

## **DEFENSES TO DISCIPLINE**

Publication Note: NALC first published this material as a booklet entitled Defenses to Discipline. The booklet has been updated and is reprinted here.

### **INTRODUCTION**

#### **Just Cause**

Each year, management takes disciplinary action-letters of warning, suspensions and removals-against thousands of letter carriers. In some cases, the disciplined letter carrier accepts the punishment as having been warranted and does not dispute the action taken by management. In many cases, however, the letter carrier does not accept management's sanction, and files a grievance. Most of the time such Grievances are resolved amicably in the grievance procedure, but in some cases the NALC and management are unable to reach agreement, and the grievance is appealed to arbitration.

At the core of discussions concerning discipline-in - grievance meetings or in arbitration hearings alike-is whether the discipline was for just cause. The requirement that discipline must be for just cause is established in Article 16, Section I of the National Agreement between the NALC and the Postal Service. Other than simply stating the requirement, however, Article 16 does not define just cause. Thus, it is for the parties to determine and define just cause on a case-by-case basis.

To some extent, just cause must remain undefined and undefinable, because each case in which discipline is imposed is in some ways unique and different from all other cases.

To a certain extent, however, just cause has been defined. Every working day, NALC arbitrates nine or ten discipline grievances-more than 2,100 discipline grievances in 1997 alone, and more than 27,000 such Grievances since the inception of the NALC/USPS grievance-arbitration procedure in 1972. In each of these grievances, the arbitrator has faced the issue of just cause. And for each grievance, the arbitrator has written a decision and award explaining the reasons for finding the contested discipline to be either for just cause or not for just cause. From those decisions in which the NALC's grievance was denied, it is possible to glean a practical definition of just cause. From those decisions in which NALC's Grievance was sustained in whole or in part, it is possible to find a practical definition of what is not for just cause, and, further, it is possible to distill those

defenses to discipline which have compelled arbitrators to rule that discipline was without proper cause. This booklet is about those defenses.

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### **The Four Categories of Defenses**

Almost always, the grievant and the NALC assert that there are mistakes or inaccuracies in management's case in one or more of four categories: (1) technical objections unrelated to the merits of the case; (2) disputes about whether grievant's conduct, if proven, would constitute a valid basis for the imposition of discipline; (3) claims that management cannot prove its fact allegations or that management has omitted some vital acts; and (4) claims that, because of mitigating circumstances, the discipline imposed is too harsh.

(1) The first of these, technical objections, includes assertions that discipline was issued untimely, that discipline was issued by the wrong person, or that management failed to follow certain other required procedures. Defenses in this category do not even touch upon the merits of the discipline. By using a technical defense, the NALC is in effect saying to the arbitrator: "In order to resolve this dispute, it is not necessary to consider management's claim that grievant engaged in misconduct, because the way in which management imposed the discipline was so improper that no discipline should be allowed."

(2) The second category, disputes about whether a valid basis for discipline has been charged, includes situations in which a letter carrier has been disciplined for accident-proneness, failure to meet casing standards, or absenteeism resulting from a compensable injury. The claim made by this defense is that no valid rule proscribes grievant's conduct. By using this defense, the NALC is in effect saying to the arbitrator: "Even assuming that grievant acted as charged, nothing has happened which properly gives rise to discipline."

(3) The third category, disputes about the accuracy or completeness of the alleged facts, may take any of several forms. The NALC may simply sit back, in effect saying: "We deny that grievant acted as you charge, it is management's burden in disciplinary matters to prove its version of the facts, and the evidence offered by management is insufficient to meet that burden." Or the NALC may take a more active stance, saying: "The grievant did not act as charged, and the evidence offered to that effect by NALC is more credible than the evidence offered by management to the contrary." Finally, NALC may assert that while grievant did act as charged, management improperly failed to notice some relevant facts, such as that grievant was provoked by another.

(4) The fourth category includes assertions that the discipline imposed is seen as

too harsh when all of the circumstances are considered. Included

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are claims that grievant's misconduct was unintentional, and that insufficient consideration was given to grievant's long service. These "mitigation" defenses are a variant of the third category, in that the NALC here also alleges that management's facts are incomplete. The difference between them is that those in the third category, when successful, usually result in the complete decision of discipline, while with the mitigation defenses NALC is usually conceding that some discipline was warranted, and the argument is about how much.

### **State Multiple Defenses Separately and Alternatively**

The NALC will often try more than one of the above categories in a single case-and sometimes will use all of them. When multiple defenses are used they should be stated separately and argued in the order in which they are presented above. Thus, the summary of argument of the Grievance of a letter carrier with 32 years of service charged two months after the fact with discarding deliverable mail might be as follows:

- 1 . The discipline should be disallowed as untimely.
2. Even if the discipline was not untimely, the discipline should be disallowed because management failed to prove that grievant acted as charged.
3. Even assuming that grievant acted as charged, the discipline imposed is too harsh given grievant's 32 years of discipline-free employment.

A series of arguments stated separately and alternatively ("even if", "even assuming"), as above, gives the arbitrator the maximum number of hooks upon which to hang his or her hat. If two of the arguments are found totally unmeritorious, prevailing on whichever remains means at least a partial win.

### **Using Defenses to Discipline**

The remainder of this booklet is divided into four sections, one for each of the categories of defenses described above. For each of the defenses, there is a "Case Examples" section providing one or more quotes from arbitrations in which the defense was employed. Each defense also has a "Supporting Cases" section which lists cases in which the defense was employed, showing the NALC Computer Arbitration Number for each case, as well as the name of the arbitrator and the date of the decision.

Stewards may use Defenses to Discipline as a starting point for the investigation of potential discipline Grievances. The described defenses should be used as a

checklist, and the steward should explore carefully the possible

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availability of each defense. Representatives who discuss discipline grievances at various steps of the grievance procedure can use their familiarity with the defenses to help focus grievance discussions on those points which are most likely to determine the final outcome. Arbitration advocates can use the cited material and listed cases as a starting point to pull together arbitration precedent in support of the arguments they will make to an arbitrator.

### **A Final Caveat**

There are two fundamental truths in arbitration: 1) No two cases are exactly alike, and 2) Different arbitrators rule differently. Taken together, this means that finding a previous winning case very similar to the one with which you're concerned does not guarantee a win. Finding such a case is a big plus, but it's not the end of the game.

### **SECTION 1**

#### **TECHNICAL DEFENSES**

#### **UNRELATED TO THE MERITS OF THE DISCIPLINE**

Many arbitrators have found principles of procedural due process to be implied by the just cause standard. The examples of technical defenses in this section illustrate ways in which arbitrators have applied these principles in USPS cases.

When technical defenses are used, NALC turns the tables and takes the initiative. Management, who started the whole business by making an accusation of misconduct, finds the finger pointed back at it. Because technical defenses are exhilarating, there is an unfortunate temptation to try to use them in every case, even where not quite justified. This temptation should be resisted, because overuse blunts their sharp effect, and erodes credibility.

Moreover, NALC representatives should note that in the vast majority of disciplinary grievances, the outcome is dependent on the central facts and merits of the discipline-whether the grievant acted as charged, the severity of the infraction, mitigating factors and the grievant's disciplinary record, if any. Although some discipline is so flawed procedurally that it can be overturned on that basis alone, NALC representatives should be careful not to expect this in every case, or even in most cases.

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### **Technical Defense No. 1 Discipline was not timely issued.**

When management discovers a letter carrier's misconduct, it must initiate discipline in a timely manner. If management does not do so, it waives whatever rights it may have to impose discipline.

It is not clear exactly where the line is drawn between timely and untimely discipline. A letter of warning for a one-minute extension of a break issued thirty years after the event would obviously be untimely. However, a removal two weeks after mail was discarded might be found timely, particularly where management spent the two week period investigating to make certain that it had all the facts before it acted to impose discipline.

