REGULAR ARBITRATION PANEL

In the Matter of the Arbitration
between
UNITED STATES POSTAL SERVICE
and
NATIONAL ASSOCIATION OF
LETTER CARRIERS, AFL-CIO

GRIEVANT:  H HOPKINS
POST OFFICE:  ARCATA, CALIFORNIA
CASE NO:  W7N-5E-D 32107

BEFORE:  Gary L. Axon, ARBITRATOR

APPEARANCES:
For the U. S. Postal Service:  Robert L. Hall, Jr.
Labor Relations Representative
USPS - Oakland Division
1675 7th St.
Oakland, CA 94615-9405

For the Union:  Alan J. Apfelbaum
Regional Administrative Assistant
San Francisco Region
NALC, AFL-CIO
1043 Diguilio Avenue, Suite A
Santa Clara, CA 95050

Place of Hearing:  Arcata, California
Date of Hearing:  August 28, 1991

AWARD:  Postal Service did not have just cause to remove Grievant from the Postal Service. For the reasons stated, the grievance is sustained and the Postal Service is ordered to reinstate Grievant and make him whole for all wages and benefits lost as the result of the removal.

Date of Award:  November 18, 1991

Gary L. Axon
Arbitrator
I. STATEMENT OF ISSUE

The parties stipulated to a statement of the issue which read as follows:

Whether or not the removal notice issued to Harry Hopkins, was issued for just cause? If not, what is the appropriate remedy?

II. RELEVANT CONTRACTUAL PROVISIONS

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.

III. STATEMENT OF FACTS

Grievant Hopkins was a PTF letter carrier at the Arcata, California Post Office. He has over 28 years of experience with the Postal Service. Grievant started work at the Arcata,
California office on January 8, 1990. Grievant and his family lived in a fifth wheel trailer during their first year at Arcata.

On December 5, 1990, Grievant injured his back during the course of his duties as a carrier. Grievant testified that he felt sharp pain in his back while lifting trays of magazines. Grievant stated he did not feel bad enough to leave work. The next day was his scheduled day off. According to Grievant, the pain in his back increased to the point that he needed to see his doctor.

On December 6, 1990, Grievant was examined by Dr. David Salter. Dr. Salter concluded Grievant needed to be off work "due to back impairment." (Jt. Ex. 9, p 2). Postmaster Allyn Kelbar scheduled Grievant for a fitness for duty examination. Dr. Phillip Wagner performed the fitness for duty examination on December 14, 1990. In his medical report Dr. Wagner concluded Grievant could not return to work at the present time because he has a "herniated lumbar disc." (Jt. Ex. 9(8)). Dr. Wagner also stated Grievant could not "work at light duty at the present time." Dr. Wagner anticipated Grievant would not be able to return to full duty until January 7, 1991. (Jt. Ex. 9, p 9B).

Dr. Salter completed a "Duty Status Report" dated December 13, 1990, in which he identified the total disability from December 6, 1990, until February 6, 1990 (sic). (Jt. Ex. 9, p 7). Dr. Salter identified Grievant's problem as a sciatica problem and disc rupture. He also wrote on the form "Needs bed rest." Grievant's condition was not improving to the level Dr. Salter had expected in the first weeks of rehabilitation for the injury.
Dr. Salter scheduled Grievant for a MRI with Dr. D. Gregory Holland. Grievant was examined by Dr. Holland on December 20, 1990. Dr. Holland wrote in his report in relevant part as follows:

The examination demonstrates a posterolateral disc herniation to the right at L5-S1. The possibility of a small free fragment cannot be ruled out. There would appear to be impingement upon an edema of the right S1 nerve root.

(Jt. Ex. 9, p 11)

Postmaster Kelbar acting on information from a confidential source that Grievant was planning to move his household goods from his trailer to a residence Grievant had recently purchased contacted the Postal Inspection Service about Grievant’s planned move. Postal Inspector Michael B. Cassidy met with Kelbar. Kelbar showed Cassidy the residential areas at issue. Cassidy testified he observed Grievant once but saw nothing unusual in Grievant’s conduct. Cassidy instructed Kelbar on how to use a video camera in order to tape Grievant performing daily activities.

