on Suspension, and facing a loss of pay, is corrective.

Any employee who receives Discipline which is paper is robbed of the fundamental protection of the Contract that before an eventual removal, the employee 'felt' lower levels of Discipline which should deter future Discipline.

THE INTERVIEW(s)

The Supervisor

- How did you happen to issue this Seven Day Suspension to Sarah?
- How did you determine a Seven Day Suspension should be issued?
- How did you decide Sarah would have a no – time served Suspension?
- Are you aware that the APWU does not have no – time served / paper / working Suspension in its Contract?
- If you were aware, would you have issued this Suspension as a no – time served Suspension?

The above as questions work to establish the Supervisor was unaware of the Contractual differences and possibly confirm a willful disregard of the Contract.

THE DOCUMENTATION

- Discipline Notice
- Grievant's statement and/or interview
- Witness statements and/or interviews
- Supervisor's interview

THE AGREEMENT

- National Agreement, Article 16
- JCIM, Article 16
- EL - 921

Appropriate Remedy

The appropriate remedy is to expunge the procedurally defective Discipline.

Additional Tips

This violation is typically only seen in facilities in which Management has Letter Carriers / NALC employees. It is my suspicion that if PMG Dejoy's consolidation is successful, we will see an increase in this form of violation by Management due to an increase in Supervisors who primarily deal with Carriers.

You should not cite the NALC Contract in your Grievance unless necessary. The NALC has no Contractual barring on the APWU. What is important is that you are aware of where this violation comes from to effectively interview Management. The concept of willful disregard is acting in a deliberate manner with conscious indifference to our Collective Bargaining Agreement. This is an egregious error. This sort of violation, in layman's terms, is when Management willingly ignores the Contract.

Such a violation is one of the greatest errors Management can make, and we must treat this violation as such. When Management issues Discipline this way, they are telling you and the employee, "We don't care what the APWU Contract says, we are going to do as we see fit." This must be emphasized in your Grievance, this violation is not only a procedural defect, but is also a disregard for the APWU as the Bargaining Unit Representatives of Clerks, Maintenance, MVS, Etc.

You can absolutely incorporate Contractual provisions on Union Recognition in your Grievance. What is more important is that you argue Management had no regard for the APWU when it issued Discipline or the Grievant's Contractual Rights. You are also increasingly likely to find other violations in the Discipline in areas where the NALC and APWU differ, such as unadjudicated Discipline.

Chapter Fifty - Seven

THE ISSUE: INNAPPROPRIATE / HARMFUL ARGUMENTS

THE DEFINITION

Stewards, Officers, and Business Agents who handle Step 2, Step 3, or the Arbitration of Grievances commonly find arguments made at a lower level which are harmful to the APWU / Craft / Employee.

THE CIRCUMSTANCES

A pervasive issue is when new Stewards, or Stewards who do not have the experience / training make arguments in the Grievance – Arbitration procedure which are ultimately harmful to the employee, the craft, or the APWU. These arguments are commonly made when a Steward believes they have a unique angle, or argument. This reasoning is not exclusive, as some Stewards simply believe they know better than others.

Such arguments can be seen in this guide. The Chapter on Unadjudicated Discipline references the NALC's Contract in Additional Tips. The NALC's binding settlement establishes that an Arbitrator can wait until the lower-level discipline is adjudicated to then meet and rule on the higher-level Discipline. This clearly defined in the NALC JCAM. The NALC JCAM also states that an Arbitrator may not consider Unadjudicated Discipline cited in a disciplinary notice when determining the propriety of the current disciplinary action. The language is stronger, and different, than the language we have.

A Steward could argue that the APWU has Arbitration panels that give priority to long Suspensions and Removals, and due to this Management must rule on the higher-level Discipline regardless of the outcome of the lower-level Discipline. Such a Steward may believe they have a new, precedent making argument. A 'gotcha' which forces Management to settle the long Suspension or Removal favorably. This issue is an experienced advocate will know if we raise that argument, we could simply receive a continuance like the NALC has received in the language from Arbitrator Snow.

The correct way to argue this violation is to focus on discipline not served is not corrective in nature, and to raise Procedural Due Process violations in the Investigative / Pre – Disciplinary Interview(s). Herein lies the issue, when the Steward who handled the Step 1 or Step 2 did not include the basic argument or made an argument which conflicts with the basic argument we normally make.

The defense against 'out of the box' arguments is the intent of the guide. At Step 2 we must fully disclose our arguments and contentions. A Steward handling the Step 1 or Step 2 can only make unique or new arguments if they first raise the core, standard arguments. These unique arguments also cannot conflict with Contractual Language or the common arguments we make.

THE CONVERSATION(s)

The Step 1 / Step 2 Steward

The Steward who handles the Step 1 should be advised to make the core, basic Contractual arguments to sustain the Grievance. The Step 1 Steward should be advised not to raise too many unique or diverse arguments as it provides Management time to prepare counter arguments at Step 2.

The Steward who handles the Step 2 must be advised to raise the basic arguments first, and any additional arguments must be consistent with the Contract and traditional arguments.

If a Steward fails to comply it is advised to start decertification procedures in your Local.

Appropriate Action

The appropriate action depends on the step where the error is caught. It is highly recommended that for newer Stewards, a senior Steward or Officer reviews their cases.

If the error is caught after the Step 2 appeal is submitted, but before the Step 2 Decision is rendered, the Steward or Officer should submit the **APWU's Additional Facts, Evidence and/or Contentions Form to Management at the Step 2 Meeting**. You can effectively raise a new argument in this manner and this form can easily correct a deficiency by a Steward made at a lower level.

If the error is caught after the Step 2 Decision, you must utilize the Unions Additions and Corrections. The language can vary, but I have seen and used, "The Union must reaffirm its standing argument against Managements action, as discussed at Step 2, which is…" A caveat is the Additions and Corrections should serve to correct Managements decision letter If it is incomplete, or inaccurate. The optimal time to raise the additional argument is before Management renders their decision.

Several Stewards will try to raise new argument in the Additions / Corrections, or in a Step 3 appeal. This is only as valuable as Management allows. Some regions have Labor Relations representatives who strongly argue against this, others ignore the violation. The best advice is to raise the argument as early as possible even when a Steward makes a mistake earlier in the process.

Additional Tips

This chapter is not a violation on Managements behalf but the Unions. I place emphasis on using the appropriate form to introduce new Contentions during Step 2 if a lower-level Steward failed to raise all the arguments. When you do not, Management has an effective defense that they did not have the opportunity to respond at Step 2.

If you are a Steward who handles the lower levels of the Grievance procedure, take note. You must raise the appropriate argument at the lower level and request the correct remedy. Raising the wrong argument, or remedy can result in losing the Grievance.

Chapter Fifty - Eight

THE ISSUE: EVIDENCE GATHERED AFTER ISSUANCE

THE DEFINITION

Management can only use the information available at the time of the issuance of discipline when justifying issuing discipline. Information gathered after the issuance of Discipline cannot be used to justify disciplinary action.

THE ARGUMENT

Arbitrators have long taken the position that Managements action "must stand or fall upon the reason given at the time of discharge." This adage is seen as early as 1947 in the Arbitration *West Va. Pulp & Paper Co.,* 10 Lab. Arb. 117, 118. This position is parroted in famed Arbitration Textbooks such as Fairweather's "Practice and Procedure in Labor Arbitration" and Elkouri & E. Elkouri, "How Arbitration Works." This position is consistent with APWU Arbitrators such as Arbitrator Fletcher who stated:

> "The notice or removal is what is before the Arbitrator. Under well-established tenets of just cause our review is limited to the evidence on the elements of alleged misconduct dealt with in the notice or removal. We are not privileged to consider matters that are not dealt with in the removal notice as they are not evidence pertaining to the specific allegations triggering removal. We are not privileged to consider elements of alleged misconduct occurring before the removal notice was issued if they are not relied on in the notice. Also, we are not privileged to consider alleged elements of misconduct that occurred after the removal notice was issued, as they are not evidence pertaining to the allegations relied on for removal. While the notice of removal is not akin to a criminal bill of indictment, it nonetheless is all that a charged employee is required to answer. Attempting to prove misconduct with allegations going beyond that what is contained in the notice or removal is a breach of due process."

The core of this violation is one of Procedural Due Process. Procedural Due Process is discussed in Chapter Thirty – One. It is wholly improper to rely on evidence the employee did not have the opportunity to review or respond to prior to the issuance of Discipline.

THE INTERVIEW(s)

The Supervisor

- What evidence did you show the Bill Manahoff during the investigation interview? 3971's, 3972, etc.?
- What information did you rely upon when issuing Discipline to Bill Manahoff?
- What is the last absence you discussed with Bill Manahoff?
- Did you continue your investigation after issuing Discipline to Bill Manahoff?

- What evidence have you uncovered?
- Have you considered this information when negotiating with the Union?

Some of the above questions fit prior to the Step 1 meeting, while others fit after the Step 1 meeting. Prior to Step 1, the intent of the interview is to simply confirm and lock in what information the Grievant could respond to. After Step 1, the intent is to also confirm if the new information was considered by Management.

THE DOCUMENTATION

- Discipline Notice
- Grievant's statement and/or interview
- Witness statements and/or interviews
- Supervisor's interview
- Any / All Evidence gather after discipline was issued

THE AGREEMENT

- National Agreement, Article 16
- JCIM, Article 16

Appropriate Remedy

The appropriate remedy is to expunge the Discipline.

Additional Tips

The heart of this violation is the fact that the Grievance – Arbitration procedure is a review of Managements actions when evaluating Disciplinary cases. The famed Arbitrator Daugherty, who created the 7 Tests of Just Cause, put it best:

> "It should be understood that, under the statement of issue as to whether an employer had just cause for discipline ... it is the employer and not the disciplined employee who is "on trial" before the arbitrator. The arbitrator's hearing is an appeals proceeding designed to learn . . . whether the employer, as sort of trial court, had conducted, before making his decision, a full and fair inquiry into the employee's alleged "crime"; whether from the inquiry said trial court had obtained substantial evidence of the employee's guilt .... In short, an arbitrator "tries" the employer to discover whether the latter's own "trial" and treatment of the employee was proper. The arbitrator rarely has the means for conducting, at a time long after the alleged offense was committed, a brand-new trial of the employee."

It is improper for Management to claim that information they gathered after the fact is why they issued Discipline. Furthermore, we have a strong Procedural Due Process argument that Management used information the Grievant had no opportunity to respond to.

Chapter Fifty - Nine

THE ISSUE: RELIANCE ON SECONDHAND INFORMATION

THE DEFINITION

The issuing Supervisor must conduct their own investigation and cannot rely upon the investigation of a third party (Such as the Postal Inspectors). Additionally, only information directly seen or witnessed should be relied upon by Management.

THE ARGUMENT

Management cannot rely upon the investigation of a third party, or evidence inferred from a third party. This extends to the Postal Inspectors, the Office of Inspector General, and any other law enforcement agency. Management will commonly rely upon the Investigation Memorandum of the Postal Inspectors to justify discipline. This is improper as Just Cause requires the decision maker to conduct their own investigation, and Arbitrators have universally agreed Management cannot rely upon the investigation of the Postal Inspectors.

In addition, Management cannot rely upon hearsay evidence as the basis of Discipline. Hearsay is, according to Cornell Law School, "an out-of-court statement offered to prove the truth of whatever it asserts, which is then offered in evidence to prove the truth of the matter." Hearsay would be any statement made outside the Arbitration, which a witness called offers to establish truth based on the word of an individual not present. For example, if Management claims the Grievant was witnessed drinking at the bar, and states, "My Coworker, Supervisor Susan Smith, witnessed the Grievant at the H Street Bar on April 29th."

The issue is that the credibility of the statement cannot be determined, and the Union cannot cross-examine the actual witness. The hearsay rule extends to a recount of events, or a summary of events by any third party. For example, if Management introduces a statement by an alleged witness but the witness is not present, this is a hearsay.

The Postal Inspectors, and Management through Hearsay evidence, typically attempt to influence the process with emphasis on specific points, the exclusion of relevant information, bold lettering, underlying, etc. This is an undue influence on the Grievance Arbitration Process.

Finally, the Grievant has the Procedural Due Process right to respond to, and review, the evidence against them at the Investigative Interview / Pre – Disciplinary Interview. If properly raised, if the employee cannot respond to the actual evidence in the Interview, it is a clear violation of Due Process. Management cannot use hearsay evidence to entrap the employee into admitting guilt.

THE INTERVIEW(s)

The Supervisor

- Did you rely upon the Statement or Recollection of a Third-Party / the USPIS Investigative Memorandum as part of your investigation prior to initiating discipline?
- Did you rely upon the Statement or Recollection of a Third-Party / the USPIS Investigative Memorandum as a proper investigation into the Grievant's conduct prior to initiating the discipline?
- Was the Statement or Recollection of a Third-Party / the USPIS Investigative Memorandum an accurate reflection of the Third-Party Witness / USPIS Investigation into the Grievant's conduct?
- Was the Statement or Recollection of a Third-Party / the USPIS Investigative Memorandum a fair and thorough report of the Third-Party Witness / USPIS Investigation into the Grievant's conduct?
- Did the narrative of the Statement or Recollection of a Third-Party / the USPIS Investigative Memorandum accurately report the sworn witnesses' statements included within the Third-Party Witness / USPIS Investigation?
- Did the Statement or Recollection of a Third-Party / the USPIS Investigative Memorandum omit any facts the Third-Party Witness / USPIS Investigation uncovered in its investigation of the Grievant?
- Did the Statement or Recollection of a Third-Party / the USPIS Investigative Memorandum alter any facts the Third-Party Witness / USPIS Investigation uncovered in its / their investigation of the Grievant?
- Did you review the facts contained within the Statement or Recollection of a Third-Party / the USPIS Investigative Memorandum?
- Did you review the documents contained or mentioned within the Statement or Recollection of a Third-Party / the USPIS Investigative Memorandum?

The above questions work to establish the issuing Supervisors review of the Third-Parties information. Evidence or information contained within Managements investigation can be hearsay, not factual, or tainted to justify their conclusion.