### **Case Examples**

In the usual grievance a delay in presenting charges can mean the loss of evidence to the aggrieved. Memories fade with the passage of time, witnesses become difficult to locate so as to reconstruct the events in question, a photograph of the scene taken weeks later may be inaccurate as to the conditions that prevailed on the date of occurrence. In my opinion a delay of 47 days in presenting a letter of charges is too long and I find that the Employer has violated Article 16 of the National Agreement. (C-01261)

The Postal Service urges that there is no statute of limitations in the agreement as to when a charge must be brought. That argument misses the point, however, which is that the grievant must be given a meaningful opportunity to respond to and defend against the charges. In this case, given the nature of the offense-the failure to withdraw a piece of mail from the departure case-and the volume of mail normally handled by the grievant, the grievant did not have such an opportunity when he was not given any indication of the offense until almost one month later. (C-01458)

It is a fundamental principle in law as well as contract arbitration that a party possessed of certain rights must not let them lie fallow, but must act upon them promptly. The agreement in this case gives management the right to discipline and/or discharge for just cause. The Postal Service took the position that grievant had on August 3, 1976, committed an offense which might be the subject of discipline. An investigation was begun which was not terminated until January 28, 1977 .... In the intervening six months, grievant continued on the job. While an employee has no need or right to expect to be kept advised of an investigation, unless a contract holds otherwise, he does have the right to expect that the result of the investigation or the charge under consideration will be promptly communicated. If he has committed an offense worthy of punishment by his employer he must

know it promptly after the wrongdoing. This is part of due process or fairness in the employment setting-an unsettled charge must not be kept pending unduly long. Insofar as the action of August 3, 1976, is grounds for discipline, the arbitrator concludes that for the Postal Service to have waited six months to finalize the offense into discipline is unreasonable and contrary to the degree of promptness which is an employee's due. (C-1504)

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### Supporting Cases

C-00033, Arbitrator McConnell, September 17, 1981  
C-00036, Arbitrator Rentfro, February 14, 1979  
C-00289, Arbitrator Kotin, April 20, 1982  
C-00516, Arbitrator Dolson, November 8, 1984  
C-01261, Arbitrator Schedler, June 3, 1982  
C-01458, Arbitrator Dobranski, September 2, 1982  
C-01504, Arbitrator Krimsly, January 18, 1978  
C-01516, Arbitrator Holly, March 6, 1978  
C-03607, Arbitrator Stephens, June 20, 1983  
C-03808, Arbitrator Gentile, June 30, 1983  
C-06647, Arbitrator Sobel, November 17, 1986  
C-07106, Arbitrator Howard, May 8, 1987  
C-15110, Arbitrator Jacobs, January 28, 1996  
C-17613, Arbitrator Powell, December 16, 1997  
C-18103, Arbitrator Walt, March 11, 1998

### **Technical Defense No. 2**

**Discipline was ordered by higher management, rather than by the grievant's immediate supervisor.**

The decision whether to impose discipline, and the decision as to the degree of discipline to be imposed, should be made by the letter carrier's immediate supervisor. While higher authority may advise, if asked, it is improper for officials above the immediate supervisor to initiate discipline or to override the immediate supervisor's recommendation as to extent of penalty.

### **Case Example**

The decision to discharge grievant was not made at the local level: it was made by labor relations officers at the MSC. It is clear that (grievant's immediate supervisor) exercised no independent judgment. When she signed the disciplinary notices, she was allowing instructions. The evidence does not even suggest that she had or believed she had authority to do anything contrary to MSC directions. She was told

that grievant "had to be removed," and from then on the decision was no longer hers.

The agreement requires discipline to be proposed by lower-level supervision and concurred in by higher-level authority. The requirement was omitted in this instance. (C-04679)

#### Supporting Cases

C-00396, Arbitrator Howard, June 23, 1976  
C-00908, Arbitrator Caraway, September 8, 1986  
C-04282, Arbitrator Zumas. April 19, 1984  
C-04674, Arbitrator Zumas, February 8, 1985

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C-04679, Arbitrator Dworkin, January 12, 1985  
C-05250, Arbitrator Giles, November 12, 1985  
C-06012, Arbitrator Nolan, March 6, 1983  
C-06658, Arbitrator LeWinter, November 21, 1986  
C-09873, Arbitrator Rentfro, February 23, 1990  
C-11504, Arbitrator Johnston, December 17, 1991  
C-15025, Arbitrator Stephens, December 18, 1995  
C- 16090, Arbitrator Shea, November 21, 1996

#### **Technical Defense No. 3**

#### **Management's grievance representative lacked authority to settle the grievance.**

Article 15 specifically confers upon management's grievance representatives full authority to resolve any grievance. Where it can be demonstrated that management's representative lacked authority, discipline has sometimes been overturned. (This defense is closely related to Technical Defense No. 2 above. Where higher management has initiated discipline, it is presumed that subordinate supervisors lack authority to settle.)

#### **Case Example**

[B]oth Step 1 (a) and (b) of Section 2 of Article XV entitled Grievance-Arbitration Procedure. are couched in express mandatory language. Specifically, Step 1 (a) requires that any employee who feels aggrieved "must" discuss the grievance with his immediate supervisor within a designated time period. Step 1 (b) provides in relevant part that in any such discussion"... the supervisor shall have authority to settle the grievance.

"Proper compliance by management with these terms of the Agreement was,

however, seemingly not achieved, for the record indicates that while the appropriate representatives met at Step 1. substantial doubt nevertheless exists as to the authority of the supervisor to settle the grievance. In this regard, the testimony demonstrates, as evidenced by the admission of the Postmaster under cross-examination, that he initiated the suspension, that the supervisor at Step 1 did not have the authority to settle the grievance without consulting him. This failure of management to comply with the prescribed language of Article XV, Section 2. Step 1(a) and (b) of the Agreement. which clearly bestows upon Grievant's supervisor the authority to settle the grievance. cannot properly be viewed as harmless error and non-prejudicial to the rights of the Grievant. To the contrary, in the considered judgment of the arbitrator, this failure goes to the very heart of the grievance process in that the Grievant is thereby denied the contractual right to have his grievance considered independently and objectively at the outset of the grievance procedure by his supervisor who is generally most familiar with his work record. Any removal of the supervisor's authority to settle the grievance, it seems to the Arbitrator. is violative of the letter and spirit of the Agreement and renders the Step 1 procedure little more than a charade. Accordingly, the Arbitrator finds the assertion by the Employer that the Grievant was not denied due process to be without persuasive merit. (C-01469)

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#### Supporting Cases

C-01469, Arbitrator Britton, March 25, 1981  
C-01944, Arbitrator Holly, May 20, 1980  
C-04282, Arbitrator Zumas, April 19, 1984  
C-06530, Arbitrator Williams, October 17, 1986  
C-14907, Arbitrator Barker, November 10, 1995  
C-15668, Arbitrator Vrana, July 29, 1996  
C-17067, Arbitrator Britton, July 18, 1997  
C-17854, Arbitrator Johnston, January 6, 1998  
C-17884, Arbitrator Helburn, January 30, 1998  
C-17897, Arbitrator Helburn, February 10, 1998

#### **Technical Defense No. 4 Double Jeopardy**

Management may not twice impose discipline for a single act of misconduct. Thus, to issue both a letter of warning and a seven-day suspension for the same roll-away accident would be improper. It is not improperly subjecting a letter carrier to double jeopardy, however, when a removal is issued for the same misconduct for which an emergency suspension or an indefinite suspension has been issued (unless the employee was returned to work after the suspension).