On February 2, 1991, Kelbar video taped Grievant and his daughter at a storage area. The video tape showed Grievant hooking up a car to be towed by another car. On the tape Grievant was shown to be bending down and making the cable connections between the two cars.

On February 19, 1991, Grievant was summoned to the post office where he was interviewed by Inspector Cassidy. Grievant gave a written statement in which he admitted being "involved in
moving household items" from February 1, 1991, through February 16, 1991. In his statement Grievant described the move of his household goods as being accomplished with the help of his wife and daughter. (Mgt. Ex. 1). Grievant also included in his statement that he was scheduled to see his doctor on February 20, 1991, and expected to be released for duty at that time. Grievant saw Dr. Salter on February 20, 1991, who released Hopkins to return to work with a 25 pound lifting restriction. (Jt. Ex. 9, p 32). Kelbar placed Grievant in a "non-duty, non-pay status effective February 23, 1991, pending a complete investigation into alleged irregularities in your conduct as a postal employee." (Un. Ex. 6).

On March 21, 1991, Valerie Story, Superintendent of Postal Operations, notified Grievant of the Postal Service intent to remove him from employment. The letter stated in relevant part:

You are hereby notified that you will be removed from the Postal Service effective April 26, 1991. The reason for this action is:

During the period of December 30, 1990 through February 16, 1991, you were observed by Postal Inspectors and other persons engaging in the movement of household items from a storage location to a residence dwelling on Elk River Road. You were observed pushing, pulling, lifting, and bending, in violation of the restrictions submitted by you.

On February 19, 1991, you were interviewed by Postal Inspector Michael Cassidy, in which you admitted to the moving of household items during the referenced period. Further, you admitted that your medical restrictions were possibly exceeded, but only did so in an effort to keep your wife and daughter from being hurt during the move.

You were well aware that totally disabled employees who partially recover are required to report such a change in their medical condition immediately, in order to evaluate their suitability for limited duty assignments. Your failure to report your recovery, and continuation to receive compensation is fraud.

Your conduct is violative of Sections 544.23, and 666.2 of the Employee and Labor Relations Manual (ELM), which prohibits the making of a false statement, or misrepresentation to obtain compensation benefits, while ELM Section 666.2 requires that postal employees are honest and of good character.

Your misrepresentation and lack of honesty warrants your removal, since by their very nature is disruptive and impedes postal efficiency.

... (Jt. Ex. 2)

The Union filed a grievance alleging the removal was without just cause. Postal Service denied the grievance on the grounds Grievant was in fact able to perform limited duty and was not totally disabled. (Jt. Ex. 5 and 7). As such, the letter of
removal for filing a fraudulent claim was proper. The Union advanced the case to arbitration. A hearing was held, and the parties were able to offer evidence and argument on the case. Post-hearing briefs were submitted in lieu of oral closing arguments. The post-hearing briefs were timely filed. The record was closed on October 21, 1991. The issue is now ready for decision by the Arbitrator.

Grievant filed a workers' compensation claim dated December 6, 1990, seeking pay because he was unable to work due to a back injury. (Jt. Ex. 9, p 1). Grievant submitted a CA-17 claim form dated January 4, 1991, to continue the disability pay. (Jt. Ex. 9, p 16A). Both claim forms were certified by management as true and correct to the best of their knowledge. OWCP accepted the claim as resulting from an on-the-job injury. (Jt. Ex. 9, p 29). OWCP authorized continuation of pay for the period of disability not to exceed 45 days.

Supervisor Story testified she made the decision to remove Grievant based on the investigative memorandum prepared by Cassidy. (Mgt. Ex. 1). Prior to issuing the letter of removal, Story stated she met with Grievant to provide him with the opportunity to explain the Cassidy report. Story was not convinced by Grievant's explanations and later moved to discharge Grievant Hopkins.

Dr. Salter was called to testify on behalf of Grievant. Dr. Salter described his medical findings regarding Grievant's back problem as a significant injury. The treatment he advised was two
weeks of bed rest followed by two weeks of performing basic life activities such as walking and preparing food. The next aspect of Grievant’s treatment was physical therapy. The therapy was referred to as a "work hardening program" where Grievant advanced from basic exercises to more difficult exercises to strengthen his back.