THE DOCUMENTATION

- Discipline Notice
- Grievant's statement and/or interview
- Witness statements and/or interviews
- Supervisor's interview
- Statement or transcript of third-party
- USPIS Memorandum

THE AGREEMENT

- National Agreement, Article 16

- JCIM, Article 16
- EL – 921
- CBR Defending Against Inspection Service and OIG Investigations

Appropriate Remedy

The appropriate remedy is to expunge the procedurally defective Discipline.

Additional Tips

This is a clear violation of Just Cause, was a complete and thorough investigation completed as referenced in Article 16 and the EL – 921. The USPIS will often capitalize, underline and bold information they wish to emphasize. The investigative memorandum will often draw conclusions which are not based on the facts.

The Investigative Memorandum will commonly state evidence does not exist to press charges or issue a ticket. This does not mean the employee is not guilty, but the evidentiary standard was not met for a formal court proceeding. In this situation, the USPIS will often present the information as favorably for local Management to take Disciplinary Action. In addition to this, Management will often rely on the mere fact an employee was arrested or charged with a crime to justify its position.

A real example from an Arbitration I was the TA in. Management referencing the USPIS Investigative Memorandum, specifically hearsay information. Management assumed the employee committed a crime while outside, and claimed a video existed from a dashcam and surveillance video but were unable to produce the footage. Management did have some still images from a camera which showed nothing.

In the Arbitration Management claimed that the video showed the employee going around a vehicle where the crime happened, and then claimed the footage showed a window being broken. Management did not attempt to prove the employee was guilty in its testimony, but strongly implied that the imaginary video 'proved' the employee was at the scene of the crime, no one else was around, and at the same time the window was broken. Management did this so the Arbitrator could draw the desired conclusion.

The issue here is clear. While the USPIS Investigative Memorandum framed the employee as guilty and was firm that no other possibility existed; and Management claimed they had video proof, no one could provide this proof. This alleged video is hearsay evidence. It was improper to cite, improper to reference, and improper to justify Disciplinary action on.

In this case, Management also introduced the alleged 'word' of other employees who expressed being uncomfortable or threatened by the employee. Management could not provide names. The Union countered this argument by stating not engaging in a discussion but raising an objection made earlier in the Grievance Procedure – a request for information which the Union explicitly requested the video.

If the Union engaged and discussed the hearsay evidence, it validates it. The best approach was to claim the evidence simply did not exist at the time of issuance and was

fabricated. The Union also took this position for the hearsay statements of other employees who did not want to be identified.

While my example is extreme, it is a real example. This example pushes both common elements of the reliance on secondhand information. This is not how Management commonly acts with such a blatant violation. Management will commonly raise hearsay evidence in their Investigative Interview.

For example, this hearsay evidence can common be a question such as, "Isn't it true you were at the bar on Tuesday?" At face value, this may not hurt the employee. Once the employee says yes, Management follows up with, "Are you aware being at the bar, while on the clock, is an offense which warrants termination?" This implies guilt.

The issue is the first question is exclusively based on hearsay. The Union should immediately object and ask the review the Statement which claims the employee was at the bar. Or object to the second question as leading. When the Union does not act, the hearsay becomes irrelevant as the employee validated the information.

Chapter 31 is abundantly clear on the Unions need to be extremely active in an Investigative Interview. I recommend attending my training or contacting me to hold my training called I N T E R V I E W for your local to fully grasp what rights and responsibilities we have. Hearsay evidence can easily be codified by the employee in the Grievance Procedure.

At Arbitration, whenever Management attempts to rely upon hearsay evidence the NBA will object or deal with it as appropriate, per my example. But when the employee confirms the information in the Investigative Interview, the information no longer needs to be relied upon – Management can use the employees answers to do so.

This reliance on secondhand information is often prevalent when Management relies on an Investigative Memorandum. Management will often cite the conclusions of the USPIS as factual, when those conclusions are often typically based entirely on hearsay. The violation is not just that Management relied on the Investigation of a third-party, but that Management also has not proven to a preponderance of evidence the employee is guilty. Management has drawn conclusions which are not factual.

The proper way to combat the use of secondhand information is to object in the Investigative Interview, question the evidence in Managements interview, use a Request for Information to confirm the nature of the evidence, and raise the following contentions:

1. Article 16's Just Cause was violated as a complete investigation was not conducted, and the Supervisor relied on the word or investigation of a third party.
2. Discipline is punitive, as Management has produced evidence to prove the employee's guilt.
3. Procedural Due Process was violated as Management failed to allow the employee to respond to the evidence against them prior to issuing Discipline.
4. The employee is innocent – Management has not proven to the preponderance of evidence the employee is guilty.

Chapter Sixty

THE ISSUE: EAP ATTENDANCE

THE DEFINITION

An employee who voluntarily attends EAP (Employee Assistance Program) should be given positive consideration in the issuance of discipline as, at minimum, Mitigation.

THE ARGUMENT

An employee who attends EAP, especially voluntarily, should receive positive consideration and mitigation in the consideration to, or issuance of Discipline. Disciplinary Action must be corrective in nature, and if an employee is experiencing a problem in their personal life outside of their control Discipline is not corrective in nature. This position is supported by the ELM. ELM 941.32 states:

> **Limits to Protection**
>
> Although an employee's voluntary participation in EAP counseling should be given favorable consideration in disciplinary action, participation in EAP does not limit management's right to proceed with any contemplated disciplinary action for failure to meet acceptable standards of work performance, attendance, or conduct. Participation in EAP does not shield an employee from discipline or from prosecution for criminal activities.

This position is confirmed by the USPS's Law Department. The USPS Law Department's Training for Supervisors: Discipline for Misconduct states on page C-3:

> "Where the employee maintains he or she cannot correct the problem because of physical or personal problems, consider other options, such as a referral to EAP or fitness for duty."

The above quote is missing context. The context is this quote is from the USPS Law Department's "Rules" section. The USPS does not dispute this position. If an employee has a situation in which they cannot correct or fix, Discipline should not be issued at best and at worst the attendance to EAP must be given positive consideration.

This argument is more pervasive when the employee proactively attends EAP prior to any corrective and/or Disciplinary Action is taken. For example, an employee receives a Notice of Removal for Attendance. 30 Days prior to the Investigative Interview, the employee began voluntary attendance to EAP for a Drug / Alcohol Addiction. While the employees Attendance record may not have improved yet, the employee is already correcting the root cause of their absences – their Addiction. In this case, the APWU's position should be the Discipline is Punitive, and the Discipline must be expunged.

THE INTERVIEW(s)

The Supervisor

- Were you aware the Grievant began attending EAP on August 1st?
- Were you aware the Grievant had an addiction to drugs/alcohol which was the cause of their absences?
- Isn't it true that during the Grievant's Investigative Interview for their 14 Day Suspension the Grievant mentioned having an addiction?
- Isn't it true the Grievant informed you they were attending EAP when they requested leave via a 3971 to visit EAP?
- Did you consider the Grievant's EAP attendance when issuing this Notice of Removal?
- In the Notice of Removal, you did not reference the Grievant attending EAP, why is that?
- Do you consider attending EAP an administratively acceptable reason for absences?
- Are you aware of the subject of ELM subsection 940?
- What is the subject of ELM subsection 940?
- Are you aware ELM 941.32 states, "an employee's voluntary participation in EAP counseling should be given favorable consideration in disciplinary action?"
- Why did you decide to issue a Notice of Removal?
- Do you believe firing the Grievant can correct an addiction?
- Prior to the Grievant voluntarily attending EAP, did you refer the Grievant to EAP?
- Why didn't you refer the Grievant to EAP?
- Do you understand EAP is a negotiated benefit designed to help employees with similar issues?
- Under what circumstances would you refer an employee to EAP?

The above questions work to establish the issuing Supervisors did not consider the Grievant's attendance to EAP, nor were they aware it should be a positive consideration. This interview, if successful, proves Management failed to consider the Mitigating Circumstances and did so out of ignorance.

THE DOCUMENTATION

- Discipline Notice
- Grievant's statement and/or interview
- Witness statements and/or interviews
- Supervisor's interview
- Statement or note from EAP confirming attendance

THE AGREEMENT

- National Agreement, Article 16
- JCIM, Article 16
- EL – 921

Appropriate Remedy

The appropriate remedy is to expunge the procedurally defective Discipline for voluntary attendance. For a referral with attendance, the Discipline must be mitigated.

Additional Tips

The EAP argument on its surface is weak. The ELM language is not strong and allows Management to still issue Discipline as warranted. The strength of this argument is Discipline being punitive in nature. You cannot correct a substance abuse issue by firing an employee or suspending an employee. If anything, Discipline exasperates the situation.

Management will often argue that they must follow Progression. This is untrue. The JCIM states:

> The requirement that discipline be corrective rather than punitive is an essential element of the "just cause" principle. In essence, this means that for most offenses management must issue discipline in a progressive fashion. This includes issuing lesser discipline (e.g., a letter of warning) for a first offense and increasingly severe discipline for succeeding offenses (e.g., short suspension, long suspension, discharge).
>
> The basis of this principle of corrective or progressive discipline is that it is issued for the purpose of correcting or improving employee behavior and not as punishment or retribution. However, in certain instances removal may be the proper corrective action on the first offense, for example, theft, threats, etc.

The above section is often mis-quoted by all parties. Management will cite the first paragraph and argue that they must issue the next level of Discipline. This is not only untrue; the second paragraph clears this misconception up. If a lesser level of Discipline is corrective in nature, then it should be issued over Progressive Discipline.

We must also consider the Mitigation element. Arbitrators are consistent that Mitigation should be considered when analyzing the penalty. Referring to the Douglas Factors from Chapter 55, some elements clearly apply such as the employee's potential for rehabilitation. With the assistance of EAP, clearly the potential for rehabilitation exists. The is the entire purpose and intent of EAP.

One such Arbitration is APWU Arbitration Number FH31022. Not only is the potential for rehabilitation explicitly listed, so is length of service and job performance. You do not find a better source of Mitigation than an employee being able to improve and actively taking steps to improve. The analysis concludes with, "Nevertheless, there are more factors to consider in the analysis of the propriety of a disciplinary action than just the facts."

To fully maximize this argument, raise that the Discipline is Punitive, the Supervisor did not complete a fair investigation, the Supervisor intentionally ignored the Grievant's mitigation (depending on the discipline and discipline) and finally argue Mitigating Circumstances.

Chapter Sixty - One

THE ISSUE: FMLA LAPSE / INSUFFICIENT FMLA

THE DEFINITION

An employee who has exhausted their FMLA allotment is not cured of their underlying condition.

THE ARGUMENT

An employee who has exhausted their FMLA 12 – Week / 480 Hour entitlement is not suddenly cured of their condition. Management already has substantial documentation for the employees' medical condition, and as such should reasonably expect continued absences for severe conditions – which is the preemptive requirement of the FMLA entitlement.

When an employee is disciplined for absences related to FMLA, it violates the Contractual Requirement that Discipline must be corrective in nature and cannot be punitive. You cannot Discipline away a health crisis. Nor can any Discipline be corrective in nature when the underlying cause is a serious health condition. The mere fact that Management issues Discipline following the expiration or exhaustion of FMLA is punitive as a reasonable person would be aware of these basic facts.

While Management is not prohibited from issuing this Discipline, the fact the Grievant has already substantiated the condition should serve as, at the very least, Mitigation.

Additionally, Management may issue Discipline following an employee returning to work after an extended absence, such as an injured employee who was off work for months / years. The argument would be the same. Management gave the employee a job offer fully knowing that they have a preexisting health condition and would not qualify for FMLA. It is not corrective to Discipline someone for having such a health condition.

THE INTERVIEW(s)

The Supervisor

- Are you aware the Grievant has a qualifying FMLA condition?
- On what date was the Grievant's FMLA approved?
- On what date did the Grievant's FMLA expire?
- What notice did you give the Grievant that their FMLA was expiring?
- When is the last time you had an attendance review with the Grievant?
- When is the last time you had a discussion with the Grievant?
- Has the Grievant informed you they were cured of their FMLA condition?
- What would be an Administratively Acceptable reason for an employee missing work?

- On the Discipline issued, you stated the Grievant provided no Administratively Acceptable reason for their absences. Is this true?
- Do you not consider a Federally protected condition as being Administratively Acceptable?
- Are you aware the Contract requires Discipline be corrective in nature?
- Do you believe a Suspension can cure the Grievant?
- If not, why did you issue this Discipline?

The above as questions work to establish the issuing Supervisors was being completely arbitrary and capricious when issuing this Discipline. While the questioning seems like hitting the same point over and over, we must build up to getting the Supervisor to admit, or poorly deny, that they knew Discipline could not correct a health condition.

THE DOCUMENTATION

- Discipline Notice
- Grievant's statement and/or interview
- Grievant's FMLA Case Number
- Grievant's FMLA Documentation
- Supervisor's interview

THE AGREEMENT

- National Agreement, Article 16
- JCIM, Article 16

Appropriate Remedy

The appropriate remedy is to reduce the severity of the discipline based on appropriate mitigation.

Additional Tips

Management often takes the position that they are doing the employees a favor by 'allowing' them to use FMLA and will quickly ramp up Discipline once exhausted. While we cannot discredit the operational needs, the fact remains that our Contract is clear. All Discipline must be Corrective in nature.

Arbitrators have upheld that Management can still issue Discipline for violation of USPS policies, so this argument is not a get out of jail free card. It is an appropriate argument to raise and can result in expunging based on the facts/circumstances. The interview is essential in this situation as the Union must establish the clear lapse in Managements consideration and judgement.

Chapter Sixty - Two

THE ISSUE: NO SUPERVISOR STATEMENT / INTERVIEW

THE DEFINITION

When a Supervisor is the witness to an alleged offense Management must investigate the claim, normally requiring a Statement or Interview.

THE ARGUMENT

Article 16 requires a complete and thorough investigation under Just Cause. As discussed in Chapter 59, Management cannot rely on hearsay evidence. Management often fails to substantiate how they are aware of information, especially when it involves another EAS employee.

The employee has the right, in the Investigative Interview, to review the evidence against them. Management also has the responsibility to prove to the preponderance of evidence that the employee is guilty. Hearsay evidence, even if coming from a reliable source, does not allow that opportunity nor does it satisfy Managements requirements.

