

## Advanced Labor Education Resource Training

### ABSENTEEISM

#### A. Case Elements

1. A history of being absent from work (irregular in attendance).
2. The attendance record indicates a pattern excessive unscheduled absences (approved or unapproved).
3. A showing that the employer made the employee aware of the duty to be regular in attendance.
4. A showing that the employee/Union that the level of absence is acceptable compared to other employees.

#### B. Definition of Issues

1. Is the employee incapable of providing regular and dependable attendances
2. Has management set a certain percentage of absence to be unacceptable?
3. Is the amount of absence so serious that it renders the employee undependable?
4. Is the discipline progressive?
5. Was the employee forewarned of the consequences of a continued level of absences?

#### C. Contractual/Handbook (other) Citations which should be made by Union at or prior to Step 2 are:

1. Article 5
2. Article 10
3. Article 16
4. Article 19 (ELM 513, 666, 667) (M-41, Chapters 1 and 2)

#### D. The arguments that should, at least, be considered, and if appropriate, articulated by the Union at or prior to Step 2 are:

C#2099

1. The level of absence does not indicate irregularity of attendance.

C#9766

2. Grievant's absences were approved by management.

C#3231 C#7544

3. Grievant was never fore-warned of possible discipline for excessive unscheduled absences.

C#8386

4. Discipline is not corrective.

C#9548

5. Grievant was due reasonable accommodation.

C#10907

6. Employee was held to a different standard.

**E. The documentation/evidence that should be jointly developed/reviewed to establish relevant evidence is:**

1. 3971's for cited absences.
2. 3972's
3. 3997's
4. LMOU
5. Medical certificates for absences (if used).
6. Relevant medical documentation for absences (if provided).
7. Statements from physician as to a prognosis and ability to work in the future.

**F. Remedies**

1. Rescind/Purge discipline from the file.
2. Make whole.
3. Interest at Federal judgment rate.

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Applicable history of this topic begins, for us, with the National Arbitration Award, USPS and NALC Case No. NC-NAT-16, 285, Arbitrator Sylvester Garrett, November 19, 1979 in which Arbitrator Garrett deals with the issue of whether or not the Postal Service may properly impose discipline on employees for "excessive absenteeism" or failure to maintain a regular schedule" even though the absences upon which those charges are based are where the employee was granted approved sick leave.

(Prior to Garrett, the Union had had some success in arguing that, if an unscheduled absence was in the record as "approved" for the payment of sick leave, then that absence could not be counted against an employee for purposes of issuing formal discipline for the charge of "excessive absences." After Garrett, at least for non-preference eligible employees, that could not be argued successfully by the Union.)

The quick and dirty answer is - yes, management can use instances of unscheduled absence where the employee was granted approved sick leave as part of the basis for issuing discipline.

The issue of whether or not such absences can be used, according to Garrett is not determined by whether or not sick leave has been approved for pay purposes. Rather the issue of whether or not such absences can be used is determined, on a case by case factual basis, on whether or not the employee was, in fact, incapacitated for the performance of his/her official duties.

This factual basis of determination, according to Garrett, is a "just cause" basis (which is a useful thing from the Union's point of view and just from any point of view). What it means is this:

The burden is on the employer to indicate, with at least a preponderance (50% +1) of persuasive evidence, that the employee was not incapacitated for the performance of his/her official duties.

Why so? Because with "just cause" the initial burden is on the employer to show that there was a requirement with which the employee did not comply.

While there is a requirement to be regular in attendance (ELM 666.81), there also is a promise, by the employer (Article 10, Section 5), to continue the leave program, including sick leave; that leave program is spelled out in operational detail expressly states that the purpose of sick leave is to provide protection from loss of income when the employee is incapacitated for the performance of their official duties.

Thus, even though the employee might, through illness, be less than perfectly regular in attendance, there is, on the face of it, no "just cause" for issuing discipline to an employee for availing himself/herself of one of his/her express contractual rights.

So the employee, using USPS Form 3971, claims he/she was indeed incapacitated for the performance of his/her official duties, and a supervisor approves sick leave for pay purposes. How can the employer use such an instance against the employee?

The argument runs like this:

Just because some supervisor approved a Form 3971 requesting sick leave is not proof that an employee was, in fact, ill and incapacitated as claimed. The employee might, for example, have been lying. (On the other hand such an approved form certainly does not prove that the employee was lying. Absent other considerations, there is no evidence the employee was not incapacitated for the performance of his/her official duties.)