Dr. Salter confirmed at the hearing his previous medical reports that "there was no question Grievant suffered a significant back injury." Because of the seriousness of the injury, Dr. Salter explained he was reluctant to release Grievant to duty out of concern for the potential of re-injury.

Grievant Hopkins testified that he helped move the household goods. He described his role in the move as giving supervision to his wife and daughter plus lifting light weight items. Grievant stated his wife was very protective of him because of the uncertainties regarding the back injury. Grievant also drove the truck with the loaded household items.

Shirley Hopkins, Grievant’s wife, testified on behalf of her husband. According to Mrs. Hopkins, she and her daughter did most of the loading and unloading of the household goods. When she came to light weight items, such as a lamp, she would give it to Grievant for loading. Mrs. Hopkins also described how Grievant might help steady a mattress to keep it from tipping while she and her daughter carried the mattress. Mrs. Hopkins denied Grievant performed any heavy lifting during the move of the household goods.
A neighbor, Duane Pope, testified he watched the Hopkins' moving into the residence. Pope stated he never saw Grievant do the lifting of the goods. The work of moving the furniture he saw being performed was done by Mrs. Hopkins and the daughter.

Postmaster Kelbar testified with respect to the circumstances under which he made the video tape of Grievant at the storage lot. He also explained his Step 2 decision. (Jt. Ex. 5). Kelbar stated he did not observe Grievant put anything into the trailer. Kelbar also stated he observed Grievant in the area where Grievant kept his horses.

IV. POSITION OF PARTIES

A. United States Postal Service

Postal Service takes the position Grievant violated the medical restraints which he had submitted in order to obtain compensation for full and total disability. Relying on the well-established principles of arbitration, Postal Service submitted it proved by a preponderance of the evidence the following:

1. A rule existed;

2. The rule is reasonable;

3. Grievant knew or should have known of the rule and the consequences of breaking the rule;

4. There was a complete and thorough investigation which demonstrated conclusively that the grievant violated the rule, and the investigation included the grievant's opportunity to respond;
5. The degree of discipline was reasonably related to the seriousness of the infraction. (Post-hearing Brief, p 1)

In the Federal Employee’s Notice of Traumatic Injury and Claim for Continuation of Pay/Compensation form signed and filed by Grievant dated December 6, 1990, he acknowledged the rules against false and fraudulent acts with respect to obtaining benefits under the Federal Employees Compensation Act. (Jt. Ex. 9, p 1A). According to Postal Service, the rule is reasonable in that misrepresentation and lack of honesty warrants removal. (Jt. Ex. 2). Grievant knew or should have known of the rule and consequences of breaking the rule based on a letter sent to Dr. Salter (Jt. Ex. 9, p 26) informing the doctor that OWCP strongly encourages partially disabled employees to return to suitable work. Grievant was copied on the letter to Dr. Salter.

Postal Service next argues there was a complete and thorough investigation which demonstrated Grievant violated the rules. The video tape taken on February 2, 1991, clearly shows Grievant bending to install wires under his car while continuing to receive payments from OWCP and concealing the fact he was not totally disabled.

Postal Inspector Cassidy’s investigative memorandum containing Grievant’s sworn statement further substantiated the charges against Grievant. (Mgt. Ex. 1). In the statement Grievant admits to being involved with the move of household items, car and working with his horses. Further, Grievant admitted in his
statement that during the move "some restrictions were possibly exceeded."

It is also the position of Postal Service that the degree of discipline is reasonably related to the seriousness of the infraction. Postal Service reasons Grievant not only exceeded his restrictions but continued to conceal his culpability throughout his testimony at the hearing. At the hearing Grievant offered that he informed 204B Gary Scott of his improved condition. Since this contention was raised for the first time at the hearing it should not be considered by the Arbitrator. (Levak, Case No. W7N-5L-D 12287 and W4N-5E-D 33792).

Postal Service next contends Grievant testified "incredulously" that he did not know he was on total disability until after February 6, 1991.