The argument is a clear violation of Just Cause, a failure to prove the employee is guilty of any wrongdoing, and a failure to provide Procedural Due Process.

THE INTERVIEW(s)

The Supervisor

- During the II, what evidence did you present to the Grievant to review?
- Why wasn't the Grievant presented a Statement from the Supervisor who allegedly witnessed the misconduct?
- Do you recall the Unions Request for Information?
- Line item three of the Unions Request for Information explicitly requested a copy of the witnessing Supervisors Statement or Interview, why wasn't one provided?
- Line item four of the Unions Request for Information explicitly requested anything and everything used to determine Discipline should be issued, why wasn't one provided?
- With no statement or interview, what did you base your decision upon to issue this Discipline?
- Do you believe it is fair to issue Discipline when the Grievant could not respond to the primary evidence against them?
- If the witnessing Supervisor never informed you of the alleged misconduct, would you have issued Discipline?

The above questions are designed to establish that Management failed to allow the Grievant to review the evidence against them, as well as acted unreasonably.

THE DOCUMENTATION

- Discipline Notice
- Grievant's statement and/or interview
- Request for Information
- Investigative Interview Notes (Management and Union)
- List of Documents reviewed in II

THE AGREEMENT

- National Agreement, Article 16
- JCIM, Article 16

Appropriate Remedy

The appropriate remedy is to expunge the Disciplinary Action.

Additional Tips

This section may seem repetitive, based on the similarity and reference to Chapter 59, but this is so pervasive it requires emphasis. Management often relies upon the word of their coworker or counterpart over completing any real investigation. I was in an Arbitration in which Management played telephone as to who was the source of information. Person A heard from Person B. Person B heard from Person C. Person C heard from Person A.

Even the Arbitrator was confused. While the NBA did an excellent job, the problem was the Union did not raise the contention earlier. This is a clear Procedural Due Process violation, a denial of information, and a failure to prove the employee is guilty.

When looking at a case with this violation, it is essential to attempt to review the case as if the evidence were never referenced. Management may have proved their case, but it is unlikely. This also makes it essential that the Steward who represented the employee in the II did an effective job. The employee should not answer any hearsay questions, and the employee should review the information first.

Management will commonly avoid this as a viable violation when they get a confession out of the employee in the II. This is a common reason Management will ask leading questions. The Stewards default response should be, "That is a leading question that presumes guilt. If you are asking the employee a question, they will need to review the evidence that proves this violation to effectively respond."

Let Management deny you, that is perfectly fine. If we raise this contention in the II, the argument is preserved later in the process.

Chapter Sixty - Three

THE ISSUE: NO APPEAL RIGHTS ON LOW

THE DEFINITION

A Letter of Warning must include the employees' appeal rights within the Grievance procedure.

THE ARGUMENT

Article 16.3 of the JCIM explicitly states, "A letter of warning which fails to advise the recipient that it may be appealed through the grievance procedure is procedurally deficient." This is the strongest language the Contract has on Discipline. If the Letter of Warning does not appraise the employee of their right to file a Grievance it is procedurally defective and must be expunged.

THE INTERVIEW(s)

The Supervisor

- Did you issue the Grievant's Letter of Warning?
- Were you aware the Discipline did not include the Grievant's Grievance – Arbitration rights?
- Why did you exclude the Grievant's Grievance – Arbitration rights?
- Were you aware a LOW without appeal rights is procedurally defective?

The above questions are brief and designed to just establish that the Supervisor is responsible.

THE DOCUMENTATION

- Discipline Notice
- Grievant's statement and/or interview
- Supervisor's Interview

THE AGREEMENT

- National Agreement, Article 16
- JCIM, Article 16

Appropriate Remedy

The appropriate remedy is to expunge the Disciplinary Action.

Part Three – Bonus Chapters

Discipline Remedy – Deep Dive

THE ISSUE: DETERMINING THE APPROPRIATE REMEDY – JUST CAUSE, DUE PROCESS & DISCIPLINE

THE DEFINITION

Arbitrators who rule in an Industrial Setting (Workers with Progressive Discipline and Just Cause) have precedence for how they determine if a Grievance remedy is to Reduce or Expunge Disciplinary action.

THE DISCLAIMER

This section is theoretical, based on reviews of thousands of Grievances, Case Studies, and Arbitral authority. The intent is to educate Stewards and Officers who want to know more about the appropriate remedy.

THE RESEARCH

Extensive research has been done into how Arbitrators rule. The most public is LAI, or the Labor Arbitrators Institute which releases newsletters, email blogs, and conducts seminars / Conferences. You also have the National Academy of Arbitrators who has published books reviewing the very concept of how Arbitrators Arbitrate, and the remedies they give. Notably the NAA has an excellent book, The Common Law of the Workplace.

While in the APWU our 'appropriate remedy' is to nearly always argue Discipline should be expunged, this is not necessarily the reality of the positions Arbitrators take. Many Arbitration Guides do not cite specific references, and when they do, they are limited. This gives Union Advocates who do not have access to a wide birth of Arbitrations a limited view into how Arbitrators think. The purpose of this 'Bonus Section' is to compile about five years of research into a simple chapter that fully explores how Arbitrators decide on Disciplinary cases.

The 7 Tests of Just Cause

We famously look at Just Cause as the strongest litmus for our remedies. Under Daugherty's 7 Tests, the appropriate remedy to any 'no' answer is to overturn the Discipline and make the Grievant Whole. The issue is, not even Daugherty believed this in all cases. For example, in his 1964 Decision in Grief Bros. Cooperage Corp., 42 LA 555, he determined that the decision of the corporation did not meet the Tests of Just Cause, but the remedy was to reinstate the employee without backpay, meaning the employee effectively had a four-month Suspension.

To review and apply Just Cause, we must look at the environment the tests came from. The opinion of Arbitrators, in the 'Common Law' established by Arbitrators, is that Arbitrators review the actions of Management, and in the fact the Grievant may or may not be guilty if often

inconsequential. The problem is this approach flies in the face of arguments of innocence, of Appropriateness, etc. Daugherty put it best when he said:

> "It should be understood that, under the statement of issue as to whether an employer had just cause for discipline ... it is the employer and not the disciplined employee who is "on trial" before the arbitrator. The arbitrator's hearing is an appeals proceeding designed to learn . . . whether the employer, as sort of trial court, had conducted, before making his decision, a full and fair inquiry into the employee's alleged "crime"; whether from the inquiry said trial court had obtained substantial evidence of the employee's guilt .... In short, an arbitrator "tries" the employer to discover whether the latter's own "trial" and treatment of the employee was proper. The arbitrator rarely has the means for conducting, at a time long after the alleged offense was committed, a brand-new trial of the employee."

In fact, Daugherty himself did not insist on reviewing witnesses in his Arbitrations. Whereas APWU Arbitrations today focus on Witnesses and Cross Examination. The world of Arbitration was different in the 1960's and 1970's. Concepts such as "Aggravating Circumstances" we not considered to the degree they were today. Even the concept of Due Process has changed dramatically.

Many of our 'landmark' Due Process cases came after Daugherty was an active Arbitrator. The standards of Procedural Due Process, in this guide, were not even thought of. Daugherty was trying to place the burden of Procedural Due Process on all workers with a Collective Bargaining Agreement.

The Labor Arbitration Institute admits some elements of Just Cause have grown stronger, while others weaker. The truth of the matter is, while many Arbitrators say they follow the 7 Tests of Just Cause, put Just Cause in their opinions, and tout Just Cause as a main factor in their decision making, this is not the reality.

Many Arbitration Textbooks were written by USPS – APWU Arbitrators. Such as Richard 'Dick' Mittenthal. Our Grievances are ruled by the best and most respected Arbitrators. These very same textbooks argue a standard among arbitrators that is not reality. If you dig deeper at their opinions, at Arbitral case studies and the cases reviewed, you will find a variety of opinions. The problem of Just Cause as a defense is Just Cause cannot be defined, and the definition we have has varying value.

A trend of recent, prominent research done in Universities on Arbitration, and related publications, is to quote Arbitrators who have worked for the APWU and USPS such as Das. The books written on Arbitration have been reviewed by APWU and USPS Arbitrators such as Mittenthal. So, while our highest levels of Arbitration make claims which they themselves do not want to get pinned down to. This mentality is exactly why we get wildly different results when we appeal Grievances to Arbitration. Arbitrators are fickle individuals.

Other Just Cause Standards

Other theories of Just Cause exist. And some vocal dissenting opinions exist, such as John E. Dunsford, former President of the National Academy of Arbitrators, who opinioned

against Daugherty's position and challenged the uneven application. This differing opinion of Just Cause has defined the alternative to the 7 Tests were typically reference, as defined by Professors Abrams and Nolan which includes:

> "…both management and employees have agreed that wages and benefits will be paid in exchange for "satisfactory" work. Work is "satisfactory" if it meets 'Four elements: (1) regular attendance, (2) obedience to reasonable work rules, (3) a reasonable quantity and quality of work, and (4) avoidance of any conduct that would interfere with the employer's ability to operate the business successfully.' … Arbitrators assess the appropriateness of discipline by this fundamental understanding between the parties, and by considering the legitimate underlying interests of both management and union. For 'just cause' to exist, the discipline must further at least one of three management interests: 1. Rehabilitation of a potentially satisfactory employee. 2. Deterrence of similar conduct, either by the disciplined employee or by other employees. 3. Protection of the employer's ability to operate the business successfully."

Once the above is met, then the employers' interests are compared to the Unions. What this boils down to, again, is trying to impose 'Industrial' or 'Procedural' Due Process upon employers, Unions and employees. The underlying premise is still what is fair to all parties, with a caveat that the severity and level of Discipline must be considered.

What to Take Away

Our situation is different as we have Just Cause in our JCIM, at least in a form. Even so, this does not mean all Arbitrators will rule using Just Cause as they should. We are very fortunate our JCIM defines Just Cause as this does nail Arbitrators down to a degree. If they do follow the JCIM, it does not mean the recommended remedy will be granted. Generalizing, it is superior to have multiple very strong Just Cause violations and to argue the underlying premise of fairness.

We complain often that our Discipline Grievances do not get ruled on as they should. Arbitrators vary so wildly that you cannot rely on them to enforce Just Cause appropriately. The fact is Arbitrators can rule how they want. What Arbitrators frequently state is they want a degree of procedural fairness regardless of Just Cause.

Arbitrators are more and more often trying to apply Procedural Due Process as a standard to all Grievances under the guise of Just Cause. This premise is one shared by Daugherty. Arbitrators also are increasingly 'slippery' to avoid giving a firm standard. This forces us to use our best judgement.

The conclusion is simple, while most Arbitrators may fully believe in Just Cause, their actions do not always line up. We MUST quote the JCIM as it is a binding document. The Arbitrator MUST consider the JCIM as terms all parties have agreed with.

As the front-line Steward, who handles Step 1s or Step 2s, it can be advantageous to settle a Grievance for a desirable or 'good' remedy over waiting for a perfect remedy. Before we explore how we should settle, we must take a more modern look at Just Cause and Due Process.

Modern Analysis

One of the first steps off the path of common APWU knowledge is the Robert M. Schwartz series of books. Other Unions use his work as a basis of training material. His book, "Just Cause: A Union Guide to Winning Discipline Cases," looks at what modern Just Case means. It is very close to what I have found. This could be conformation bias, but I believe our Grievances should closer emulate Schwartz over Daugherty. Especially when Schwartz has decades of post – Daughterty research to stand upon.

On page 16 of his book, Schwartz states:

> *Among its accepted requirements: employers must publicize rules, enforce them consistently, follow due process, treat employees alike, act on substantial and credible evidence, apply graduated penalties, and consider mitigating and extenuating circumstances.*

His book then boils down these concepts and states: "A review of more than 15,000 awards reveals wide agreement on the following basic principles:

1. Prior Notice
2. Recent Enforcement
3. Due Process
4. Substantial Evidence
5. Equal Treatment
6. Progressive Discipline
7. Mitigating, Extenuating, and Aggravating Circumstances"

Unfortunately, this modern research also has its flaws. Number four, Substantial Evidence, disagrees with the modern standard LAI and I have found, where the evidentiary standard is 'preponderance of evidence' and not 'beyond a reasonable doubt'. If a Reasonable Person believes the evidence confirms guilt, and the evidence meets evidentiary standards, that is enough.

Still, despite this glaring inconsistency, Schwartz' analysis is accurate. Schwartz only looks at Just Cause, which is in a vacuum. But it is accepted that Just Cause does include Procedural Due Process, requires prior notice, requires fair and recent enforcement, requires the discipline to be corrective and/or progressive, and mitigation must be considered.

A Handbook for Grievance Arbitration

While the vast majority of Arbitration Textbooks tend to be 'slippery' the 1992 "A Handbook for Grievance Arbitration" by Arnold M. Zack is possibly the one exception. On page 172, Zack states:

> "The two types of cases may resent comparable threshold questions about arbitrability and about whether the contractual procedures and parties' practices have been adhered to in processing the case to arbitration, but if the case is to be resolved on the merits two distinctive sequential procedures apply.

> The first is to determine whether or not there are even grounds for discipline. In receiving the evidence presented by the parties, the arbitrator must determine whether the behavior complained of was prohibited, whether the employee was aware of the prohibition, and then the crucial question of whether the grievant did commit the offense. It is incumbent upon the parties to provide the requisite evidence of company rules, testimony about the posting or delivery of such rules and the grievant's actual or constructive notice of the rules, and evidence about whether the grievant acted as charged. The latter evidence may be admitted by the grievant or may come from testimony of witnesses so that the arbitrator must weigh some of the standards set forth previously for determining credibility.
>
> Once the arbitrator has followed this procedure for determining whether or not there was just cause of any discipline, the subsequent procedure takes one of two tacks. If the arbitrator finds that the discipline was unjustified, or not for just cause, the arbitrator will order the employee to be returned to work with full reimbursement of losses suffered. But if the arbitrator finds that discipline was justified, the arbitrator must reexamine the parties' presentations to secure the evidence needed to impose the proper penalty for the infraction. Among the evidence that that parties should have provided for the arbitrator to make the determination are the standards of progressive discipline adhered to by the parties, the prior disciplinary penalties on the grievant's current record, the evidence of how similar situations were dealt with for employees in similar situations or with similar prior records, and any evidence about the employment or earnings of the grievant if he was suspended or terminated from employment.
>
> Once an appropriate penalty is determined, the arbitrator has to handle the issue of remedy if the option is to reduce the penalty imposed on the grievant. If the employer has imposed an excessive penalty short of discharge, then it is relatively simple for the arbitrator to reduce the penalty to one deemed more appropriate and to make the employee whole for the difference, whether it be three weeks' back pay when reducing a four-week suspension to one week, or three days' back pay when reducing a three-day suspension to a letter of warning. Making the employee whole for lost earnings would not only create entitlement to the back pay, but should also entitle the grievant to reimbursement of that portion of overtime he or she would have earned before the removal."