## **Case Example**

[B]y returning the grievant to work after the emergency suspension [USPS] implicitly mitigated the penalty to that encompassed by such suspension. Thus, the imposition of the discharge action, almost four weeks after the grievant returned to work, constituted a subsequent increase of or addition to the penalty for the same offense, an action which is violative of the due process rights of the grievant. Having implicitly set the penalty for the grievant's offense, the Service may not subsequently add to that penalty, thus subjecting the grievant to a form of 'double jeopardy. (C-00095)

### Supporting Cases

C-00095, Arbitrator Howard, March 30, 1977  
C-00398, Arbitrator Gamser, November 11, 1976  
C-00541, Arbitrator DiLeone, December 27, 1984  
C-04890, Arbitrator Howard, April 23, 1985  
C-14305, Arbitrator Johnston, March 20, 1995

## **Technical Defense No. 5**

### **Higher management failed to review and concur.**

While it is up to the immediate supervisor to initiate disciplinary action (see Technical Defense No. 2, above), before a suspension or removal is imposed it must be reviewed and concurred in by higher-level management.

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## **Case Example**

Concurrence is a specific and formal contract requirement to the issuance of a suspension or a discharge. It must occur before the issuance of the discipline and not afterwards. The requirement is not met merely because a superior agrees with the discipline. It must be demonstrated that he was requested to concur, and that he reviewed the matter in light of all the current information at the time of concurrence. and that he gave his consent to the issuance of discipline. While the contract does not require a writing to accomplish this, it is the employer's burden to demonstrate it occurred. (C-05164)

### Supporting cases

C-00908, Arbitrator Caraway, September 8, 1986  
C-01477, Arbitrator Holly, February 15, 1982  
C-04156, Arbitrator Goldstein, February 22, 1984  
C-05164, Arbitrator LeWinter, September 19, 1985

C-05685, Arbitrator LeWinter, January 27, 1986  
C-06679, Arbitrator Carson, November 24, 1986  
C-1448 1, Arbitrator Alsher, May 12, 1995  
C-16568, Arbitrator Ames, January 10, 1997  
C-17674, Arbitrator Johnston, December 22, 1997  
C-18208, Arbitrator Hales, April 12, 1998

**Technical Defense No. 6**  
**Insufficient or defective charge.**

Article 16 requires that management give a letter carrier a written notice of charges when imposing a suspension or a discharge. Implicit in this requirement is that the notice of charges describe and explain the basis for the discipline with sufficient specificity that the letter carrier may make a defense.

**Case Example**

A 'charge' in a disciplinary matter has a similar meaning to an indictment in a criminal matter before a grand jury. Basically, a 'charge' is an accusation in writing that claims that the individual named therein has committed an act or been guilty by omission, and such act or omission was a violation of shop rules or usual good behavior expected of an employee and punishable by discipline. A letter of charges is the foundation of going forward with discipline ... No discipline can be sustained without a charge. For the instant grievance the removal letter merely related in narrative style the events that the Employer believed occurred on April 15, 1981. There was not a single sentence in the entire letter of removal that accused [grievant] of conduct contrary to the rules of the shop; therefore his discharge was without just cause. (C-01233)

Supporting Cases

C-01233, Arbitrator Schedler, April 1, 1982  
C-0131 1, Arbitrator Levak, September 24, 1982

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C-06710, Arbitrator Williams, December 3, 1986  
C-07106, Arbitrator Howard, May 8, 1987  
C-15515. Arbitrator Axon, June 8, 1996

**Technical Defense No. 7**  
**Management failed to render a proper grievance decision.**

Article 15 requires that management state certain information in its Step 2 and Step 3 grievance decisions. Failure by management to state that information has

sometimes resulted in the overturning of the contested discipline.

### **Case Examples**

[T]he failure of the employer to provide the contractually required 3rd Step decision letter deprived the Union of the benefit of a detailed statement of the reasons for the denial. While it is evident that the Union's representative knew what the Employer's 3rd Step representative had said during the meeting, he was deprived of the final analysis of the Employer's representative's reasoning in reaching the decision. Hence, the grievance process was frustrated by these procedural errors and those frustrations operated to the detriment of the Grievant .... As a consequence, the [Union's] motion is granted, and the case will not be considered on its merits. (C-01477)

The parties to the National Agreement are bound to comply with its clear and unambiguous procedural provisions designed to insure that due process is accorded to employees charged with disciplinary offenses. Arbitrators are likewise bound to enforce these agreed-upon procedures and sustain grievances where the failure to do so prejudices the rights of the grievant. I am convinced that the failure in this case to provide the Union with the reasons for the decision at the third step was prejudicial to the Grievant and denied him due process. Accordingly, the procedural error forms a sufficient cause to sustain the grievance without consideration on its merits. (C-01833)

The Postmaster's failure to timely issue a Step 2 decision made it progressively more difficult for the Union to present and prove its case. For example, the Postmaster failed to timely give the Union a detailed statement of his reason(s) for denying the grievance. As a result, when the Union appealed the case to Step 3, it was still unclear about Management's allegations against Grievant. Management's failure to communicate with the Union made it difficult for the Union to fashion a defense for Grievant. Further, by failing to timely issue a written Step 2 decision, Management deprived the Union of its right to file complete additions and corrections under Article 15.2 Step 2(g). Moreover, without a Step 2 decision, it was difficult for the Step 3 official to prepare for and present the Union's case at Step 3.

The Union was indisputably prejudiced by Management's failure to render a Step 2 decision. Accordingly, I conclude that Management also violated Article 15.2 Step 2(f) of the National Agreement. (C-16747)

C-01477, Arbitrator Holly, February 15, 1982  
C-01833, Arbitrator Foster, March 12, 1982  
C-06647, Arbitrator Sobel, November 17, 1986  
C-16747, Arbitrator Vrana, May 5, 1997

### **Technical Defense No. 8**

#### **Management failed to properly investigate before imposing discipline.**

Before the decision to impose discipline is made, management must conduct a full, fair and impartial investigation, including giving the letter carrier an opportunity to respond to the charges.

### **Case Examples**

It has been said that the real heart of procedural due process is not even a question of the employee's guilt or innocence; it is how the company goes about arriving at its decision. When the decision is to impose a penalty as severe as discharge, care must be taken that all the relevant facts and evidence are considered. Discharge without a complete investigation or without affording the employee an opportunity to be heard falls short of minimum standards.

The reasons why due process requires that an investigation be made into all the relevant facts and circumstances, including the employee's explanation, before disciplinary action is taken are several. If this is not done, the employer risks nondisclosure of essential elements of the case. A thorough investigation reduces the likelihood of impulsive and arbitrary decisions by management and permits deliberate, informed judgment to prevail. By giving the grievant an opportunity to present his side of the story and point out mitigating factors raises the possibility that the employer would have been dissuaded from discharging him in the first place. The same evidence presented prior to decision may have a more important effect than when offered at the grievance level. This is so simply because it is human nature to stick to and defend a decision already made. This reluctance to reconsider, even in the light of new information, is more pronounced in labor-management relations because the employer has an additional institutional interest to 'stand firm' and defend the authority of the supervisory personnel who made the decision to discharge. (C-01030)

Due process in discharge cases demands that the employee be given the opportunity to explain, if possible, the misconduct with which she is charged. This explanation should be sought before a decision is reached and positions are frozen. The only opportunity for explanation afforded the Grievant before the decision to discharge was an abortive interview with two Postal Inspectors, with whom she refused to speak.

Her reluctance to discuss the matter with the Inspectors is understandable. Suddenly faced with a reading of her Miranda rights by two strangers, she feared criminal prosecution for whatever it was she was being charged with. It is quite

another thing for her supervisor or someone in labor relations to talk to her about it. point out the discrepancies found in the certificates previously accepted, and ask for any explanation she might have for the apparent alterations.