Postal Service concluded in the post-hearing brief as follows:

In this case, grievant withheld knowledge from his agent, and based upon this concealment of fact withheld his even limited services from his employer while receiving full compensation for total disability. Therefore, grievant did not only exceed the limitations set by his doctor, but rather set those limitations himself. He provided services to himself and his family while being compensated by his employer, the Federal Government and denying that Government his services. (p 5)
B. **NALC**

The Union asserts Grievant did not make a fraudulent claim for workers' compensation benefits. From the viewpoint of Union the documentary evidence clearly established Grievant had a significant back disorder. Dr. Salter's testimony revealed he took a conservative approach to treating Grievant in a controlled environment in order to return Grievant to full employment.

On December 14, 1990, Grievant was sent by Postal Service for a fitness for duty examination. From December 14, 1990, until March 4, 1991, no Postal Service medical officer contacted Grievant for another fitness for duty examination even though Postal Service had the right to do so under Section 547.3 of the ELM. Postal Service made no attempt to alert Grievant or Dr. Salter that limited duty was available for Grievant at the Arcata Post Office.

Moreover, Union asserts Postal Service had an affirmative obligation to provide up to date medical data and limited duty offers to Grievant. In the instant case no evidence was submitted by Postal Service that medical personnel were ever involved regarding Grievant's medical treatment. Further, no interim reports were maintained by Postal Service regarding Grievant's medical condition. (ELM, Section 545.6). Dr. Salter testified without contradiction no Postal Service official contacted him regarding Grievant's current medical condition or the availability of limited duty.

The Union next asserts Management failed to send the CA-17 to Dr. Salter to ascertain Grievant's ability to return to
limited duty. (ELM, Section 543.32). By virtue of the fact Postal Service never advised Grievant of his obligation to return to work, Management failed to comply with the ELM. (ELM, Section 543.34).

With respect to the video tape, Union asserts what was demonstrated by the tape was Grievant performed minimal work within his limitations. Dr. Salter confirmed, after viewing the video tape, Grievant’s activities were within the medical limitations established for Grievant Hopkins. At the time of the video tape Grievant was limited to 30 pounds lifting and was performing substantial exercises in physical therapy so he could return to work fit to work safely.

Regarding Kelbar’s testimony that he observed Grievant hooking up a horse trailer on February 1, 1991, Union asserts Grievant did not violate any medical restrictions. All Grievant did was position his truck and by means of a crank lower the trailer on the ball to secure the trailer. None of Grievant’s activities establish he behaved contrary to law. Grievant’s testimony that he performed none of the heavy lifting of the household furniture was uncontradicted. Grievant’s testimony with respect to the household move was corroborated by Grievant’s wife and a neighbor.

Regarding Cassidy’s report, Union points out that the postal inspector never observed Grievant engaged in physical activities which were contrary to the medical restrictions. As Cassidy is without firsthand knowledge of the events concerning Grievant, his report should not be credited.
It is also the position of Union that in a case involving allegations of a false claim for workers' compensation benefits, the Postal Service bears an extremely heavy burden of proof. According to Union, arbitral authority supports the position that where the charges involve criminal conduct, moral turpitude or dishonesty, Postal Service must substantiate its claims by real and tangible evidence. (Eaton, Case No. W1N-5D-D 3092; Britton, Case No. S7N-3D-D 14284; Williams, Case No. S4N-3U-D 14338; Rentfro, Case No. W1C-5H-D 12242). In each of the cited cases the arbitrators did not permit the charges to be sustained based on inference or mere suspicion.

Applying these principles established in the cited cases to the present case, Union maintains Postal Service failed to establish that any claims made by Grievant were false or untrue. There is no dispute that Grievant's initial claim for benefits was proper. The Postal Service's case rests on some undefined assertion Grievant did not return to duty even though he was physically able to perform work. The fact is Grievant followed his doctor's orders to maintain a rehabilitation program, and to remain off work.

Even if it is assumed Grievant did exceed his medical restrictions, the violation of a physical limitation placed on the employee by his doctor does not rise to the level of a removable offense. (Case No. S4N-3U-D 14338). In addition, the Arbitrator should reject Management's attempt to impose a definition of total disability on Grievant which would prevent Grievant from doing
"any" physical activity. The standard is not confinement to bed rest, but performing functions that are within the employee's restrictions and physical capabilities. (Case No. S7N-3D-D 14284).