Zack then goes into nuances such as if an employee was fired prior to the Grievance being heard and opinions on a windfall if a Suspension of 14-days was overturned for a now terminated employee. While the book is an excellent guide, some analysis does not apply to us or we have modern arguments of progression with substantial precedence. The takeaway from the remainder of Zack's analysis is to trust how the APWU commonly handles Grievances – this is the reason we raise an argument of skipping progression so strongly.

The second paragraph can be boiled down to an Arbitrator must first confirm the employee was guilty of the offense and knew the rule. Not just that the rule was posted, or the Grievant should have known. This is consistent with all current advice. Many Stewards fail to hold Managements feet to the fire when it comes to notice and the Grievant knew. We should

not only ensure that the Grievant appears guilty, but also that service talks, discussions, and on the job performance reviews occurred. Zack summarizes this as "Just Cause."

The third paragraph can be summarized simply. Once Just Cause is established, which includes guilt, the Arbitrator reviews the penalty. The Arbitrator reviews the decision Management made to determine if they reach the same conclusion. This means reviewing the cases put on by both parties, reviewing if Discipline is progressive, review prior Discipline, and review similar cases. This paragraph analyzes if Management was justified, if the penalty imposed justified.

The fourth paragraph summarizes that once the Arbitrator decides what the penalty should be, the Arbitrator then modifies the penalty imposed to determine what the penalty should have been.

Case Studies and Analysis

Mentioned several times in this Guide, I have reviewed thousands of Arbitrations and hundreds (if not thousands) of Grievances. The issue is I have an APWU bias. In addition to my own analysis, I reviewed dozens of Case Studies made by Universities, Researchers and Experts in addition to reviewing their sources to draw conclusions. This section will focus on the following Case Studies and Analysis:

1. A study of reversal determinants in discipline and discharge arbitration awards: The impact of just cause standards (1996 Article – George Bohlander & Donna Blancero; 18 Pages)
2. COMMON REMEDY ISSUES IN FEDERAL SECTOR ARBITRATION (2007 Report for the Society of Federal Labor and Employee Relations Professionals – Arbitrator Elliot Shaller; 23 Pages)
3. The Impact of A Grievant's Offer of Apology and the Decision-Making Process of Labor Arbitrators: A Case Analysis (2012 Analysis - Daniel J. Kaspar and Lamont E. Stallworth; 60 Pages)

Several other case studies were reviewed for this section, but these three have more of a direct impact on the conclusions drawn and address different angles. Bohlander & Blancero found that five factors were the most significant when Arbitrators rules:

1. Supporting Evidence
2. Mitigating Circumstances
3. Disparate Treatment
4. Unequal Treatment
5. Procedural Errors

According to their analysis, procedural errors were the strongest violations found. They found the following elements were referenced by Arbitrators in their decision-making process:

1. Evidence did not support charge of wrongdoing
2. Charge supported, however, there were mitigating circumstances
3. Arbitrary, capricious, or discriminatory discipline or disparate treatment

4. Management committed procedural errors prejudicing the grievant's rights.
5. Inappropriate administration of rules
6. Management contributed to employee misconduct
7. Grievant provided a last chance to improve performance
8. Employees' off-duty misconduct not related to organizational performance

This list is in order of most common violations and the duo defines these as elements of Just Cause. This analysis should then be put into terms we use in this (and other) guides. Number one simply means Management did not meet the preponderance of evidence. It was more believable, or Management did not prove to a more likely than not degree that the Grievant was guilty.

This can take many forms. For our purposes, the conclusion should be that Management must prove that the employee is more likely guilty than not with credible evidence. The credible evidence should mean no hearsay, real statements, and some sort of proof such as clear signs of intoxication or a breathalyzer test for an intoxicated employee.

Number two means Arbitrators commonly review Mitigating Circumstances in finding the conclusion of Management was improper. This is supported by the third Case Study analyzed. The third Case Study reviews the Mitigation surrounding taking ownership and apologizing. The apology is more pervasive in the process when it is impactful, so once the employee is notified that they committed the offense or is questioned. An apology has the least value in Arbitration. The same can be said of all Mitigating Circumstances – if mentioned late they sound like an excuse and the decision maker does not have an opportunity to consider them. In fact, the Case Study on Common Remedies in Federal Arbitration explicitly mentions the power of the Douglas Factors – which is why this guide suggests them as Mitigation.

Number three means Managements decision was done on a whim or was excessive considering the facts. This can mean making an example of someone, previous lax enforcement, other employees received less harsh penalties, etc. Management must be fair and equitable in the issuance of Discipline for all employees.

Number four means Management committed procedural errors, notably Procedural Due Process. This is distinct. There must be a real sense of procedural fairness in the process and all Discipline should be corrective in nature.

Number five is a misnomer. Number three also references when some employees receive different penalties. Number five focusses more on when Management has a clear rule with penalty, and they previously issued less harsh penalties. An example would be our CBA, which allows termination for intoxication. If Management routinely issued Letter of Warnings, gave Discussions, or then sent employees to EAP it would be improper to issue another person a Removal for their first offense.

Number six means Management was either aware and let it slide until someone else found out, Management participated, or someone in Management did the same thing which lead employees to believe it was acceptable. We see this when Management takes excessive breaks, Management commits the offense themselves, etc.

Number seven means Management had Just Cause to issue Discipline, met all the requirements, but a root problem existed which caused the Grievant to commit the offense. If an employee is terminated for sleeping on the job, but the cause was intoxication, an Arbitrator may reduce the removal if the employee goes to EAP or AA. This is viewed as a final chance for a good employee to perform adequately.

Number eight is the easiest. It is a Nexus. If the action of an employee had no impact on the employer or the employee's ability to do their job, the employee should be reinstated.

These eight points are directly found in rulings and are consistent with the elements I have found. Once an Arbitrator decides whether the employee is guilty or violating an appropriate rule, they then review the facts of the case. Once the facts are reviewed and if the Arbitrator draws the same conclusion, then the Arbitrator considers Mitigation, Aggravation, and Extenuating Circumstances. Overarching are potential procedural errors Management may commit.

ADDITIONAL RESOURCES

- Practice and Procedure in Labor Arbitration by Owen Fairweather
- How to Prepare and Present a Labor Arbitration Case by Charles S. Loughran
- How Arbitration Works by Elkouri
- Evidence in Arbitration by Marvin Hill
- Black's Law Dictionary by Henry Campbell Black
- Procedural Due Process: A Reference Guide to the United States Constitution by Rhonda Wasserman
- JURIS Arbitration Law Legal Information Database
- HEIN Online
- Research Gate
- Various Universities
- National Academy of Arbitrators
- Labor Arbitrator Institute
- Discipline and Discharge in Arbitration by the American Bar Association (And Supplements)
- Arbitration: Cases, Problems, and Practice by Matthew Adler
- Arbitration: Practice, Policy, and Law by Thomas Stipanowich and Amy Schmitz
- AAA Handbook on Arbitration Practice by the American Arbitration Association
- How and Why Labor Arbitrators Decide Discipline and Discharge Cases: An Empirical Examination by Theodore Antoine
- 1000's of Arbitrations (APWU, NALC, Industrial Arbitrations with Just Cause and Progressive Discipline)
- Dozens of Case Studies by Universities such as the University of Michigan
- Arbitral Discretion: The Tests of Just Cause by John E. Dunsford

DRAWING CONCLUSIONS

If you read this unnumbered chapter, you are left with one question. How do you use this information. The intent is for you to be able to use this information and draw your own conclusion when negotiating Discipline. A key premise of negotiation is BATNA – Best Alternative to a Negotiated Agreement. You should never take a deal when your alternative is better than the offer you have.

For example, if you have a Notice of Removal and you review all the relevant facts and determine the appropriate remedy should be a long Suspension, the issue becomes details. You may draw the conclusion of a long Suspension as the Grievant is guilty, but Mitigation exists. When negotiating you may want a four-week Suspension, and Management wants a six-week Suspension.

At this point you must determine what an Arbitrator would likely give you. That is your alternative. You must also consider the time it would take to be heard, the time you would spend working on the Grievance, the time the NBAs would spend arguing the case, and the thousands of dollars the Arbitration would cost.

You must also consider if an Arbitrator would grant backpay in that situation. If an Arbitrator does not grant backpay in cases like your own, and the case will not be heard for nine months, it does not matter if the Removal is reduced to a four-week Suspension on record if the employee is off work for nine months.

The wrong conclusion is to blame the process. Other Unions have far longer Grievance procedures than we do. Our fourteen- and ten-day processes are surprisingly quick. The rest is backlog. It is in the Grievant's best interest if we settle all Grievances in the most favorable way.

We must draw the correct conclusions, and those conclusions are to look at Grievances as Arbitrators do. Although it can and does vary (Such as the application of Just Cause), the most accepted Arbitral review process is:

1. Is the employee guilty of the accusation.
2. Just Cause was met – Most notably rule was posted, how it is applied, Management proved their case to a preponderance of evidence, Procedural Due Process, etc.
3. A review of Management's entire case and actions – Does the Arbitrator draw the same conclusion as Management considering which evidence is hearsay, which is substantial, when evidence was known, fairness of the investigation, and a review of all Mitigation.
4. An overarching review of Due Process, CBA Provisions/Elements and Legal Standards such as Double Jeopardy, Progressive Discipline, Review and Concurrence, Highest Level Official as Step 2 Designee, etc.

These four normally are reviewed in this format. When reading Awards and Opinions, Arbitrators will often first decide if guilt is made and will end the analysis at that point. Number two is the next analysis. Does Management have actual Cause for issuing the Discipline. Followed closely by a review of Managements case.

The case analysis will often be worded as, 'While Management established the Grievant did commit the offense, this decision was not known at the time of issuance. The employer must rely on the information available to them at the time.' Or, 'While Management established Cause was met, Management failed to take into consideration factors surrounding the event in question.'

Those are not direct quotes but intended to describe the review process. At this point the Arbitrator will commonly mention Mitigation. An Arbitrator may agree with Managements right and decision to issue Discipline but will disagree with the penalty. Finally, a review occurs of Contractual Due Process and Legal Due Process elements which would overturn the entire Discipline.

The fourth element will commonly be sandwiched in an Award earlier, but the actual review tends to happen last. While reading arbitrations can be dry, you absolutely can detect snark and attitude from Awards and Opinions. Commonly you will find the intent coming off. They way I interpret these opinions and awards is, 'I spent all this time reviewing the case. Management was right. They presented their case well. But at the end of the day, they simply butchered the process when they had the reviewing official also be the Step 2 Designee. If I could fine them, I would. I wasted my time.'

The inverse is also true. 'The Union raised that Management failed to meet Cause. This is categorically untrue. The Union also raised that Management failed to consider the Grievant's mitigating circumstances. Considering these circumstances, the Arbitrator agrees that Management did not properly consider the Grievant's Mitigating Circumstances but disagrees with the Unions conclusion the Discipline must be overturned. The Arbitrator rules that this Discipline should be reduced to a more appropriate level.'

The correct conclusion here is not to believe we should ask for less. We could miss something the Arbitrator discovers, and the skill of the Business Agent comes into play. The conclusion that we should draw is that Arbitrators must rule by intent of the Contract but also has an overarching degree of fairness that is implied.

How to Settle Grievances

The intent of this Guides exploration into Discipline has been to establish we must focus on three main elements. One is Due Process in all forms, especially Procedural Due Process, is met in all phases of the process. As far back as Daugherty, Arbitrators have attempted to shoehorn in Due Process into Just Cause as an additional 'test'. The intent of Just Cause has always been fairness, which is explicitly what Procedural Due Process is.

Two is the Grievant's Mitigation/Aggravation, in all shapes and forms. We must ensure these elements are raised at the appropriate and impactful time. The value of Mitigation is that a Reasonable Person would impose a lesser penalty if the information was known at the time, and the employee's credibility is boosted raising the defense earlier.

Three is that the most accepted and influential elements of Just Cause are met including: notice of the rule; fairness of the application of the rule; fairness of the rule being applied; and the charge is proven to a preponderance of evidence. These three elements often require work and investigation on the Unions part, while other violations are capitalizing on Managements mistakes.

If you do that you have a winning Grievance. The question becomes what the acceptable remedy is. Arbitrators review if Managements actions were proper, and if improper, correct their actions to be proper. This gives our contentions or arguments varying levels of impact on the process. Even in this guide, the appropriate remedy is often listed as, 'expunge discipline and make Grievant whole.' This is to ensure someone who skips to a specific section asks for the maximum appropriate remedy and does not adversely limit an Arbitrator or the Union later in the process.

Just Cause is not a universal hammer or switch. If the rule was not posted but the offense is so egregious the employer must fire the person, an Arbitrator may agree. We must look at the total circumstances. This is where mitigation comes in as such a strong factor. An employee who has five years of service may have minimal consideration, ten years some consideration, fifteen and more total years may have a great impact.

This is exactly why it has been repeatedly mentioned that a complete and thorough investigation has been conducted is a weaker element. Arbitrators in and outside the APWU typically rule that if the preponderance of evidence standard is met, that criteria is met. What often matters is that some reasonable investigation was conducted and the evidence is credible, not that the evidence is overwhelming.