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The Inspectors were doing their job. It was primarily aimed at garnering evidence to support the charge of submitting falsified medical certification. When they confirmed the charge to their own satisfaction, they tendered the case back to Postal Service supervision for final action. Supervision's function is different than that of the Inspection Service. At this point it became supervision's responsibility to confront Grievant in an effort to ascertain if she had any explanation for the altered certificates, especially in light of their initial acceptance some six months earlier. This kind of investigation was not undertaken until after minds were made up and the Union served notice that it was grieving the discharge. (C-00036)

### Supporting Cases

C-00036, Arbitrator Rentfro, February 14, 1979  
C-00053, Arbitrator McAllister, June 10, 1983  
C-01030, Arbitrator Rentfro, April 9, 1979  
C-01405, Arbitrator DiLeone, June 23, 1981  
C-05073, Arbitrator Gentile, August 27, 1985  
C-05204, Arbitrator Rentfro, October 1, 1985  
C-05424, Arbitrator McConnell, January 10, 1986  
C-13895, Arbitrator Shea, September 6, 1994  
C-15556, Arbitrator Shea, June 26, 1996

### **Technical Defense No. 9**

#### **Improper citation of "past elements"**

It is improper for management to cite discussions as past elements in support of another disciplinary charge. It is also improper to cite discipline which has been grieved but not finally settled or adjudicated as a past element. When these are cited, arbitrators sometimes order the present discipline rescinded or modified.

#### **Case Example**

The Employer's case is further flawed by the fact that it is Violative of that portion of Article XVI of the National Agreement which provides, '... such discussions may not be cited as an element of a prior adverse record in any subsequent disciplinary action against an employee,...' The Notice of Removal cites two such discussions as elements of the Grievant's past record.

These procedural defects cannot be overlooked as being insignificant. They are of

serious concern because they are in violation of both the letter and spirit of the National Agreement, and importantly they deprived the Grievant of his right to due process. In the absence of due process the grievance must be sustained without any consideration of its substantive merits. (C-01944)

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### Supporting Cases

C-00584, Arbitrator Levak, October 26, 1982  
C-01944, Arbitrator Holly, May 20, 1980  
C-01983, Arbitrator Holly, August 6, 1981  
C-03541, Arbitrator Hardin, May 11, 1983  
C-03910, Arbitrator Fasser, June 18, 1977  
C-04335, Arbitrator Hardin, June 7, 1984  
C-04401, Arbitrator Williams, July 16, 1984  
C-06907, Arbitrator Nolan, March 29, 1987  
C-14470, Arbitrator McAllister, May 17, 1995  
C-17750, Arbitrator Duda, November 13, 1997

### **Technical Defense No. 10**

**Management refused to disclose information to the Union (including claims that information was hidden.).**

Management must disclose to NALC all relevant information concerning the discipline.

### **Case Example**

The testimony in the record clearly proves that the management representative at the Step 2-A hearing did not make [the postal inspector's investigative summary] available to the Step 2 Union representative, whether or not he asked for it. While the record is contradictory as to whether such material was requested by the Union's Step 2-A representative, management has the burden to prove that it had 'just cause' for the grievant's discharge, and concomitant with that 'burden of proof' was the requirement that it made available to the Step 2-A Union representative all of the pertinent material it had in its possession upon which it based its discharge decision. This it simply did not do. (C-00308)

### Supporting Cases

C-00090, Arbitrator Willingham, December 11, 1972  
C-00308, Arbitrator Dash, May 17, 1974  
C-04273, Arbitrator Williams, May 2, 1984  
C-06658, Arbitrator LeWinter, November 21, 1986

**SECTION TWO**  
**DISPUTES WHETHER GRIEVANT'S CONDUCT, IF PROVEN, WOULD**  
**CONSTITUTE A PROPER BASIS FOR THE IMPOSITION OF DISCIPLINE**

All letter carrier behavior may conceptually be divided into two categories: 1) behavior for which no discipline may be imposed, and 2) misconduct for which discipline may be imposed. Examples of behavior for which discipline may not be imposed include finishing one's route on time every day, or taking lunch at an authorized location. Examples of misconduct for which discipline may ordinarily be imposed include stealing from the mail, or assaulting a supervisor.

Sometimes management crosses the line between these categories and issues discipline for behavior which may not be properly characterized as misconduct, either because the behavior violates no rule, or because the rule which is violated is invalid. When this happens, the discipline should be disallowed.

While this is a dramatic defense, it is inapplicable to most disciplinary actions- decisions directly addressing this defense count for fewer than .01% of NALC's discipline arbitrations.

Although the opportunities to employ this defense are infrequent, it is the only proper defense in certain recurring situations. For example, management sometimes disciplines employees simply for failure to meet the "18 and 8" standard. Such a charge does not form a valid basis for the imposition of discipline, because NALC and USPS have jointly agreed that failure to meet that standard, by itself, is not disciplinable misconduct. In such situations, the NALC representative handling the grievance must look behind the charge and ask "what is the rule implied by the charge?"

Where the charge is failure to meet standard, the rule implied is that failure to meet standard, by itself, is disciplinable misconduct. But such failure is not misconduct, and this defense, therefore, should be employed. In other kinds of cases, a valid rule will be found to be implied. For example, in a discharge for fighting the rule implied by the charge is that fighting is disciplinable misconduct, a valid rule. And because a valid rule was found, this defense could not appropriately be used.

**Case Examples**

[T]he Service has failed to charge the Grievant with a dischargeable offense. The reason given by the service for the removal of the Grievant is both void for vagueness and an obvious attempt to discharge the Grievant for being "accident-prone," a non-offense.

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"The Service may properly charge an employee with physical inability to perform assigned duties, with psychological disabilities to perform assigned duties or with specific acts of negligence or violations of established safety standards. However, the Service is not entitled to concoct a bastardized form of infraction in order to remove employees it considers to be accident-prone. (C-01311)

If Grievant was in fact acting as a Steward on January 7, 1982, his personal abusiveness to [his supervisor] falls precisely into the zone for which the special immunity status was created; a closed grievance meeting or closed discussion to discuss Union matters. It is in this context, and the context alone, that the parties meet as equals. The Steward is entitled to the same deference and latitude as his or her supervisor. It is in this situation, away from the audience of other employees, where a steward may display a loss of temper or use profanity and still be protected from discipline. (C-01191)

The Employer cannot discipline an employee for absences which are legitimately caused by the physical incapacity of an employee up to at least the point where that employee exhausts his/her accumulated sick leave benefits. To hold otherwise would make it possible for the employer to say to an incapacitated employee, 'although you have accumulated sick leave available, you cannot use it because to do so would make your attendance unsatisfactory.' Certainly, such a conclusion is not in accord with either the intent or spirit of the negotiated Sick Leave benefits. (C-00599)

[I]t is the arbitrator's considered opinion that to remove the grievant for absence caused by an injury suffered while on duty and one which he had no control over and from which he appears to have fully recovered, would be punitive in nature rather than corrective. (C-04024)

Supporting Cases

C-01191, Arbitrator Goldstein, July 6, 1982  
C-01311, Arbitrator Levak, September 24, 1982  
C-04024, Arbitrator Parkinson, December 29, 1983  
C-04163, Arbitrator Lamey, December 28, 1983  
C-00599, Arbitrator Holly, August 2, 1978

**SECTION THREE**

**DISPUTES ABOUT THE CORRECTNESS OR COMPLETENESS OF THE FACTS USED TO JUSTIFY THE DISCIPLINE.**

This defense may be divided into two major categories.