In sum, Grievant followed his doctor's orders and remained off duty. This, the Union concludes, does not translate into fraud on the part of Grievant.

V. DISCUSSION AND FINDINGS

Postal Service charged Grievant with "Unacceptable Conduct/Fraudulent Claim for Compensation." The quantum of proof in cases where the employee is charged with acts of dishonesty or fraud is extremely high. Where the allegation of misconduct carries the stigma of dishonesty the burden is on the Postal Service to prove by clear and convincing evidence the charges on which it seeks to remove the employee.

The basis for removal in this case centers on the allegations Grievant failed to report his recovery and continued to receive compensation. (Jt. Ex. 2). There is no dispute that Grievant's original claim for compensation for the injury was anything but proper.

The major thrust of the Postal Service case was that Grievant had recovered from his back injury based on physical activities that allegedly violated the medical restrictions. Because Grievant failed to report his changed medical condition so Management could evaluate his suitability for limited duty, Postal Service argues Grievant's lack of honesty warrants his removal.
The Arbitrator rejects the Postal Service assertion that Grievant engaged in fraudulent conduct in making a claim for OWCP benefits for seven primary reasons.

First, the medical evidence in this case overwhelmingly supports a conclusion Grievant did not make a fraudulent claim for benefits. Postal Service offered no medical evidence to contradict Grievant's medical records and doctor's testimony that Grievant was totally disabled from performing work as a letter carrier for the Postal Service at all times relevant to this case. The documentary medical evidence and medical testimony of Grievant's doctor clearly established Grievant had a significant back disorder which prevented him from carrying out his regular work for the Postal Service.

Second, Grievant was following his doctor's prescribed course of treatment in what was described as a "work hardening" program. Grievant testified the physical therapy program involved progressively more strenuous exercise as his back condition improved. (Jt. Ex. 9, p 23 - 24E). Grievant was also to perform home exercises. (Jt. Ex. 9, p 31C - 31D). The medical records in evidence revealed Grievant was in therapy on almost a daily basis from January 14 through February 4, 1991. Dr. Salter's notes of January 28, 1991, indicated continued improvement of the lumbar lesion. The doctor also had Grievant continue the work hardening program and disability until February 24, 1991. (Jt. Ex. 9, pp 25A - 25B).
Third, it was not until February 20, 1991, that Dr. Salter released Grievant to return to work. Dr. Salter wrote in his notes Grievant has a fairly severe disease and recommended Grievant go back to work with a 35 pound lifting restriction to see how he does over the next month. (Jt. Ex. 9, p 32). Dr. Phillip Wagner evaluated Grievant for fitness for duty on March 4, 1991, and confirmed Dr. Salter’s opinion Grievant could return to work with a 35 pound weight limitation and be re-assessed in one month for return to full duty.

The bottom line is that until late February and early March, 1991, no doctor had cleared Grievant for limited duty. The medical releases to return to limited duty were issued after the incidents for which Grievant was discharged. Thus, Postal Service’s claim that Grievant had "partially recovered" on the dates Grievant engaged in conduct for which he was terminated is without medical foundation.

Fourth, the Postal Service’s position with respect to what physical activity Grievant could perform in effect asserts Grievant could engage in no physical work without violating his restrictions. For the first two weeks following the injury Grievant’s doctor recommended complete bed rest. After the initial period of bed rest, Grievant was able to resume some light activities such as driving, walking and food preparation. Pursuant to his doctor’s orders Grievant participated in a work hardening program which consisted of some fairly strenuous exercises.
Adoption of the Postal Service's logic would have participation in the work hardening program a grounds for removal.

The fact that Grievant was considered totally disabled from work does not necessarily mean that Grievant cannot drive a vehicle, observe his horses and assist his daughter in moving the horses without violating the medical restrictions. In other words, a totally disabled employee does not have to be confined to bed in order to avoid discharge for engaging in limited physical activities.