In the introduction, it is discussed how to write a Step 2 using arguments and contentions. The reason I write my Step 2s in that way is because it allows you to draw stronger conclusions in a manner an Arbitrator would acknowledge. For example, "The Union contends Just Cause was not met as Management failed to establish that the hearsay evidence, that they allegedly heard on the workroom floor, was factual. The Union argues that Exhibit 1, 2 and 3 proves that several witnesses have offered a conflicting version of events. The Best Evidence is that the Grievant is innocent. The Union argues the reliance on a single piece of evidence, which is hearsay, is entirely improper and fails to meet the standards of Just Cause."

This allows you to argue several other violations, but the important element is that Management conducted no investigation. While Arbitrators consider a complete investigation a weak element of Just Cause, if you connect this violation to innocence or draw another conclusion from the evidence, you have an argument which may overturn Discipline.

Considering this approach, the fact remains that we must determine what settlement we would accept. Using the above contention in the Step 2, when negotiating, you may take a reduction in Discipline. Why? You may know the Grievant is guilty and that Management just did not properly cite their smoking gun evidence. You may know Management has other witnesses. You may know your statements or witnesses are unreliable. You must review the total facts/circumstances. You may know the Grievant lied and would crack when cross-examined. Why would accept a reduction?

Because you may have objectively reviewed the case and found that Management does have evidence in their case file which proves guilt. In those circumstances reducing a Notice of Removal to a Discussion or a Letter of Warning may be appropriate. Especially considering that at Arbitration, an Arbitrator may agree with Management. If Management should objectively believe the evidence they have, an Arbitrator could likely agree with their conclusion and simply disagree with the applied penalty based on the other facts/circumstances.

I recommend all Stewards review the entire Grievance objectively. Analyze the Grievant's guilt, Managements actions, Managements decision, the relevant Contractual Provisions and the penalty applied.

You can break down Management actions into the Procedural Due Process and Due Process elements which should be considered in the process. You can break down Managements decision into the conclusion they drew, and the penalty imposed considering all the facts including mitigation, evidence strength, etc. Then you review all relevant Contractual Provisions including the clearly defined elements of Just Cause in the JCIM, Progressive Discipline and Corrective Discipline. Finally, you review the result, or the penalty. If being objective, did you draw the same conclusion. If not, the penalty is not proper.

This order is logical. While Arbitrators may put Just Cause before relevant Contract Provisions, overarching Due Process, etc., it is not logical for a Steward. We look at Discipline in a black and white lens, where the employee is guilty or not. That cannot be shaken after reading a Guide. This is the 'fire' good advocates have. We fight harder for those we believe in. You should not, and do not want to lose that.

Despite this fact, Arbitration is a review of Management's actions, not the Grievant's. When we construct Grievances, our goal is to prove Managements actions were wrong, not that the Member was correct or innocent. Taking this position also allows us to earnestly fight for guilty or wrong members.

This approach also draws upon what our strongest arguments are. When writing a Grievance, your strongest argument is innocence, but that is a high bar to prove. Your second strongest is that Procedural or Due Process (And other Legal Standards) were violated. Then you have Cause, and a review of Managements actions. Finally, you have improper penalty considering the facts/circumstances including Mitigation.

The strongest arguments can result in Discipline being overturned. The weakest results in an amendment of the penalty. When looking at Procedural, and Due Process elements, it includes Progression, Discipline is Corrective, etc. The core argument is Management messed up so much that the Contract was violated, and the process was not fair. You still argue every relevant violation possible.

Your remedy should take into consideration all the elements discussed here, including their value in the process. The only smoking gun we have is proving Management did something wrong or acted improperly based on the facts / circumstances.

Summary of Appropriate Remedy

The above is still theoretical and maybe too much to decipher. After reviewing the basic guide with Stewards, and teaching this material over the years, I have found some just need a chart. I must warn you that this is not a concrete chart but is a starting point.

Union Argument / Contention	**Remedy**
Grievant is Innocent	Expunge Discipline
All Main Procedural Due Process Elements	Expunge or Severely Reduce Discipline
Single Strong Legal / Due Process Element from Training Guide(s) AKA Double Jeopardy	Expunge or Severely Reduce Discipline
Most Main Procedural Due Process Elements	Reduce or Mitigate Discipline
Several Strong Just Cause Violations	Expunge Discipline
One Strong Just Cause Violation	(Strongly) Reduce Discipline
Strong Mitigating Circumstances	(Strongly) Reduce Penalty (Either Time on Record or Level of Discipline)
Weak Mitigating Circumstances	Reduce Penalty (Time on Record)
Minor Procedural Due Process Violation(s)	Reduce Penalty (Time on Record)
Minor Just Cause Violation(s)	Reduce Penalty (Time on Record)

Again, the above is an example. You can chain violation which may strengthen the remedy you can receive. For example, if you argue a minor Just Cause violation of an insufficient investigation, you can easily connect the dots to include other legal standards such as preponderance of evidence, hearsay evidence, and Procedural Due Process for not showing evidence in Managements Interview.

Arbitrators still often view the elements secularly in the Drawing Conclusions section. Each element is reviewed individually. This is why the advice on Just Cause is to make strong,

singular arguments. This also addresses the elephant in the room. That is that the JCIM specifically mentions a modified summary of Just Cause. Specifically citing those elements will be more pervasive than other Just Cause arguments.

The reason you 'chain' arguments is that the connection proves and reinforces the other arguments. A strong Just Cause argument may prove or reinforce a violation of Procedural Due Process. An Arbitrator cannot consider an argument not raised. Our job is to raise all possible arguments. Think like Management. They do not cite one ELM provision in Discipline, they cite all that may reasonably apply. Even if the Union can prove some elements were not for Cause, Discipline could still be justified and upheld. We should do the same and raise every argument which could be applicable.

It must also be considered that the definition of Just Cause is not concrete. When we discuss a Strong Just Cause violation, we discuss a violation of the specific language in the JCIM. For understanding sake, Procedural Due Process is listed separately. While modern definitions of Just Cause include Mitigation, Progression, Substantial Evidence, etc., it is not the reality of how Arbitrators rule. The above chart is simply a synopsis what arguments work and how they apply.

A final, re-warning. You must review the case. A single, strong violation of Just Cause, even an important element such as notice, may not apply when an action is common sense. Procedural Due Process may not apply if the employee skips the Interview after a five-day letter or they refuse to answer questions, and the Union did not raise their rights. The circumstances matter.

Do not take this bonus section as gospel. This section is designed to simply illustrate that not all violations are created the same. We should just not appeal everything without understanding the if the employee is guilty, Mitigation is not a get out of jail free card.

We must also recognize that we should fundamentally disagree with how Arbitrators rule as Union Stewards. We should firmly believe that if Management violates the Contract discipline should be overturned. At the same time, we must educate the membership to understand that if you are guilty, unless Management makes a mistake, you need to prepare for the consequences. The Grievance – Arbitration process has an inherent fairness, and it could be fair is issue discipline, to an Arbitrator, despite the violations.

Argue as if Management just committed the worst offense possible. I have accused Management of calling for a member's head when they cite the ELM Provision on Loyalty. I have accused Managers of being active participants in Harassment when they did not properly investigate and change my Grievance to include them as the creator of a Hostile Work Environment. I have accused Management of breaking numerous federal laws. I make Management sound as evil, and horrible as possible in the process of writing Grievances.

This aggression is used to force Management to settle reasonably, or the risk exists that a far harsher remedy will be granted in the process. You only settle for a reasonable remedy based on your facts, but you still should be as aggressive, assertive, and passionate as you already are. Your settlement should appear to be a reasonable alternative to fighting further.

Compensatory Remedies

THE ISSUE: MOST STEWARDS FAIL TO SEEK THE APPROPRIATE REMEDY

THE DEFINITION

The intent of our Collective Bargaining Agreement is to make all parties whole. Stewards often incorrectly attribute this to mean that a Make Whole remedy includes only standard wages and a restoration of the employee's seniority.

AWARD TYPES

Arbitrators retain several different types of Remedies and Awards they can grant. Under the guise of our Collective Bargaining Agreement, the premise is to make all parties whole. When the APWU defines a Make Whole Remedy, we often exclude both the total potential loss, and all damages the Grievant experienced.

Many locals have taken the position that asking for any additional financial remedy is improper. This is the result of losing Grievances that request similar remedies, the insistence of Management, or a misunderstanding of the remedies Arbitrators can grant. While we should never take Managements advice, the fear associated with a different remedy does have grounds.

The common thread among Stewards is requesting an amount of money which cannot be quantified in any realistic way. For example, you seek $10,000 in a Notice of Removal Grievance and site the reason being, "Emotional Distress" you are unlikely to win. That would likely be considered a punitive award.

Punitive Award

Punitive means "Relating to punishment; having the character of punishment or penalty; inflicting punishment or a penalty." In Arbitration, a Punitive Award is one which is designed to punish Management for their action. This is nearly universally frowned upon. In fact, Circuit Courts have overruled Arbitrations from several Unions which seek such an outlandish award.

To quote Arbitrator Ryder, "The trauma and embarrassment of the exposed error should be enough." In 99.9% if situations, seeking a remedy which is unfounded will harm your Grievance over help. While Arbitrators have wide discretion, this is one area they do not.

The rare circumstance we receive a Punitive Award is repeat noncompliance with one or more Cease and Desist Awards, Management acted in a willful, willing and flagrant manner and finally, Management persists in committing the offense. An Arbitrator may issue an award which seems punitive in nature, but it will be on the guise of a Compensatory Remedy.

Compensatory Remedy

A Compensatory Remedy is a Remedy which resolves Compensatory Damages. Compensatory Damage is the total financial harm, injury or other loss caused by another person's actions which are quantifiable.

The intent of Make Whole is to restore an individual to their pre-action status. The issue is several additional costs exist that the Union should seek. Such considerations are missed overtime opportunities, night differential, missed travel plans such as Vacation weeks. This compensation also includes compensation for remedies which are not contained within the Collective Bargaining Agreement or are difficult to quantify such as Harassment.

When the parties or an Arbitrator agrees that harm happened, someone must put a number to that harm. If the Union does not put a number to that harm and justify it, it becomes the whims of an Arbitrator to decide this amount.

For a monetary remedy to be Compensatory it must be correcting harm or a violation. Nearly any violation may have a financial remedy and not be punitive if worded or argued correctly.

Common Misconception

To this guide, we shall call these 'additional' remedies Compensatory. The intent is to change how the APWU and Stewards view awards and Make Whole. As referenced several times in the Guide (And sitting on my bookshelf as I write this), The Elkori & Elkori's How Arbitration Works specifically states, make-whole awards may include recovery of lost overtime, premium. or other special pay."

Form 8039 Back Pay Decision/Settlement Worksheet pay also has a section for Overtime pay. Finally, the current NLRB ruling (December 13th 2022) on Make Whole Remedies states a Make Whole Remedy includes, "all direct or foreseeable pecuniary harms suffered."

When the APWU slaps 'Make Whole' into a Grievance or Settlement and we do not argue for total damage we are doing a disservice to the Grievant and the Bargaining Unit as a Whole. At minimum we should argue for missed overtime as an average.

Pecuniary vs Non – Pecuniary Damages

Pecuniary Damages are damages directly attributable to a quantifiable financial metric. This is mostly what we have discussed thus far. This would include Wages, Medical bills, Travel expenses, Property damage, and Housing Costs, etc. Pecuniary simply means it has a direct tie in to a financial loss. The NLRB agrees (At least currently) that if an employee suffered a financial loss due to mis action of their employer, the Make Whole Remedy should include the Compensatory Remedy to return their financial situation to as it was before the action was taken.

This alone gives the APWU a wide birth of space to argue for money. Aggressive Stewards will slap a number down but fail to realize we have an obligation to prove our remedy

as much as our Grievance. It is not proper to just ask for an additional $2,000. We must prove why we are asking for $2,000.

Non – Pecuniary Damages are those which are not directly quantifiable. This would often mean emotional distress or hardship. You will commonly see two forms of Non – Pecuniary Damages: Harassment/Hostile Work Environment and Justice Delayed.

The Court system typically correlates Non - Pecuniary Damages to the salary of wages of the individual who is impacted. If an employee makes $50,000 a year with an average hourly rate of $23.71 and has been experiencing an issue for an hour a day for six weeks, the appropriate remedy would likely be $711 dollars. If the employee worked Overtime weekly and experienced an hour of Harassment on their NS day as well, the math would now total $853 dollars. Your Grievance should show that math.

Justice Delayed is another matter. The adage is, 'Justice Delayed is Justice Denied.' When the Union must Grieve for the enforcement of a Settlement or file a Grievance about Management not following their appropriate process for a 1767 or an IMIP (Or any process), this delay does harm the Grievant and the APWU. The Union typically argues for a flat rate. The reason behind a flat rate is the compensation is an addition to the original requested remedy.

You do not just ask for this remedy type because you feel Management is not properly adjudicating Discipline, or you feel Management is being mean, rude or improper. You must be able to quantify that Managements inaction is exasperating the situation or causing additional undue harm to the APWU or a Grievant.

We can win both Pecuniary and Non – Pecuniary remedies in the appropriate situations. Arbitral Precedence exists. We must raise these contentions as early in the process as applicable. As a Grievance strategy this also makes sense. Management will often base a denial on the remedy requested or spend time arguing against the remedy and not the violation itself.

USING THE CORRECT AWARD

A common problem many Stewards have is the highest level of training provided is a training manual or a presentation of a training manual which draws conclusions based on decades of experience and tens of thousands of Arbitrations collectively argued among Business Agents. That training is excellent, but it provides copy and paste arguments. This guide is no exception.

When it comes to Grievance analysis, the skill set tends to be lacking. At no fault of the Stewards own. This is also not the fault of those teaching or training. It is incredibly difficult and inefficient to try to break down the elements that lead to a conclusion. This guide is also evidence of that fact.

The problem we need to solve collectively is teaching the appropriate stage to seek these additional remedies, and why. At Arbitration, usually months if not longer away from an event, it becomes easy to argue that a Compensatory, Non – Pecuniary Remedy is warranted because it took so long to be heard. The issue is that Business Agents can struggle to introduce

this remedy if it was not requested earlier in the process. Even with the catch all 'Make Whole' remedy as the NLRB standard can change at any time.