However, if such an "approved instance of sick leave is factored in with, for example 9 other instances, one every week in a row, each falling on the Monday following a non-scheduled Sunday; and no two in a row was approved by the same supervisor, and then some supervisor, using DSIS, notices this pattern, BINGO - the employer has evidence that an arbitrator might well accept, absent any rebuttal, as persuasive proof that the employee was not always, in fact, incapacitated for the performance of his/her official duties, but was instead, sometimes at least, simply failing to meet the requirement to be regular in attendance.

Note: The employer still is several bricks shy of a load sufficient to meet the burden of issuing formal discipline.

Supervisor now goes to the files and discovers a properly citeable record that, on some specific date prior to this 10 week string, this employee had been informed of his/her requirement to be regular in attendance and advised that failure to meet it could result in formal discipline being issued to him/her.

Supervisor now plugs in M-39 115, Discipline, and calls the employee into the office. (The employee fails to trigger his/her Weingarten Rights) and, in a kindly fashion, the supervisor attempts to draw out the employee's side of the story. Did the employee have a series of therapy appointments, for example? The employee hems and haws and then says that he likes to stay up late on Sunday nights to watch re-runs of the Benny Hill show and then he likes to sleep in late on Monday so he calls in sick and goes back to bed. He doesn't think it makes any difference to the operation. A PTF can do the work. (Perhaps, even, the employee is right about the PTF.)

At this point the employer has evidence proving the "just cause" elements: A requirement reasonably related to work; employee knowledge of the requirement, including knowledge that failure to meet it could result in the employee being issued formal discipline; and evidence that the employee, in fact, failed to meet that requirement. This is so even though the instances of unscheduled absence featured requests for sick leave which were approved by the supervisor.

There is, at least, one standard defense and loads of possible "case specific!" complications.

The standard defense is worth mentioning because it has the possibility of general application.

Our contract - Article 16 - features, implicitly, the doctrine of "progressive discipline" which includes (we can and should argue) the notion that milder measures should be exhausted before reliance is placed on harsher measures.

The sick leave program contains provisions for the exercise of supervisory discretion, for absences of 3 days or less, as to whether or not to require medical certification (MC) of the employee upon return from the 3 day or less unscheduled absence. The sick leave program also contains provisions for placing an employee on a Restricted Sick Leave List (RSL), via a fast track when there is clear evidence of abuse of the sick leave negotiated right. Placement on the RSL makes the requirement for MC an automatic requirement.

We can argue that, absent application of these administrative measures, i.e., nondisciplinary, the employer has failed to meet the requirement of progressivity, i.e., of exhausting all express milder measures for correcting the employee's behavior before resorting to harsher measures. (Only a handful of particularly bad misbehavior justify leapfrogging over a step by step application of progressively more severe disciplinary measures - or so we can argue - many arbitrators would accept such an argument.)

Two things are wrong with this approach, one political, one from the point of view of legal argument. (1) Political Flaw - to grievant, the necessity of providing MC, particularly if it involves being on the RSL, can subjectively seem worse than getting a Letter of Warning. "Thanks a lot," he might say to you. "I'll remember your 'help' come next election."

(2) Legal Flaw - by way of rebuttal, the employer could argue that, even granting our claims about progressivity, progressivity applies only to formal discipline. Administrative action, such as supervisory discretion on MC for absences of 3 days or less and/or RSL do not have to be exhausted, under the doctrine of progressive discipline, before formal discipline is issued. Under

Article 3, management has the right to decide whether or not to exhaust administrative actions first, Article 16 notwithstanding, and, furthermore, prevailing practice in the installation is to issue formal discipline for the charge "failure to be regular in attendance" when there is "just cause."

## **A. Case Elements**

1. A record of unscheduled absences.
2. A showing of the employee being made aware of his/her duty and responsibility to be regular in attendance and of being warned that failure to do so could lead to formal discipline.
3. An initial persuasive showing by the employer of irregularity - "a pattern of unacceptable attendances
4. Failure on the part of the employee/Union to rebut that showing with persuasive evidence that the employee was, in fact, incapacitated for the performance of their official duties for enough of the instances within the employer's "pattern of unacceptable attendances to shift it to acceptable.

## **B. Definition of Issues (specific to Absenteeism type disputes)**

1 . Is the employee incapable of providing regular and dependable attendances  
C#09548 - Rentfro - 1989, page 4, denied; discussion and conclusion Rentfro states:

"It goes without saying that the grievant's attendance record is about as bad as can be imagined. The Postal Service presented uncontradicted evidence that grievant was AWOUNO Call for over 334 hours (41+ days) in a one-year period."