Fifth, the video tape of Grievant taken on February 2, 1991, showing Grievant hooking up a car to be towed does not establish conduct equal to fraud. While the tape does show Grievant performing physical movements in attaching the two cars together with a tow line, no lifting was observed on the tape. After viewing the video tape Dr. Salter testified unconditionally that Grievant's activity shown on the tape did not violate any of the restrictions he had placed on Grievant. Dr. Salter testified Grievant was under no restriction from driving, walking or performing basic life activities. Dr. Salter did restrict Grievant from doing repetitive heavy lifting, none of which was observed on the tape.

Sixth, the next conduct on which Postal Service argued constituted evidence of fraud was the moving of the household goods. At the outset it should be pointed out that while the letter of removal states the postal inspectors observed Grievant moving the goods, Inspector Cassidy testified that he did not
observe Grievant move household goods. Further, Cassidy stated that on the occasions when he did have Grievant under surveillance, he saw "nothing out of the ordinary."

The letter of removal also states that other persons also observed Grievant engaging in the movement of the household goods. However, Postal service produced no witnesses at the arbitration hearing who actually observed Grievant’s conduct during the move of the household goods. This is a fatal flaw in the Postal Service’s case as it goes to the heart of the allegations of fraudulent conduct on the part of Grievant. Where the charge is fraud, the offense must be established by persuasive evidence contained in the record.

Seventh, Grievant did sign a written statement that he "assisted" his wife and daughter in moving the household items. Hopkins and his wife testified at the arbitration hearing that he did no heavy lifting. In addition, they testified Grievant confined his lifting to light weight items such as lamps, and steadying goods being moved by his wife and daughter. A neighbor corroborated the testimony of Grievant and his wife. Since no Postal Service witness who actually observed Grievant’s conduct testified at the hearing, the testimony of the Union witnesses stands unrebutted.

The Arbitrator cannot conclude on this record that Grievant’s role in assisting his wife and daughter in moving the household goods rises to the level of demonstrating Grievant was
attempting to defraud the Postal Service by drawing disability benefits.

The Postal Service in the instant case seeks to impose a definition of total disability on Grievant far broader than is justified by the medical evidence and arbitral authority. Grievant was restricted from performing his Postal Service duties by his doctors. That does not mean there was absolutely nothing the Grievant could do in the way of physical activities. (Case No. S7N-3D-D 14282). The evidence offered by Postal Service failed to demonstrate Grievant's conduct during the period of disability was inappropriate for one recuperating from a back injury. While Grievant may have stretched himself with respect to his physical restrictions, there is no showing Grievant had recovered to the point he could safely resume his Postal Service job.

Even if it were to be found Grievant violated his doctor's instructions, the violation of a medical restriction does not automatically translate into a fraudulent claim for compensation. As arbitrator Williams noted in Case No. S4N-3U-D 14338 the Postal Service "erred in seeking to raise the doctor's instruction to the level of being a 'safety instruction,' and to also claim that removal is a proper discipline for violation of such an instruction." At most, Postal Service proved Grievant may have extended his medical restrictions beyond that requested by his doctor.

The fraudulent act which Grievant was charged in the letter of removal was Grievant's "failure to report his recovery."
Since Postal Service did not offer evidence which proved Grievant had recovered, a finding of fraud cannot be laid on this Grievant. If the Postal Service had a belief Grievant had recovered sufficiently to return to light duty or full duty as a letter carrier, Management has available to it less severe options than removal to get this injured employee back to work in a safe and orderly fashion.

In sum, the Arbitrator concludes Postal Service has failed to prove by clear and convincing evidence Grievant engaged in unacceptable conduct which constituted a "Fraudulent Claim for Compensation." Had the Postal Service met its burden of proof, this Arbitrator would have no difficulty sustaining a disciplinary action up to, and including discharge for acts of fraud.

**AWARD**

Postal Service did not have just cause to remove Grievant from the Postal Service. For the reasons stated, the grievance is sustained and the Postal Service is ordered to reinstate Grievant and make him whole for all wages and benefits lost as the result of the removal.

Respectfully submitted,

[Signature]

Gary L. Axon
Arbitrator
November 18, 1991