This still leaves a glaring weakness, the inability to argue these remedies earlier in the process. We cannot simply appeal all Grievances to Step 3 or Arbitration. The Grievance procedure is not designed to handle that nor is it in the best interest of the membership to have all remedies delayed. By time the case is appealed to Step 3 (Or Arbitration) the remedy should be corrected.

The Recommended Approach

I have a four-step process for evaluating the appropriate remedy which has been wildly successful in determining the remedy I should seek, and if a Grievance is worth appealing. That approach is:

1. Evaluate the Strength of the Grievance
2. Request the maximum Appropriate Remedy as early as Possible
3. Provide Reasoning for Your Remedy
4. Include Make Whole in all Remedy Requests

The first thing you must do is evaluate the strength of your Grievance. For a Contractual Grievance, you must be able to guarantee you can win on the merits of the Grievance alone. Often, Management also must have failed to perform their responsibilities either correctly or timely. This can be a delayed RFI, failing to Investigate or a recurring violation.

For Discipline the same parameters exist, with the addition that you have substantial reasoning to believe Managements decision would be overturned. Using the previous bonus chapter, I would be looking for a strong Just Cause violation, some Procedural Due Process violations, and one Legal / Due Process violation. This way, no matter what the opinion of the Arbitrator on the value of the elements, you have a win.

After you establish these facts, ask for the maximum appropriate remedy. The appropriate remedy for failing to provide information could be a $50 a day until it is provided. Failing to complete the IMIP process could have a remedy of $20 per employee each day until the alleged perpetrator is removed from their position. If you can prove the violation, you want to ask for the open-ended amount.

Next you must explain in your Grievance the reason why. Simply as, "The Union has proven Management has failed to complete the IMIP process and that Supervisor Tom Smith has created a Hostile Work Environment. Due to Managements inaction, and the continued hostile environment, the Union is requesting a remedy of $20 a day to each employee being supervised by Tom Smith to make them whole for the constant attack on their mental and personal health. As of August 3rd, the Union calculates this at $480 since the IMIP process should have been initiated. This is an escalating remedy, and the Union is requesting all parties to be made whole."

Such a remedy allows an NBA to argue for further increased damage later in the process, especially if the issue is not remedies by time your Grievance goes to Arbitration. If

you follow the multiple Grievance strategy, which is recommended, and file a recurring Grievance after two weeks you increase the amount you asked for. The Business Agents now have the evidence they need of the violation and Management inaction.

Strengthening the Approach

A fundamental misunderstanding is that the Union can get a crazy remedy for proving a violation. As discussed under 'Punitive Award' the truth is Arbitrators typically tend to rule minimally unless aggravating circumstances exist. After reviewing and backward engineering the best Arbitration awards I have been able to come across, we do have some predicable elements that we can use in our Grievances to get the high value awards.

One such was the Kehlert Multiple Grievance Strategy. Arguing harm to the Union, creation of a Hostile Work Environment / a Safety Violation and arguing the core violation has merit. As does arguing lowest level / Article 15 or a compliance in a separate Grievance. The question is not if what we can do works, it is why. The why is how we write better Grievances.

The reason Compliance Grievances work is because Management disregarded the agreement they made and disrespected the Union as a Bargaining Unit Representative. I commonly see in awards / opinions for escalated remedies a combination of the following words: Willful, Willing and Flagrant. These words have strong legal meaning, and can be defined as:

Willful – Intentional or Deliberate

Willing – Voluntary, or Eagar

Flagrant – Serious or Reckless

These three words combine into this argument: "Management has violated the Contract in an Intentional (Willful) way. Management had full knowledge this was a violation, as they previously signed the following Settlements about this violation: Exhibit A, B and C. The Union asserts this decision was made voluntarily (Willing) as other alternatives existed, such as compliance with the previous Settlements. Despite being able to comply at no extra financial responsibility, Manage violated the Contract and our previous agreement in a serious and reckless (Flagrant) way, as no reasonable effort was made to stop the violation."

These three words represent the worst violations Management can make. If Management intentionally violates the Contract (Willful), they show the workforce and APWU does not matter. If Management voluntarily (Willingly) violates an agreement, or does so when other options exist, it proves that Management has no respect for our Contract. Finally, if the violation is extreme (Flagrant) and little effort was made to comply, Management disregards the safety and working conditions and is essentially rubbing salt in the wound for a repeat violation.

These three words have power, and I try to include them in all my appeals. What is more important than the words is what they represent. The one thing Arbitrators hate more than anything is when the parties reach an agreement or an issue is ruled upon, and one party

decides to do it anyways out of no real need. This is where the standard of Make Whole, or the rule we cannot attain a punitive award, gets tossed out the window.

A common complaint I have seen is that some areas, regions, or NBAs can get better awards than others. There is a reason for this. The difference comes down to LMOU's, JCAM (Joint Contract Application Agreement) and Previous Awards. If an LMOU provides an additional layer of strong language to the Contract, a violation is worse than just a violation of the Contract. If a region has a JCAM which addresses the issue, Management is violating an Area Labor Relations agreement and the Contract. If an office has a previous award or settlement, Management is acting against their own word or the ruling of an Arbitrator. All of these are far more harsh violations.

These high remedies normally require a combination of Management disregarding an agreement or doing something so crazy that a Reasonable Person would never act that way. For example, if you have a Harassment Grievance and Management does not follow the USPS policies of the IMIP process, you have a strong argument Management disregarded the Contract, the ELM, and various Publications. That action is heinous and completely flagrant. The only remaining problem is we need to prove the intent of the violation.

If you do not have those previous remedies or awards, your fight becomes proving the intent of how Management acted which can require an interview, or their actions must be so out of line it justifies an increased remedy as a form of punishment to ensure future compliance.

Stewards must successfully argue that Management is guilty of both the violation, but also violating in a willful, willing or flagrant way.

A willful violation would be one in which the parties involved must have known it was a violation – even if they disagreed. A local settlement, especially one signed by Management locally, is a smoking gun. Think of it this way, is a Supervisor signs a settlement saying, "Late from lunches will not be used in Attendance Discipline" and then issues a Seven Day Suspension for Attendance including Late from lunch, that Supervisor issued the discipline knowing it was wrong. This is especially strong when Management had another option, such as excluding those dates. This sounds like a punitive argument, and it is. It is punitive to include those lates but also a willful violation of the Grievant's and Unions rights!

A willing violation would typically be when the participants had other options to handle the situation, or someone should know it was wrong and decided to do it anyways. This can commonly be a cover up to protect another EAS employee. Harassment is a common example. Management willingly violates USPS policy to ensure a coworker doesn't get fired. That is a clear derelict of duties and a violation of our Contract.

A flagrant violation is one that is extremely bad, or Management acted in a way which made it far worse in the eyes of the employee or Union. You commonly see this when Management is handling crossing crafts or Supervisors doing bargaining unit work. We have language on a 12/60 hour maximum. Management will commonly argue they had to do the work, or a carrier had to do the work. This is false. We must argue they could maximize the APWU

craft first, even if it means they will later hit 60 hours and need to be paid admin leave. Management acted recklessly to make their job easier, which is more harmful to the Union!

The words themselves may only be words I have seen many times, but the power is the intent behind them. Arbitrators care, and rule, far more favorably when the Union can prove Management is not being reasonable when they commit violations.

The best way to prove such violations is to pack your Grievance with previous settlements, service talks, MOUs, stand-up talks, etc. that proves Management knew the right way to handle the situation. The more extreme Managements actions are, the stronger your argument is. If discussing crossing crafts again, if Management could have called someone in, but decided to pull a carrier off assignment to work ten hours doing clerk work it is far more severe than Management giving two hours to a carrier because a clerk went home early.

The violation is all the same. The intent and options available is what would determine if we can seek a larger remedy. I commonly see Grievances where Management settles crossing craft Grievances by just paying out. As Stewards we get sick of repeat work. If you include in a settlement that Management will make every effort to avoid utilizing other crafts, we now open the door that Management made no effort and is willingly going back on their word.

It is recommended, when trying to get a compensatory remedy, to not just prove your violation, but prove how bad the violation is. If you follow the structure discussed and think in terms of willing, willful and flagrant you are far more likely to convince an Arbitrator that a simple make whole is not appropriate as Management knew what they did was wrong and simply did not care. Even if they did, we always argue for the maximum remedy possible.

SOME EXAMPLE AWARDS (NALC AND APWU)

- 18C – 4J -C -20367221 (Benton Harbor)
- 1F 18C-1F-C 22123762 (Palatine PNDC)
- J10C-lJ-D 11232787 (Springfield)
- Jl5C-lJ-C 1736502 (Springfield)
- USPS v. NALC, CA No. 19-3685 (7-26-21)
- 4J-16N-4J-C-21113794 (Carne, 4-18-22)
- 4J-19N-4J-C-20502441 (O'Connor, 1-31-22)
- J16N-4J-C-20062325 (Nixon, 9-12-20)
- J16N-4J-C-20192603 (Jordan, 9-2-20)
- C16N-4C-C-18189269 (Roberts, 11-7-19)
- C 16N-4C-C-18352211 (August, 10-18-19)
- C16N-4C-C-18267277 (Roberts, 3-6-19)
- J 11 N-4J-C-17397690 (Simon, 11-3-17)
- J 11 N-4J-C-17360783 (Widgeon, 9-29-17)

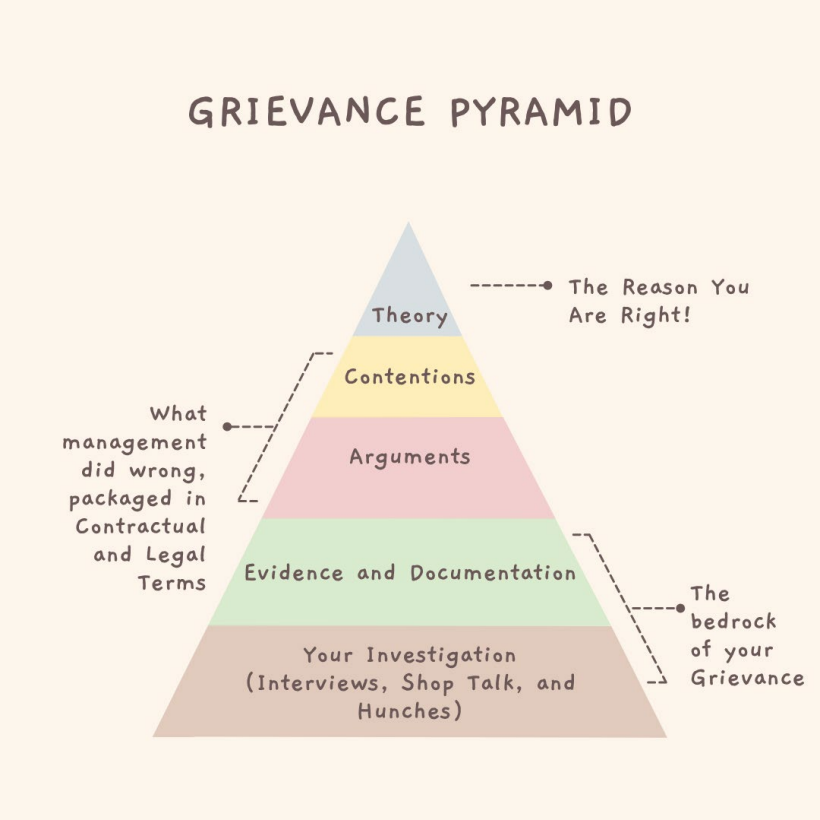
Grievance Structure

THE ISSUE: MOST STEWARDS FAIL TO PROPERLY STRUCTURE THEIR GRIEVANCES

THE DEFINITION

Cohesive and well-structured Grievances are far more likely to prevail in the Grievance – Arbitration Procedure. A well-structured Grievance should be well documented, have supporting evidence, make coherent arguments, and raise contentions which support your strongest argument.

A PROPER STRUCTURE



The key to a winning Grievance is raising all relevant violations in a structured, cohesive format. Most case files and Step 2 appeals I review are disjoined and self-cannibalize. While in some situations you can raise conflicting arguments that are both true, more often than not you will find that your Grievance is more successful if you focus on a cohesive format.

Most Stewards use the 'shotgun' method writing Grievances. They throw every argument at the wall and see what sticks. While you can, and should do that, you will often find

a situation where you provide conflicting arguments that work against themselves. The end result is a weaker Grievance.

At Step 1of the Grievance Procedure and while Investigating, you Shotgun. You find any potential violation, gather evidence, and throw it all at Management. Every argument we may raise must be on the record before the end of Step 2. So, at Step 1 and while Investigating, you find everything possible. You do this knowing some arguments are not the best, and some may conflict. It happens, but you need to put everything on the table.

What we are discussing is how to transition from a great Step 1 Grievance to a winning Arbitration. Your Grievance does not magically streamline – it takes deliberate action. At Step 2, while you must include every argument, you must structure the arguments in a way that makes sense. You also must ensure all arguments you raise support your strongest violation. This may mean, at times, dropping weaker arguments in favor of a stronger total Grievance.

Theory -> Contention -> Argument

The format I recommend is the Theory -> Contention -> Argument structure at Step 2. This structure will streamline your Grievances and present the strongest possible case file possible. This is also how I teach Step 2 Grievance writing to great success for new Stewards as it removes the confusion around how we write coherent Appeals.

The structure is simple. You identify your STRONGEST violation you are trying to prove and a narrative that incorporates your strongest violation. That is the **Theory**. For example, your theory could be Management violated the CBA by issuing Discipline to the Grievant as the Grievant is innocent or your Theory could be Management violated the CBA when they bypassed the OTDL when they assigned two non – OTDL clerks to work the DBCS on January 25th. Yes, Discipline is far easier to create a Theory for. For Discipline, your Theory should include one of the four core defenses discussed earlier in this book.