2. Has management set a certain percentage of absence to be unacceptable? Absence and Leave Control Program for Postal Supervisors, page 2, paragraph 3 - this 1976 Postal program compares the Service to other industries and talks about a loss of \$350 million; page 3, paragraph 3 -

"Admittedly, since our leave program is superior to the average industry, we can never eliminate the 6% gap. But, we can and must control and reduce it by concentrating on the abuse of leave."

3. Is the amount of absence so serious that it renders the employee undependable?  
C#00727, Gamser - 1978 - denied; page 9, last paragraph Gamser cites a case by Arbitrator Cushman:

"This arbitrator agrees with Arbitrator Warns and many other arbitrators that an employer has a right to expect acceptable levels of attendance from its employees and that when such attendance is not had, discharge is appropriate despite the fact that the absence may be for valid and legitimate medical reasons."

Page 10 - 1st paragraph

"This Arbitrator is sympathetic to employees whose absenteeism is due to illness, and therefore, to no fault of their own. Where, however, absenteeism due to illness results over a period of time in unacceptable levels of work attendance, an employer, under generally accepted principles recognized by many arbitrators, has a right to remove such an employee from employment."

Page 10 - 1st paragraph

"In such a case the employee is not being 'punished' because he is ill. He is simply being terminated for irregularity and undependability for attendance."

4. Is the discipline progressive?

C#09766 - Levak - 1990 - modified (grievant reinstated, less 14-day suspension). In this case management cited 7 and 14 day suspensions that were reduced in the grievance procedure and arbitration to letters of warning and one (1) and two (2) day suspensions.

Page 6 - paragraph 3

"The failure of the Service to impose and stick with the 14-day suspensions necessarily had the effect of failing to effectively convey to the grievant the fact that the next series of infractions would result in removal. Such conveyance and notice is the most important element of the progressive and corrective discipline procedure."

Page 7 - paragraph 2

"it seems beyond dispute that moving from that disciplinary record directly to removal, and without either an intervening 7-day suspension or a 14-day suspension, violates the corrective/progressive mandate of Article 16."

Page 7 - paragraph 4

"The Service's argument in this case in that the grievant's attendance record simply was so terrible that she had to have understood that her job was in jeopardy. Such inference cannot be allowed because of the express mandate of Article 16. Under that article, the grievant is entitled to increasingly severe progressive notice that further offenses will subject her to removal. Administrative reductions of 14-day suspensions to two-day suspension can only lead an employee to believe both that the offense was not as serious as she initially was led to believe and that the next offense would lead to a penalty less severe than removal."

5. Was the employee forewarned of the consequences of a continued level of absences?

C#02099 - Snow - 1983 - modified (grievant was reinstated, without back pay and the arbitration decision serving as "last chance").

Page 6 - paragraph 3

The arbitrator noted that most of the absences were sick leave and had management's approval. Also, that there was no showing that the grievant had been forewarned concerning the potential impact of absences due to approved sick leave.

Page 13 - paragraph 3 and Page 14, paragraph I In analysis the arbitrator talks about Section 511.3

"Employee Responsibilities," of the ELM. While it is clear that employees are to maintain their schedule and provide acceptable evidence for absence when required: "What the regulation does not make clear is how much absence from work, due to certificated, verified illness, constitutes unacceptable absence."

Page 16 - paragraphs 3 & 4

"For obvious reasons, there is no clear-cut work rule concerning how much sick leave will be considered "too much" sick leave.

Page 17 - paragraph 2, 3, & 4 "The grievant's attendance, in fact was unsatisfactory. Through warning letters and suspensions, management made it exceedingly clear to the grievant that her unexcused absences simply would not be permitted." "A primary problem confronted by the arbitrator, in this case, has been what to do about the grievant's absences in which she had "excused" sick leave. In this case, management has failed to place the grievant on notice that "excused" sick leave would be counted against her.

6. Was the employee forewarned of the consequences of a continued level of absences?

C#02099 - Snow - modified (grievant was reinstated, without back pay and the arbitration decision serving as "last chance").

Page 20 - paragraph 1 & 2

"The grievant needed to know that her excused absences along with any instances of being AWOL would be used to show a pattern of irregular attendance."