The first category-management failed to prove that grievant acted as charged-is a defense that is available in every discipline case. This is so

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because whenever management issues discipline, it assumes the burden of proving that the grievant acted in such a way as to provide cause for discipline. To meet this burden, management must come forward with probative evidence sufficient to convince the arbitrator that the misconduct with which the grievant has been charged actually occurred. The union does not bear a corresponding burden-it does not have to prove that the grievant did not act as charged. Instead, the union's job is to poke holes in the proofs offered by management.

This is not to say that the union should waive its opportunity to present its side of the case. If the union can prove through its own presentation of evidence that the grievant did not act as charged, so much the better.

The second category-grievant may have acted as charged, but was provoked by another-is an affirmative defense. If the union employs this defense, it bears the burden of proving that provocation occurred. Thus, for example, if a letter carrier punches a supervisor, the union must prove that the supervisor first attacked the letter carrier, and that the letter carrier was merely defending him-or herself.

### **Defense on the Merits No. I**

#### **Management failed to prove Grievant acted as charged.**

Before any discipline will be allowed, management must prove that the letter carrier actually engaged in the misconduct with which charged. Management's proof must be in the form of evidence. Arguments, assumptions, guesses, conjectures, allegations or speculations are not evidence. Testimony of a witness who has personal and direct knowledge is evidence, as may be photographs or fingerprints.

The arbitrator's primary function in a typical discipline case is to weigh the evidence, to determine whether the evidence is sufficient to conclude that management has met its burden of proof. In performing this function the arbitrator must decide the weight, if any, to be given hearsay or circumstantial evidence; and if witnesses have given testimony which is contradictory, the arbitrator must decide whose testimony is to be credited, and whose discounted. The decisions listed under "Supporting Cases" below, illustrate the ways in which arbitrators deal with these kinds of problems.

When you are preparing to make this defense in a case, you should also look at other discipline cases having the same charge. By doing so, you'll be able to identify the kind of evidentiary problems that may be specific to a certain charge. For example, the fact patterns found in falsification of employment application cases are quite similar to each other, but are quite

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different from the fact patterns found in cases in which discarding deliverable mail is charged-and the methods used by arbitrators to resolve disputes of fact in the two kinds of cases is also quite different.

### **Case Examples**

In industrial discipline, as in the criminal justice system, an employee is deemed to be innocent of charges against him until proved otherwise, and the burden of such proof lies with the employer in industrial discipline, as it does with the state under our criminal justice system. (C-04891)

Under these facts, I certainly have not given any weight to the denials of wrongdoing of the Grievant. I do not find him 'innocent of wrongdoing.' On the charge of improperly imbibing on duty and/or being intoxicated on the job, I hold merely that Management at hearing completely failed to prove its case. That is, after all, the burden assumed by it in discipline and discharge cases under the contract. (C-04711)

The best evidence that could have been presented as proof of management's statement of facts regarding July 10 was testimony from those individuals who were present when the events occurred. The Employer failed to present those witnesses, and the burden of going forward with such testimony cannot now be shifted to the Union. The grievant denied any wrongdoing at 604 Sunset on July 10, and there was no credible evidence to rebut his version of the facts. By failing to prove the events of the precipitating incident, the Employer has failed to set forth justification for terminating the grievant. (C-04710)

The evidence presented by the Postal Service is circumstantial in nature, however, it is noted that proof of guilt may be accomplished by the use of persuasive circumstantial evidence alone. This arbitrator requires that the evidence in support of disciplinary actions be clear and convincing. The burden of proof is, of course, upon the Postal Service.

There is no question that mail was discovered in a trash container on April 22, 1985, that the mail was addressed for the grievant's route and that she delivered the route that day. There are no witnesses who could establish that [the grievant] dumped the mail in the trash. There were also no witnesses who could establish

that the grievant left the Postal Annex for her deliveries on the day with the recovered mail. More importantly, no motive was shown as to why [the grievant] would throw deliverable mail away, especially on her assigned route.

[I]t is my determination that the Postal Service has failed to clearly and convincingly prove that [the grievant] improperly and unlawfully disposed of canceled and deliverable mail. (C-05396)

### Supporting Cases

C-01312, Arbitrator Eaton, September 23, 1982  
C-01345, Arbitrator Eaton, June 8, 1982

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C-01400, Arbitrator Epstein, July 25, 1980  
C-01432, Arbitrator Aaron, December 13, 1976  
C-02689, Arbitrator Schedler, December 20, 1985  
C-03945, Arbitrator Bowles, November 7, 1983  
C-04710, Arbitrator Snow, February 13, 1985  
C-04711, Arbitrator Goldstein, March 11, 1985  
C-04771, Arbitrator Schedler, April 2, 1985  
C-04812, Arbitrator LeWinter, May 3, 1985  
C-04891, Arbitrator Howard, April 23, 1985  
C-04976, Arbitrator Williams, July 28, 1985  
C-05166, Arbitrator Goldstein, September 5, 1985  
C-05396, Arbitrator Parkinson, November 22, 1985

### **Defense on the Merits No. 2**

#### **Grievant may have acted as charged, but was provoked by another.**

This is one of the only possible defenses to some forms of misconduct, including assaults on supervisors, customers, or other employees.

### **Case Examples**

There is no question from this record but that grievant engaged in a 'cuss-fight' with a customer. The question is: does that fact serve as just cause for removal, or do the circumstances here-some already discussed and some not-tend to mitigate such a harsh penalty? The undersigned is of the opinion they do. He will briefly explain why he reaches this conclusion lest someone think he does not agree that such a 'cuss-fight' is unsatisfactory performance - conduct unbecoming a Postal employee'. It is, there is no question about that. But it is to be quickly added, provocation is a consideration that necessarily comes within the concept of just cause, which is the test to be applied here. (C-05321)

The evidence convincingly established that [the supervisor] well knew from his long relationship with the Grievant that he was not being threatened on May 30th and that the Grievant was no danger to himself or to others. It is apparent to the Arbitrator that [the supervisor] had learned to play the Grievant's emotions 'as a musician plays a violin.' Thus, not only did he provoke and cause the situation, he well knew that the Grievant's reaction was neither threatening, abusive nor potentially injurious. (C-05873)

The undersigned will not burden these sophisticated parties by giving them his understanding or definition of the 'just cause' concept as was intended by them when they put it in the National Agreement. He knows they know what it means. He believes they will not disagree with him however when he finds, as he does, that just cause is not present when a 9 year employee, who has a good work record as a letter carrier and is serving as station steward, is removed from the Postal Service because he refuses to stand still and take from the supervisor public criticism of his official efforts as a steward, with the supervisor all the while standing less than 2 feet away, vigorously shaking a pencil in the steward's face. This is not to also say that under such circumstances the steward is authorized to 'come out fighting.' He is not and any trained steward or sea-

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soned employee, and the grievant was both, knows this. It is to say, however, that if a supervisor acts improperly toward an employee by publicly criticizing him and also violates the employee's right to be treated in a reasonable fashion, both such being found to have happened in this case, any subsequent overreaction on the part of the employee is subject to mitigation in direct proportion to the seriousness of the supervisor's breach of accepted practice and policy. (C-04203)

#### Supporting Cases

C-04203, Arbitrator Williams, March 28, 1984  
C-04213, Arbitrator Williams, May 10, 1984  
C-04478, Arbitrator Williams, June 14, 1984  
C-04750, Arbitrator LeWinter, March 25, 1985  
C-05138, Arbitrator Rentfro, September 3, 1985  
C-05321, Arbitrator Williams, October 29, 1985  
C-05242, Arbitrator Render, October 6, 1985  
C-05873, Arbitrator Levak, March 11, 1986  
C-06717, Arbitrator Goldstein, December 8, 1986  
C-06782, Arbitrator Sobel, December 8, 1986  
C-17699, Arbitrator Erbs, November 13, 1997

## **SECTION FOUR ALLEGATIONS THAT, BECAUSE OF MITIGATING CIRCUMSTANCES, THE DISCIPLINE IMPOSED IS TOO HARSH, OR NO DISCIPLINE IS WARRANTED**

The final group of defenses may be called the "mitigation" defenses. With them, the NALC in effect says "even assuming that the grievant's behavior constitutes misconduct, when all relevant factors are considered the amount of discipline imposed is excessive".