Your **Contentions** are the Contractual reasons your Theory is correct. For example, "The Union Contends Management violated Article 16.1 when they issued the Notice of Removal to Jane Doe." Or, "The Union Contends Management violated the LMOU when they assigned PFT Smith and PSE Johnson to work Overtime on January 25th." All Contentions you raise should support your Theory and strongest argument. If you have a Contention that conflict with your Theory it will weaken your overall Grievance.

For the OTDL example, you have two main defenses. One is Article 8, and the second is the LMOU (Article 30). If you have NTFT's you may also cite the "OVERTIME RULES FOR NON-TRADITIONAL FULL-TIME (NTFT) DUTY ASSIGNMENTS" in the back of the Contract, for example.

Your **Arguments** would be your assertion of how evidence, or events, created a Contractual Violation. For example, if dealing with a 14 Day Suspension and Management claims a discussion occurred but it was on the workroom floor, you would write, "The Union Argues the Discussion held on X Date was conducted on the workroom floor which is improper and does not meet the requirements of a 16.2 Discussion. The Unions position is supported by Exhibit Employee Statement, who witnessed the alleged discussion on the workroom floor."

Your Argument supports your Contention. Your Contention must support your Theory. The long version would look like this:

First you identify the Theory. For Discipline, you likely will be arguing the Discipline is technically flawed (Due Process and / or Just Cause) and Mitigation. Then you move onto framing this in your Step 2. You would address both theoretical theories individually in your Grievance Appeal.

'The 14 Day Suspension issued to Grievant Smith is technically and procedurally flawed.' The next sentence would be your first Contention. 'The Union Contends that the Suspension issued to Grievant Smith was not for Cause which violates Article 16 of the Collective Bargaining Agreement and JCIM.' Then you raise your Arguments. 'The Union Argues that the Grievant was not put on notice of the rule being applied, nor was it posted, nor was it conveyed via an Article 16.2 Discussion. The lack of the Grievant knowing the rule makes this Discipline not for Cause.'

I personally also incorporate into my Step 2 Appeal my documents / exhibits. This is an effort to make it 'stupid proof.' Using the above example, 'The Union Argues that the Grievant was not put on notice of the rule being applied **(Exhibit – Interview of Employee)**, nor was it posted **(Exhibit – List of Items Posted in Facility)**, nor was it conveyed via an Article 16.2 Discussion **(Exhibit – Request for Information)**. The lack of the Grievant knowing the rule makes this Discipline not for Cause.'

The reason I began including my Exhibits is far too often I had Business Agents either not have my full case file at Step 3 / Arbitration or I would be called and questioned about the arguments raised. One such example is, to poorly quote as it has been over five years, 'Eric, Management is saying they had a Discussion and the Discipline is Progressive. We can't send this to Arbitration.' After going through the case file on the phone, I found that for some reason the Business Agent was missing many of my Documents I had exchanged with Labor Relations, sent with the Case File to Management and sent to the NBAs Office.

The next time this happened I had changed how I file my Grievances and included the items as exhibits. I was able to say, 'The evidence is in the case file. You are referring to Paragraph 3 on Page 2 which lists Exhibit A1, which would be page 12 in the case file I sent you.' I quickly discovered the Business Agent did not have my case file, but was using Management's Denial from Step 2.

The inverse with Management is true. When I hand over a 50 page stack of papers, 99% of the time I had issues settling and would spend hours going over it all with Management. I then included Exhibits so if Management actually read my Appeal we would discuss the specifics of why they agreed or disagreed with my arguments. In fact, the first (And only during reviewing the Case) question I ask at Step 2 is, '**Did you read my Step 2 Appeal?**'

As you can imagine, normally Management would say yes, until I found they clearly did not. In those Cases I offer to re-meet or they can issue me a denial as we are having two different conversations. Management is assuming what I wrote and violating Article 15 by not

making a genuine effort to settle. Magically Management would read my Grievances and would Settle with me.

The Other Elements

At this point you have a way to raise strong Contentions and Arguments that prove your Theory correct. All documents in your case file should be relevant to proving your Theory is correct. Two exceptions exist:

1. **Framing Information**
2. **Combat Managements Defenses**

Framing Information is basic information about the Case which may be relevant to all parties. For example, employees name, if they are a regular or PSE, for Discipline the date it was issued, etc. While this information may be useful as an argument, these are simply facts. Framing Information can include timelines, Past Practices, etc.

Usually, this information comes before you raise Contentions and Arguments. If you include it within or after your Arguments and Contentions it makes your case harder to follow and also weakens the impact of your Argument. For example, lets say we have a DBCS Grievance over employees working alone. Option One is to include within the Contentions and Arguments the background information.

'The Union Contends Management violated Article 14 when having employees work the DBCS Machine alone on July 3rd. Management at this PNDC routinely understaff the DBCS Machines. The Union Argues that Management knowingly understaffed as the Union has filed such Grievances since 2017 (Exhibit Previous Settlement). The Grievant is a long-term employee with 24 years of Seniority. The Union argues that this action…'

The biggest issue with the above is you clearly have not defined your Argument. All Arguments must be in writing by Step 2. The second issue is it is incredibly hard to follow. What I recommend is to front load your Grievance with the Background information – which is Option 2.

'On or About July 3rd, Grievant Smith was forced to work DBCS Machine 8 alone. The Grievant is a full time regular with 18 years of Seniority at the PNDC and 24 total years of Seniority in the USPS as a full time regular. This Grievance is timely in the Collective Bargaining Agreement Article 15.4 as the Union filed the Step 1 Grievance on X Date, within 14 Days of July 3rd. The Union has filed this Step 2 Appeal on X Date, within 10 Days of the Step 1 Decision.'

That first paragraph should contain your background information that is 100% factual. This background, or contextual information, sets the foundation for your Grievance. This can be expanded for more complicated Grievances or situations, such as an LMOU dispute.

For example, 'On or About July 3rd, Grievant Smith was not provided Wash – Up Time at the end of their Shift after working on their duty assignment being a DBCS Operator. The Wash – Up Time rules are Governed by the mutually agreed upon LMOU (Exhibit LMOU). The

parties further have a standing Past Practice, as confirmed by Exhibit Service Talk and Exhibit Interview that handles implementation of the LMOU.

The Grievant is a full time regular with 18 years of Seniority at the PNDC and 24 total years of Seniority in the USPS as a full time regular. This Grievance is timely in the Collective Bargaining Agreement Article 15 as the Union filed the Step 1 Grievance on X Date, within 14 Days of July 3rd. The Union has filed this Step 2 Appeal on X Date, within 10 Days of the Step 1 Decision.'

This **Framing Information** is designed to let all parties know what the dispute is. Including this information has won me Grievances in the past. A good example of winning a Grievance is when Management's denial does not directly address the Unions Contentions. I had a situation where Management's denial stated a Staffing Issue was denied due to Article 3. The Unions Grievance was under Safety for DBCS Operation.

The Steward's Grievance followed my advice and included something like: 'On or About July 3rd, Grievant Smith was forced to work the DBCS Machine Number 8 alone. The XXXX Area Local and Management at this PNDC have multiple mutually agreed upon Settlements on this issue (Exhibits Settlement A, Settlement B, Settlement C, Settlement D) and the proper procedure is not in dispute. This dispute arises over whether it was a Safety violation to force Grievant Smith to work DBCS Machine Number 8 or if this decision falls under the purview of Managements Rights.

The Grievant is a full time regular with 18 years of Seniority at the PNDC and 24 total years of Seniority in the USPS as a full time regular (Exhibit Seniority Roster). This Grievance is timely in the Collective Bargaining Agreement Article 15 as the Union filed the Step 1 Grievance on X Date, within 14 Days of July 3rd. The Union has filed this Step 2 Appeal on X Date, within 10 Days of the Step 1 Decision (Exhibit – Union Timeline).'

When Management issued a Denial on the above example, the Union Steward was able to successfully argue 'lowest level resolution' and an improper 2609 / Denial. Management clearly did not even read the first Paragraph in the Unions Grievance by claiming this was a Staffing Grievance. All of the Framing Information is required for someone not within your Facility to handle your Grievance.

It is essential to have the documentation to back up your background information in your case file. You may need a Form 50. You may need a copy of your LMOU. You may need your Seniority Roster. The goal is to include what someone else may need to determine remedy and understand your arguments and requested Remedy.

The other information you may need is information that can **Combat Managements Defense**. You are not raising counter arguments, but you are including the required information that an NBA would use to combat Management later in the process. Using the above example, the most common Management defense is the Union is not timely. In fact, I have noticed cycles where Management in Areas I am familiar with will claim everything is untimely – especially when extensions were granted.

If you include in your Step 2 and case file evidence that would be used to counter Managements arguments it makes your Grievance far more likely to be settled in Pre – Arbitration and / or Step 3. This information also handicaps Management as they lose their basic argument. Sticking with untimely, if you are untimely Management has a good chance to have your Grievance not heard as it is a threshold issue – to have access to the Grievance Procedure you must be timely. The Union will be forced to spend time fighting over the fact the case can even be heard. The goal is to prevent that fight.

Other common arguments vary case by case. I have seen Management argue Article 3 – Managements Rights – when it comes to any issue over employees working a machine. It could be unqualified; it could be working alone. The background information should include all Settlements related to the issue which may be relevant. This is more of a skill you will attain over time when you begin to see trends in how Management denies your Grievances.

A Superior Outline

The format of your Grievance should look like this:

Paragraph One: **Framing Information** including: Relevant Background Information; Timeline, Basic Employee Information (Including length of service, employment status, bid, etc)

Paragraph Two: **Your Theory / Strongest Violation** with your **Strongest Contention** with Supporting **Arguments**

Paragraph Three: Your next **Strongest Contention** with **Supporting Arguments**

….

Last Paragraph: **Summarize Contentions**, **Theory** and **Justify Remedy**

Within each Paragraph: Cite **Exhibits**

Your Closing Paragraph

The only undiscussed section is how you close. If you build your Grievance correctly at Step 2, you should have every strong Contention listed. They should all support your Theory. Each Contention should have supporting Arguments. Throughout the entire Step 2 you should reference your supporting Exhibits so they cannot be disputed later.

I have seen Stewards and Regions list all documents in their Step 2 Appeal at the end. This is better than not including your Exhibits in your Step 2, but, it is not optimal. The methodology I recommend is one of logic. I want my Step 2 to be easy to follow. So if I reference a document I cite it in that moment. The reason this is a superior approach is the entire intent is to resolve the Grievance at the lowest possible level.

If you raise a technical argument on Due Process and Management does not understand it, they simply will deny the Grievance. I want to give every chance to settle. Or at least the illusion I am trying to settle. We all know some in Management will just refuse to settle Grievances no matter what. But we want the Union to appear to be the reasonable party at all

times. Since we cannot include settlement offers (Nor should we if we could) we know we will often make an offer and Management will refuse to play ball with us. If this doesn't make sense yet I want you to look at it this way:

"The Union Argues that Management violated Article 16 by not providing the Grievant their Due Process Rights."

"The Union Argues that Management violated Article 16 by not providing the Grievant their Due Process Rights (Exhibit – Investigative Interview; Exhibit – Stewards Statement; Exhibit – Stewards II Notes; Exhibit – Grievant Statement)."

Of those two options, which would you assume Management claims, 'I don't think Due Process was violated." If your guess is one, you would be correct. My intent at Step 2 is my Appeal presents my case for me. This also helps when you appeal your case. We are all human, and sometimes an NBA may not follow your Argument. In those situations, they must review the case file and rediscover what you found. If you spell it out the success rates improve.

The closing Paragraph should be simply used to reaffirm your strongest Contentions and also connect them to your **Harm**. **Harm** is simply the damage to the Grievant. If the CBA / JCIM has a remedy, you simply restate this and connect the two.

My most common example of this is Overtime Bypass. In a Bypass situation you are first provided a make – up opportunity. Your Closing Paragraph would look something like this:

'The Union has established that Management failed to offer the Grievant an overtime assignment. Not only did Management fail to offer this opportunity to the Grievant, they allowed a junior employee and PSE to perform this work, which directly violates the pecking order in the LMOU. The harm is self evident and the only appropriate remedy is contained within the JCIM. The Grievant must be made whole and provided a make up opportunity for Overtime. If Management fails to provide this opportunity within 90 days, the Grievant must be made whole.'

Within the Grievance itself the main Contentions you would have raised are a CBA violation of Overtime Assignments and the second Contention would be the pecking order in the LMOU. These are both strong violations which could result in your Grievance being sustained.

For something without a remedy, you must assign a value. A common example is a recurring violation or Harassment. I have a formula for Harassment based on the time spent interacting with the bad actor. For a recurring violation I assign an escalating remedy and justify it as harm to the Union and Craft for every day the previous settlements are not followed.

The worst-case scenario is to ask for something extreme and not be able to explain and justify why. I see this commonly with newer Stewards who feel things are 'unfair'. They want to punish Management. That is not what the Grievance procedure is for. Multiple Arbitrators (Read this as essentially all Arbitrators) agree that the embarrassment of losing and being proven wrong is punishment enough. I even quote arbitrators on that in my Settlement and Remedy Training. Your goal is to simply make everyone whole, no matter what that is, and explain why.

Example Documents Referenced (and useful)

#1 Sample Document – Post II Interview of Grievant

 # 2 Sample Document - Discipline Chronology

#3 Sample Document - Management at Step 2

#4 Sample Document - Exhibits Additions/Corrections

#5 Sample Document – Modified Exhibit List

#6 Sample Document – Evidence in II

#7 Useful Document – Additional Documents Additions / Corrections

#8 Useful Document – Receipt of Documents Form

#9 Useful Document – Received in RFI

#10 Useful Document - Step 2 Appeal Cover

#11 Useful Document - Original Documents

#12 Useful Document - Non Cited Documents

#13 Useful Document - Documents in II

#1 Sample Document – Post II Interview of Grievant

Letter of Warning Interview – Attendance
Grievant:
Steward:
APWU Local #:

1. Prior to the Investigative Interview, were you made aware further absences could lead to discipline?

2. Prior to the Investigative Interview, do you recall having a Quarterly Attendance Review in the last 90 days?

3. Prior to the Investigative Interview, do you recall having a documented discussion with your supervisor about your attendance? E.g. Your supervisor spoke to you one on one, with no one else present, and informed you that your continued absences could lead to disciplinary action.