"Mitigation" should not be confused with "leniency". The mitigation defenses present a variety of factors which management should have considered when imposing discipline, and which an arbitrator will consider even if management didn't. Leniency—simply asking, for another chance—is within the exclusive province of management. and will not be considered by any arbitrator.

### **Mitigation Defense No. 1**

**Grievant may have acted improperly, but did so as a result of lack of, or improper, training (including claims that the grievant "didn't know it was wrong").**

A letter carrier should not be disciplined for violating a rule of which he or she was not aware. It should be noted, however, that employees are pre-

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sumed to know the major rules of the shop. This defense, therefore, will not be useful where the grievant has assaulted a customer, or has intentionally discarded deliverable mail.

### **Case Examples**

There remains the question whether [grievant's] surreptitious recording, though legal, nevertheless violated a Postal Service regulation of which [grievant] was, or should have been, aware. This question can be disposed of on the basis that, so far as this record shows, management never informed the grievant that the surreptitious recording of a conversation with a supervisor was forbidden. It suffices to recall that none of the grievant's supervisors knew of any Postal Service rule on the subject. Indeed, the only prior incident of surreptitious recording ever referred to at the hearing was an incident that management had condoned. Thus, assuming that the E&LR Manual does forbid what [grievant] did, there is no evidence that he had ever been so instructed, or otherwise should have known. If the postal Service wishes to punish its employees for lawful conduct, recording conversations in which they participate, then the Postal Service must take steps that will ensure that its employees are informed of the rule. (C-01438)

In most cases I am unimpressed with arguments about lack of knowledge or training in familiar areas of job assignments. It must be noted in the instant case that the Employer argued it was not plausible (sic) that no supervisor explained to the Grievant his obligations while on jury duty. However, no supervisor who gave any instructions to the Grievant was brought forward and the Grievant's testimony that the Postmaster's order was not posted at the Branch was uncontroverted.

I recognize that an argument can be advanced that the Grievant should have known there were rules and regulations for jury duty (as there are for virtually every aspect of employment in the Postal Service) and the Grievant should or could have when he visited the Main Post Office sought out such rules to insure he was aware of his obligations.

However, I do not feel the entire burden can be shifted to the Grievant and his failure to investigate what should have been communicated by supervision and therefore some question exists as to just what the Grievant can be reasonably held on notice as to his obligations. (C-01272)

... Grievant was, all circumstances considered, a quite unsophisticated employee in matters of this kind ... He had never traveled for the Postal Service before. He had concededly received no formal training or instruction in the intricacies, such as they are, of filling out travel vouchers..

On this state of the record the Arbitrator concludes that the Postal Service itself is not without fault in the instant situation. Certainly, greater precaution should have been taken, especially in the case of a new and quite untutored employee, to insure that he be given some training or formal instruction to cope with his responsibilities in the matter of compensation for travel and the procedures incidental thereto. The Arbitrator, without condoning Grievant's conduct here, finds no basis for concluding that there was any conscious effort or intent by Grievant, to commit fraud on the Postal Service or to obtain illicit compensation. (C-00112)

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#### Supporting Cases

C-00112, Arbitrator Cushman, November 8, 1979  
C-01272, Arbitrator Leventhal, June 16, 1982  
C-01438, Arbitrator Hardin, November 8, 1982  
C-01786, Arbitrator Eaton, March 11, 1981  
C-04563, Arbitrator Schedler, December 11, 1984  
C-16511, Arbitrator Olson, March 2, 1997  
C-16708, Arbitrator Britton, April 9, 1997

#### **Mitigation Defense No. 2**

## **Grievant has long prior service, good prior record, or both.**

As a letter carrier works the job year after year, he or she establishes ever greater "property rights" to the job, and a letter carrier with substantial time on the job deserves a more moderate response to a transgression than does a new hire. This defense is most effective when the years of service have been relatively discipline-free.

### **Case Example**

Grievant has served this Employer for over eight years without any demonstrated disciplinary penalty. I have, in the past, referred to this as a 'bank of good will'. In such instances of long, good service, it must be recognized that a single violation, even a serious one may occur without an assumption that [there has been] the destruction of the trust necessary to the continued employment relationship. Indeed, years of good, faithful service have many times been used and accepted as substantive evidence of lack of just cause for discharge. (C-03587)

### **Supporting Cases**

C-02287, Arbitrator Walt, September 14, 1979  
C-02386, Arbitrator Seitz, November 12, 1979  
C-02871, Arbitrator Walt, November 20, 1979  
C-03587, Arbitrator LeWinter, May 3, 1983  
C-03863, Arbitrator Gentile, October 28, 1983  
C-04275, Arbitrator Bowles, April 25, 1984  
C-04570, Arbitrator Epstein, December 11, 1984  
C-04644, Arbitrator Dash, February 21, 1985  
C-05970, Arbitrator Seidman, December 31, 1985  
C-06952, Arbitrator Howard, March 3, 1987  
C-16572, Arbitrator Duda, March 12, 1997

### **Mitigation Defense No. 3**

#### **Grievant's misconduct was not intentional.**

Unintentional misconduct (e.g., "negligence") is generally viewed as being less serious than intentional misconduct. Intent is an essential element of

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almost all charges of misconduct, and it is clear that it is management's burden to prove that the grievant's acts were intentional.

### **Case Examples**

The real question in the instant case thus reduces itself to this inquiry: Whether or

not the Grievant's action on March 18, 1981, was a 'willful' and 'intentional' act?

After evaluating all of the evidence and the apparent candor of the Grievant when he testified, the Arbitrator reached the conclusion that the Grievant's act was that of 'carelessness' and 'gross negligence,' but not a 'willful' and 'intentional' act to circumvent or thwart the fundamental purpose of his job. Those factors which strongly influenced this conclusion in addition to the Grievant's apparent unblemished record with the Service and his own testimony which was given considerable weight, were these (1) the subject mail was placed openly in the Station's waste hamper, a location which demonstrated no reasonable attempt by the Grievant to conceal in a clandestine manner the fact that mail was being discarded; (2) the mail was left in sequential order in a type of , bundle' state which would further highlight its presence and support the Grievant's 'fanning' statement; (3) the Grievant, when initially confronted with the mail in question did not attempt to conceal the fact that he was the responsible person, but that in his judgment, which was subsequently proven wrong, the mail was not deliverable, and (4) a goodly portion of the mail was in fact not deliverable. (C-01721)

[T]he essence of the dischargeable offense of falsification is the employees (sic) dishonesty that requires a finding of intentionally issuing a false statement, as distinguished from a reasonable mistake, in direct conflict with the necessary characteristic of a letter carrier that he must always be trustworthy. Thus, the critical question is not just whether the Grievant had in fact been fired, or forced to resign from a former job, but whether he misrepresented the known fact in order to be accepted for employment. In addressing this factual question, the employee must be presumed innocent with the Employer bearing the burden of rebuttal by clearly establishing fraudulent intent. (C-01988)

One element of assault is an intent on the part of the aggressor to hit or strike the other. In this case, the testimony of the victim, or the object of the assault, clearly indicates that the aggressor has no intent to hit him with the letters. Therefore, the Service has not established that an assault occurred. Since there was no assault, it is the Arbitrator's opinion that the Grievant cannot be discharged. (C-03611)

#### Supporting Cases

C-01062, Arbitrator Howard, August 14, 1975  
C-01274, Arbitrator Goldstein, April 28, 1982  
C-01298, Arbitrator Leventhal, September 16, 1982  
C-01402, Arbitrator DiLeone, November 17, 1980  
C-01424, Arbitrator Jones, November 20, 1978  
C-01721, Arbitrator Gentile, November 10, 1981  
C-01988, Arbitrator Foster, August 7, 1981

C-03611, Arbitrator Render, May 29, 1983 C-06483, Arbitrator LeWinter, September 20, 1986  
C-15436, Arbitrator Dennis, May 24, 1996  
C-17676, Arbitrator Bankston, September 2, 1997  
C-18215, Arbitrator Hales, April 15, 1998

#### **Mitigation Defense No. 4 Grievant was emotionally impaired.**

This is a sub-category of Mitigation Defense No. 3 above. Here it is argued that grievant was emotionally impaired, and because of that impairment grievant's misconduct should be viewed as unintentional.

#### **Case Examples**

In August of 1977, [grievant] labored under severe stress and emotional tension, a condition sufficiently aggravated to require medical treatment. Indeed, he was granted sick leave for that very reason on three of the days that separated his conduct on August 23 from that of August 29 and August 30, 1977. After eight years of satisfactory employment with the Postal Service during which he won the praise and affection of many of the patrons on Route 901, [grievant] suddenly inundated the waste hamper with deliverable third class mail. If it had been his desire to dispose of that mail in order to reduce his delivery time he would have done so away from Station O. There clearly exists a different explanation for his conduct.

The distraught emotional condition of the grievant at the time in question is corroborated by his doctor and the probation officer who saw him on the day of his arraignment in the United States District Court. True enough, [grievant] told the Postal Inspectors he had disposed of some third class mail without malice and in court he entered a plea of guilty to the charge of obstruction of mail. In doing so, however, he explained that his conduct was the result of being "tired and weary". More precisely, he was reacting to an overwhelming emotional burden and not intentionally violating either the mail processing procedures at Station O or statutory law. He stands guilty of no more than negligence and the appropriate sanction should therefore have been a substantial disciplinary suspension rather than discharge. (C-02362)

It is, of course, the burden of the Union to raise and prove mental illness as a defense in the form of mitigating circumstances. The burden is on the Union to demonstrate by a preponderance of the evidence that, even though the Grievant is guilty of the charged offenses, he should be resolved of responsibility to some degree as a result of the mental disorder.

The Service is not prohibited from disciplining an employee who is a threat to other employees or who cannot perform the duties of his job, regardless of the fact that the employee's malfeasance or nonfeasance is the result of a mental illness or

disorder. The Arbitrator does not agree with those who say such discipline is a breach of the just cause clause. The Service is not under the obligation to retain an employee who suffers from a mental disorder at all costs. The service has an obligation to operate efficiently, as well as the duty to protect the safety of its employees. On the other hand, when the service chooses to discipline an employee who it knows suffers from a mental disorder,

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it does so at some risk. If the employee is a 'qualified handicapped individual' within the meaning of the Rehabilitation Act of 1973, the Service must be certain that it has reasonably accommodated the employee. The Service must also be prepared to face the contention that the discipline violates the employee's E.E.O. rights. The instant case does not involve either of those pieces of legislation. However, the Service must also be prepared to confront proof by the Union that the following factors exist:

- (1) Proof that the medical disorder exists.
- (2) Proof that the alleged offense was the result of the mental disorder.
- (3) Proof through the best medical evidence that the employee is not a threat to other employees.
- (4) Proof that the disorder does not disable the employee from regularly performing his duties.
- (5) Proof through the best medical evidence that the employee's disorder is under control and that he ultimately will be rehabilitated.
- (6) Proof that management failed to properly consider the alleged offense in light of the employee's disorder. (C-03805)

#### Supporting Cases

C-00077, Arbitrator Cohen, February 22, 1982  
C-00274, Arbitrator Williams, May 18, 1983  
C-00295, Arbitrator Feldman, February 3, 1978  
C-0055 1, Arbitrator Dash, January 16, 1985  
C-01200, Arbitrator Seidman, July 16, 1982  
C-01365, Arbitrator Epstein, June 2, 1982  
C-01916, Arbitrator Walt, September 30, 1981  
C-01972, Arbitrator Levin, May 9, 1980  
C-02362, Arbitrator Roberts, November 7, 1978  
C-02375, Arbitrator Epstein, October 12, 1978  
C-02677, Arbitrator Goldstein, December 18, 1982  
C-03342, Arbitrator Dash, March 10, 1983  
C-03805, Arbitrator Levak, September 22, 1983  
C-04350, Arbitrator Gentile, June 30, 1984

C-04913, Arbitrator Walsh, April 8, 1985  
C-05304, Arbitrator Carson, November 4, 1985  
C- 15644, Arbitrator Johnston, July 24, 1996  
C- 17324, Arbitrator Abernathy, September 16, 1997

### **Mitigation Defense No. 5**

**Grievant was impaired by drugs or alcohol (including claims that "alcoholism" was the cause of grievant's misconduct).**

This is a sub-category of Mitigation Defense No. 3 above. Here it is argued that grievant was impaired by drugs or alcohol, and because of that impairment grievant's misconduct should be viewed as unintentional.

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This defense is used more frequently than any other; only rarely, however, is it presented with the thoroughness of preparation required for a satisfactory result. If you determine that this defense may fit a case which you are preparing, carefully study the cases listed below, and make certain that you can match the elements essential for a win. If you can't, you may be better off concentrating your efforts on other defenses. (One arbitrator of NALC/USPS discipline cases was recently heard to ask, "What have you got when you sober up a drunken mail thief" His answer: "A sober mail thief.")

### **Case Examples**

What then are the factors which would allow an arbitrator to mitigate the offense committed by the alcoholic which led to his removal from the Postal Service to order that he be reinstated by the Postal Service. The decided cases rely on several factors; First, that the act was done while the grievant was an alcoholic and at the time the act was committed he was either drunk or under the influence of alcohol; Second, that the Grievant's prior work record is either relatively clear of disciplinary action or that all, or most, of the prior disciplinary actions occurred as the result of the grievant's alcoholism; Third, that the grievant is successfully participating in [PAR] and that participation has caused both his counselor and the officer in charge of the PAR. program to indicate that he is likely to be a successful candidate for rehabilitation; and Fourth, that the grievant has had a substantial length of Service with the Post Office, generally for a period of at least 10 years, with the likelihood of reinstatement increasing if the period of prior service is 20 years or more. (C-01928)

The element which must give pause in this dispute is none of the above, but the evidence concerning the cortisone medication which the Grievant was taking for an indisputably serious skin condition. Odd though it may seem to a layman the

testimony is uncontradicted that a side effect of the Depomedrol injection-which can last up to two weeks-can be serious personality aberrations. It is true that Dr. Jensen could not testify positively that the Depomedrol caused the Grievant's actions. However, he could testify that the medication had been given, and that in some cases it can, and has, caused similar behavior.