4. Prior to the Investigative Interview, did you turn in any documentation to management / your supervisor about your absences?

5. Was the person conducting the interview your immediate Supervisor?

6. How much notice were you given that you were having an Investigative Interview?

7. Did you have time to gather evidence to defend yourself?

8. Before the Investigative Interview began, were you forewarned of the specific charge in the intended disciplinary action? E.g. That you were being accuse of Irregular Attendance, Failure to Adhere to Attendance Regulations / AWOL.

9. Before the Investigative Interview began, were you forewarned of the degree and nature of the intended disciplinary action? E.g. That a letter of warning was proposed for your attendance.

10. During the Investigative Interview, were you asked your side of the story, or why you could not report to work?

11. During the Investigative Interview, was any evidence presented to you to prove your attendance was irregular?

12. If yes, what evidence was presented during the Investigative Interview that proved you were irregular in attendance?

 # 2 Sample Document - Discipline Chronology

Modified American Postal Workers Union AFL-CIO Discipline Chronology
(THIS TIMELINE PAGE TO BE PLACED AS THE FIRST PAGE IN ANY GRIEVANCE FILE)

Name of Grievant:
Local Grievance Number:

1. _____ Date of Management's Investigative Interview.
2. _____ Date of Pre-Disciplinary Meeting / Hearing.
3. _____Date of receipt of letter, charges, warning, or other reason for this grievance
4. _____ Contractual Last Date for Step-1 grievance meeting (within 14 days of #3 above)
5. _____ Date(s) of Any Step One Extensions
6. _____ Date Step-1 Meeting held (within 14 days of #2 above)
7. _____ Last date for Step-1 oral decision from management (within 5 days of Step-1 Meeting #4 above)
8. _____ Date of Step-1 oral decision from management (within 5 days of meeting #4 above) 9. _____ Date of Management initialed Step-2 form (within 5 days after Step 1 decision, #5 above)
10._____ Dates of Any Extensions Granted
11._____ Name of Steward handling Step-1
12._____ Last date for Step-2 Appeal to postmaster or designee (within 10 days of Step-1 decision, #8 above)
13. _____Date of Step-2 Appeal to postmaster or designee (within 10 days of Step 1 decision, #8 above)
14. _____ Date of Emailed Step-2 Appeal
15. _____ Contractual Last date for Step-2 Meeting with postmaster or designee (within 7 days after receipt of Step 2 appeal)
16._____ Date(s) of Any Step Two Extensions
17. _____ Date of Step-2 Meeting with postmaster or designee (within 7 days after receipt of Step 2 appeal)
18. _____ Last date for employer's Step-2 Decision, in writing, to union (within 10 days of Step 2 meeting, #14 above)
19. _____ Date of employer's Step-2 Decision, in writing, to union (within 10 days of Step-2 meeting, #14 above)
20._____ Date Case File was sent to Local
21. _____ Name of Steward handling Step-2

22. _____ Last date for Step-3 Appeal (within 15 days of receipt of Employer's Step 2 decision #16 above)
23. _____ Date of Step-3 Appeal (within 15 days after receipt of Employer's Step 2 decision)
24. _____ Certified Mail Number of Step-3 Appeal

KEY: Yellow Highlighting indicates a time delay or violation has occurred.
KEY: Highlighting other than Yellow means an Extension was Agreed too.

Steward Notes:

_____

Eric Chornoby
APWU Local 480 Steward

#3 Sample Document - Management at Step 2

AMERICAN POSTAL WORKERS UNION, AFL-CIO
Modified Receipt of Documents Form

The documents listed below were received as a result of an official exchange of information under Article 15 of the Collective Bargaining Agreement.

Date # of Pages	**Documents Exchanged**
	A.
	B.
	C.
	D.
	E.
	F.
	G.
	H.
	I.

	J.
Print APWU Representative's Name and Title:	
APWU Representative's Signature:	
Steward Comments:	

#4 Sample Document - Exhibits Additions/Corrections

Steward:

Local Grievance #:
Grievant:

Additional Documents – Additions / Corrections

Addition A:
Addition B:
Addition C:
Addition D:
Addition E:
Addition F:
Addition G:
Addition H:

#5 Sample Document – Modified Exhibit List

Modified EXHIBIT SHEET

Mark and Number all Exhibits in the file. List the Exhibits on this sheet.

Grievant:
Issue:
Local Grievance Number:
Exhibit 1
Exhibit 2
Exhibit 3
Exhibit 4
Exhibit 5
Exhibit 6
Exhibit 7
Exhibit 8
Exhibit 9
Exhibit 10
Exhibit 11
Exhibit 12
Exhibit 13

Exhibit 14
Exhibit 15
Comments:
Steward's Name:

#6 Sample Document – Evidence in II

Documents Show in II **A list of all Documents Management has shown in an Investigative Interview** **(Annotate if Provided by Employee of Management)**
Employee:
Subject of II:
Date of II:
Supervisor:
1.
2.
3.
4.
5.
6.
7.
8.
9.
10.

11.
12.
13.
14.
Comments:
Documents From Management:
Documents From Employee:
Steward's Name:

Steward:
Local Grievance #:
Grievant:

Additional Documents – Additions / Corrections

Addition A:
Addition B:
Addition C:
Addition D:
Addition E:
Addition F:
Addition G:
Addition H:

AMERICAN POSTAL WORKERS UNION, AFL-CIO
Receipt of Documents Form

The documents listed below were received as a result of an official exchange of information under Article 15 of the Collective Bargaining Agreement.

# of Pages	Documents Exchanged
	1.
	2.
	3.
	4.
	5.
	6.
	7.
	8.
	9.
	10.
	11.
	12.
	13.
	14.
	15.
	16.
	17.
	18.
	19.
	20.
	21.
	22.
	23.
	24.
	25.

Print USPS Representative's Name and Title:

Print APWU Representative's Name and Title:

APWU Representative's Signature:

AMERICAN POSTAL WORKERS UNION, AFL-CIO **Receipt of Documents Form**	
The documents listed below were received as a result of an official request for information under Article 17.3 the Collective Bargaining Agreement.	
Date # of Pages	**RFI Documents Received**
	A.
	B.
	C.
	D.
	E.
	F.
	G.
	H.
	I.
	J.
	K.
	L.
	M.
	N.
	O.
	P.
	Q.
	R.
	S.

	T.
	U.
	V.
	W.
	X.
	Y.
Comments:	
USPS Representative's Name and Title:	
Print APWU Representative’s Name and Title:	
APWU Representative’s Signature:	

American Postal Workers Union, AFL-CIO

480-481 Area Local 810 Livernois Ferndale, MI 48220

Date: January 7th, 2020

To:
Step 2 Designee
United States Postal Service

Local Grievance #:
Grievant:

Issue: Fourteen Day Suspension

Dear Designee:

The attached APWU Step 2 Grievance Appeal Form is forwarded to you in accordance with the language of the Collective Bargaining Agreement. Please let me know when you will be available to meet and discuss this case. Article 15.2(c) states that:

"The installation head or designee will meet with the steward of a Union representative as expeditiously as possible, but no later than seven (7) days following receipt of the Step 2 appeal unless the parties agree upon a later date."

Please let me know when you are available for meeting on the attached grievance appeal. If for any reason you are unable to schedule a meeting within the seven day time frame, please contact me so that we can arrange a mutually agreed upon time for our Step 2 meeting.

Thank you for your anticipated cooperation in this matter.

Sincerely,

_____

Eric Chornoby, Steward
480-481 Area Local
American Postal Workers Union

cc:
Grievance file

Steward:
Local Grievance #:
Grievant:

ORIGINAL Document List

*For the safety and faxing of Original documents to our NBA's and Labor Relations, the Original Documents were copied and cited in the grievance. This is a list of Original Documents and the corresponding exhibit number.

Original Document (Exhibit Number):
Original Document (Exhibit Number):
Original Document (Exhibit Number):
Original Document (Exhibit Number):
Original Document (Exhibit Number):
Original Document (Exhibit Number):
Original Document (Exhibit Number):
Original Document (Exhibit Number):

NON CITED EXHIBIT SHEET

Exhibits not explicitly listed in Step 2, but exchanged and used as evidence by Union

Grievant:
Issue:
Local Grievance Number:
Exhibit 16
Exhibit 17
Exhibit 18
Exhibit 19
Exhibit 20
Exhibit 21
Exhibit 22
Exhibit 23
Exhibit 24
Exhibit 25
Exhibit 26
Exhibit 27
Exhibit 28

Exhibit 29
Exhibit 30
Comments:
Steward's Name:

Documents Show in II

A list of all Documents Management has shown in an Investigative Interview (Annotate if Provided by Employee or Management)

Employee:
Subject of II:
Date of II:
1.
2.
3.
4.
5.
6.
7.
8.
9.
10.
11.
12.
13.

14.
15.
Comments:
Steward’s Name:

Sources used in this Guide

USPS – APWU Books

- APWU Collective Bargaining Agreements (From Pre-APWU until today)
- APWU JCIM
- USPS ELM
- USPS Handbooks and Manuals

APWU Training Manuals

- Krueth 4 – State Training Manual
- Kehlert's Defense vs Discipline

Arbitration and Legal Textbooks, Studies, Etc

- Practice and Procedure in Labor Arbitration by Owen Fairweather
- How to Prepare and Present a Labor Arbitration Case by Charles S. Loughran
- How Arbitration Works by Elkouri
- Evidence in Arbitration by Marvin Hill
- Black's Law Dictionary by Henry Campbell Black
- Procedural Due Process: A Reference Guide to the United States Constitution by Rhonda Wasserman
- Discipline and Discharge in Arbitration by the American Bar Association
- Arbitration: Cases, Problems, and Practice by Matthew Adler
- Arbitration: Practice, Policy, and Law by Thomas Stipanowich and Amy Schmitz
- AAA Handbook on Arbitration Practice by the American Arbitration Association
- How and Why Labor Arbitrators Decide Discipline and Discharge Cases: An Empirical Examination by Theodore Antoine
- Dozens of Case Studies by Universities such as the University of Michigan
- Arbitral Discretion: The Tests of Just Cause by John E. Dunsford

Arbitration Authorities / Groups

- National Academy of Arbitrators
- Labor Arbitrator Institute
- American Arbitration Association
- American Bar Association

Non – USPS Arbitration Searches / Training Material

- JURIS Arbitration Law Legal Information Database
- HEIN Online
- LibGuides

The Following Arbitrations and Decisions (This is a snapshot of reviewed APWU Arbitrations):

NOTE: This excludes Non – APWU Arbitrations unless free to find online. I excluded all NALC Exclusive Arbitrations not on the APWU's Website, Arbitrations for paid sources such as JURIS, and several Regional Arbitrations. This is some, but not all.

NOTE 2: The NALC (NALC.Org and fromatoarbitration.com) have countless Arbitrations online which were reviewed. They are excluded but can be found via google, search "nalc.org" + arbitration + subject

- GATS Number: Q98C-4Q-C 01059241
- GATS Number: Q98C-4Q-C 01059241
- GATS Number: Q10C-4Q-C 15174956
- GATS Number: Q10C-4Q-C 14011344
- GATS Number: Q10C-4Q-C 13106056
- NLRCA Review and Concurrence Award and Position Paper by Greg Bell
- APWU H7C5FC6017
- APWU HQTC20130645
- APWU H1C3WC8243
- APWU H1C3WC24639
- APWU H1C5LD19913
- APWU H1C3FC27044
- APWU H1C1JC23689
- APWU H1N4EC20307
- APWU H4N4FC11641
- APWU H7CNAC77
- APWU H1C1EC16223
- APWU H4N4AD30730
- APWU H4N4CC35491
- APWU H7V1FD39176
- APWU H7C2GC46249
- APWU H4N5GD7167
- APWU H1C3WC21483
- APWU H8C1NC25938
- APWU N7CNAC21
- APWU N4C5RC43882
- APWU H7C2GC46250
- APWU H7CNAC77
- APWU H7N3ED11525
- ETC

Regional Arbitrations

- Hundreds (Or More) from Eastern, Central and Western Regions
- Hundreds (Or More) of NALC Arbitrations

Closing Thoughts

I need to restate, and thank, those who came before me. Much of this guide is a simple copy, paste, and update. While some chapters were added, and others tweaked as the Contract changed, I would not be able to do this as a one-man-show without the guides written by those who came before me. I must thank my father, Patrick Chornoby, and my partner, Paola, for helping me edit this guide.

Most importantly, THANK YOU for reading, using, printing or downloading this guide. It can be better, certainly. Everything can be. This was months of preparation, researching, and writing. All nights, weekends, and Vacation time was dedicated to this effort to get this as right as possible. This was a labor of love, and you have no idea how much it means to me if you use this guide and it helps you.

I do apologize for typos, formatting issues, etc. Formatting a Guide this large was a herculean task. Using Microsoft Words page breaks, formatting tools, etc could not give me the sections I needed to 'make this work.' Unfortunately, I do not have a staff to help me, and revisions will occur, but for now, this is the final copy.

The last person to thank is Paola, my better half. Many nights, weekends, and Vacations visiting her family were spent working on this guide. She was supportive, understanding, and encouraged me to finish this guide. If I picked anyone else to share my journey with, I most likely would not have finished this Guide, let alone this quickly. Thank you.

Further Training

If you, or your Local / State would like training conducted by myself, Eric Chornoby, please email me at chornoby@apwu480.com. I also run the website APWUSteward.com, which has a plethora of other guides, books, interviews, and some training I have conducted.

Examples of training already prepared (And an older version of each training can be viewed on the above website) would be:

1. FAIRNESS: Due Process and the Legality of Discipline
2. SILENT: Past Practice and Article 5
3. Successful Settlements and Remedies in the APWU
4. INTERVIEW: Using Weingarten, Procedural Due Process and the Douglas Factors to Represent our Members

Training can be tailored, revised, and created as needed. I believe we are stronger together, and one person researching Arbitrations and Procedural Due Process for weeks does the membership no good if the information is kept.

The above PowerPoints do include accompanying documents such as Grievances to review. All presentations have been updated since being uploaded to the website and are vastly expanded upon through the presenter.