"Absent this consideration. Removal would clearly be warranted. Its presence, however, taken together with the prior excellent record of the Grievant, does seem to indicate abnormal behavior which one would not expect to be repeated in the future. (C-01237)

While the Service emphasizes the seriousness of the charge of delaying the mail, clearly the seriousness of the charge rests upon the intent and deliberation of the offender. The record makes clear that as a result of overindulgence in alcohol, the grievant was not in full possession of his senses on the day of the incident and really was not aware of what he was doing. His conduct cannot be regarded as a deliberate and intentional delaying of the mail. (C-02849)

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#### Supporting Cases

C-00282, Arbitrator Zack, February 26, 1982  
C-01237, Arbitrator Eaton, July 13, 1982  
C-01565, Arbitrator Haber, July 30, 1976  
C-01820, Arbitrator Zumas, January 12, 1981  
C-01928, Arbitrator Seidman, February 22, 1982  
C-02368, Arbitrator Howard, June 21, 1978  
C-02371, Arbitrator Rentfro, January 27, 1979  
C-02372, Arbitrator Moberly, March 20, 1978  
C-02831, Arbitrator Dash, December 19, 1977  
C-02846, Arbitrator Aaron, May 19, 1975  
C-02849, Arbitrator Howard, March 19, 1975  
C-06375, Arbitrator Rentfro, July 23, 1986  
C-07057, Arbitrator Goldstein, April 16, 1987  
C-07126, Arbitrator Eaton, May 15, 1987  
C-12085, Arbitrator Taylor, June 11, 1992  
C-17945, Arbitrator Olson, January 31, 1998

#### **Mitigation Defense No. 6** **Grievant was disparately treated.**

Letter carriers who are similarly situated should receive the same discipline for the same misconduct. For example, if two letter carriers with no prior discipline extend

their lunches by an hour, management might be able to justify giving each a letter of warning; in the same situation, management could not justify giving one a letter of warning, and firing the other.

### **Case Examples**

Union witnesses testified to eight specific cases of deviation in which no more than a letter of warning was assessed. Management witnesses questioned only one of them and corroborated most of them. Included was one instance of deviation to go to the bathroom. However, there was not even a formal discussion of the deviation. In another, there was an employee with a terrible record who deviated and was playing video games. Yet, his ultimate discipline was a letter of warning. In fact, Management witnesses agreed that no one ever before had been terminated for deviation. In general, postal arbitrators would overturn discipline if only one example of disparate treatment was proved (in fact, several were referenced by the Union). Thus, it is abundantly clear that the disparate treatment in the subject case, standing alone, would call for reinstating the grievant with full back pay. (C-04401)

The parties herein are well aware of the general rule that disparate treatment-unequal discipline for similar misconduct-is not looked upon with favor by any arbitrator. Unequal discipline imposed, even by a well meaning but somewhat disorganized employer, will consistently be overturned as discriminatory when appealed to arbitration. (C-01760)

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#### **Supporting Cases**

C-01047, Arbitrator Holly, March 30, 1979  
C-01760, Arbitrator Rentfro, June 25, 1980  
C-01920, Arbitrator Gentile, September 30, 1981  
C-01945, Arbitrator Searce, June 23, 1980  
C-02354, Arbitrator Caraway, July 5, 1978  
C-02403, Arbitrator DiLeone, October 7, 1977  
C-02801, Arbitrator Caraway, March 31, 1978  
C-04401, Arbitrator Williams, July 16, 1984  
C-04432, Arbitrator Williams, July 7, 1984  
C-04518, Arbitrator Weisenfeld, December 21, 1984  
C-05267, Arbitrator Seidman, November 4, 1985  
C-16237, Arbitrator Hutt, December 3 1, 1996  
C-16303, Arbitrator Abernathy, November 18, 1996  
C-17453, Arbitrator Duda, October 12, 1997

### **Mitigation Defense No. 7**

## **Rule Grievant broke was otherwise unenforced.**

This is a variant of Mitigation Defense No. 6, above. If management routinely permits letter carriers to violate a rule, or routinely to follow a certain behavior, it may not suddenly impose discipline for violations without first announcing its intention to begin enforcing the rule, or to stop tolerating the behavior.

### **Case Examples**

The core of this issue is the established past practice at the Pittsburgh Post Office of sometimes disposing of deliverable third class mail. however, contrary to postal regulations, and however, illegal it may have been. That practice existed, and it is of crucial consideration in this dispute.

When such a practice is condoned it is simply not fair that one or two employees bear the entire brunt of the correct, necessary, and entirely justifiable determination of management to bring such a practice to a halt. An employer has the right to enforce reasonable regulations, and the postal service in particular has an obligation to see that the mail is delivered. That is the reason for its existence.

Any employer has an obligation to inform employees clearly, without equivocation, and without the possibility of misunderstanding, when rules which have been ignored are to be enforced, and when wrongful practices which have been condoned are to cease.

While the postal service has endeavored to show that it met these obligations in the present dispute, the proof falls short of making that showing. (C-02803)

It is a basic tenet of labor management relations that prior to the imposition of discipline, an employee must be aware that the employer considers his actions or conduct violative of the labor agreement or existing rules and regulations and he must know of

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### **DEFENSES To DISCIPLINE**

the possibility that discipline may result. Where an employee believes his actions and conduct are justified and no indication has been given that persistence in that course of conduct can and probably will result in discipline, subsequently imposed sanctions must be set aside. (C-01455)

### **Supporting Cases**

C-01448, Arbitrator Dworkin, November 8, 1982

C-01455, Arbitrator Walt, December 17, 1979

C-01875, Arbitrator DiLeone, April 11, 1979

C-02029, Arbitrator Wams, July 24, 1972

C-02803, Arbitrator Eaton, May 25, 1978

C-16426, Arbitrator King, January 15, 1997

### **Mitigation Defense No. 8**

#### **Management failed to follow principles of progressive discipline.**

While management may dispense with minor forms of discipline for certain offenses which are normally dischargeable by themselves (e.g., theft of mail), for most types of misconduct, management must follow a corrective (and all arbitrators have read this to mean "progressive") pattern of disciplinary actions. This means that discharge must normally be preceded by one or more large suspensions, and that a large suspension must be preceded by one or more small suspensions, and so forth. When management fails to follow the progressive path, discipline will usually be disallowed or modified.

#### **Case Examples**

Grievant's supervisor was asked if he had considered a lesser penalty. He replied that he had, and had decided against it on the ground that he felt it would 'have no impact'.

The action of the supervisor in this regard is a violation of Article 16, Section 1, of the National Agreement. The first sentence of this Article states: 'In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive.'

It has been held many times by other arbitrators that, for discipline to be corrective, it must be progressive.

This directive from the National Agreement is mandatory. It is not discretionary. Management does not have a choice as to whether it will issue corrective discipline or not. It must attempt to make discipline corrective. Here, Grievant's supervisor decided for reasons which appeared to him to be valid that corrective discipline would be useless. He does not, however, have that discretion. He must attempt to issue corrective discipline even though he believes that it will be no use. (C-00557)

The progression of discipline upon which the discharge was based does not properly conform to the principles of progressive discipline that would warrant a dismissal.

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Progressive discipline means that each succeeding disciplinary measure is of a more severe degree so that an employee may know precisely where they stand in the progression. If supervision decides to issue a lesser degree of discipline than the last, the progression then begins again at that point. The previous disciplinary elements [in this case] are letters of warning. Even though there are earlier

suspensions, the later letters of warning must be followed by further suspension if discipline is to properly progress to dismissal. (C-01043)

#### Supporting Cases

C-00060, Arbitrator Dash, May 18, 1979  
C-00557, Arbitrator Cohen, January 4, 1985  
C-00584, Arbitrator Levak, October 26, 1982  
C-01043, Arbitrator Levin,  
C-01974, Arbitrator Schedier, June 7, 1981  
C-05902, Arbitrator Levak, April 7, 1986  
C-06299, Arbitrator Levak, June 30, 1986  
C-06894, Arbitrator Snow, February 27, 1987  
C-13284, Arbitrator Parkinson, November 19, 1993  
C-16602, Arbitrator McGown, March 29, 1997

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