**C. Contractual/Handbook (other) Citation which should be made by Union at or prior to Step 2 are:**

1. Article 15
2. Article 10
3. Article 16
4. Article 19
5. Article 35
6. ELM 513
7. ELM 666
8. ELM 667
9. M-41, Chapters 1 & 2

**D. The arguments that should, at least, be articulated by the Union at or prior to Step 2 are:**

1. The level of absence does not indicate irregularity of attendance.
2. Grievant's absences were approved by management.

C#02099 - Snow - modified (reinstated, without back pay and arbitration decision is "last chance").

Page 6 - paragraph 2

In this case (discussed extensively under Definition of the Issue) the absences were, for the most part, approved sick leave.

Page 20 - paragraph 2

The grievant, however, received no notice that medically certified absence would be counted against her. The grievant failed to receive notice that "too much" verified sick leave could cause her to be removed from the Postal Service. The point is that the failure to inform the grievant her excused absences could lead to her termination undermined management's contention that the grievant received adequate warning.

C#00727 - Garner - 1978 - denied

Gamser states that properly documented and approved sick leave should not be used, in and of itself, in a manner adverse to an employee's interest. He goes on to state that it is also not a grant of immunity.

Page 10 - last paragraph and Page 11 - 1st paragraph Gamser states that properly documented and approved sick leave should not be used, in and of itself, in a manner adverse to an employee's interest. He goes on to state that it is also not a grant of immunity.

Page 11 - paragraph 2 "When management states that an employee's attendance record provides just cause for disciplinary action, management must be prepared to substantiate the fact that this employee's attendance record supports the conclusion that the employee is incapable of providing regular and dependable attendance without corrective action being taken."

3. Grievant's absences were approved by management.  
C#03231 - Garrett - 1979

Page 8 - paragraph 4

"Basically, the NALC holds that, under Article 16 of the National Agreement, there can be no "just cause" for any discipline based on an employee's absence from work on some form of approved leave - whether it be sick leave, annual leave, leave without pay, or leave while recuperating from on-the-job injury. The imposition of discipline in any such situation would deprive employees of their right to enjoy leave benefits protected by Article 10 of the National Agreement, as well as under application of Federal law."

Page 9 - paragraph 2

"The NALC also emphasizes the obvious incongruity of trying to apply "corrective" discipline to discourage an employee from being injured or becoming ill."

Page 24 - paragraph 2

"When management states that an employee's attendance record provides just cause for disciplinary action, management must be prepared to substantiate the ... management cannot inhibit an employee in the exercise of his contractual right to imply sick leave in the manner contemplated to cover legitimate periods of absence due to illness or other physical incapacity."

Page 31 - Conclusions #2

"Whether or not the UPS can establish just cause for the imposition of discipline, based wholly or in part upon absenteeism arising from absences on approved leave, is a question of fact to be determined in light of all relevant evidence in the given case."

4. Grievant was never forewarned of possible discipline for excessive unscheduled absences.  
C#02099 - Snow - 1983 - modified (grievant was reinstated, without back pay and the arbitration decision serving as "last chance").

Page 6 - paragraph 3

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C#02099 - Snow - 1983 - modified (grievant was reinstated, without back pay and the arbitration decision serving as "last chance").

Page 20 - paragraph 1 & 2

"The grievant needed to know that her excused absences along with any instances of being AWOL would be used to show a pattern of irregular attendance."

Page 18 - paragraph 3 and Page 19 - paragraph 1 "The point is that management failed to warn the grievant that her excused sick leave might be counted against her. For example, the restricted sick leave notice given the grievant on May 7, 1982 did not do so. The notice informed the grievant that all absences must be supported by medical certification. The notice did not inform her that future illnesses would be counted against her as reflecting a pattern of unsatisfactory attendance. It would have been reasonable for the grievant to have concluded that medically certified illnesses would not be counted against her in such a way as to lead to her discharge.

6. Discipline was not corrective.

C#09766 - Levak - 1990 - modified (reinstated with full back pay and benefits, less 14-day suspension) - In this case the grievant was removed for 263 hours of unscheduled leave (including sick, emergency and AWOL). The Service had previously disciplined the grievant with a 7-day suspension and a couple 14-day suspensions, but had reduced each to 1 and 2 day suspensions. The fact that the reductions to less than five days were administrative actions meant that they were technically nothing more than letters of warning. The arbitrator found that moving directly to removal without a 7 or 14-day suspension violated the corrective/progressive mandate of Article 16.

Page 7 - paragraph 4

". . the grievant is entitled to increasingly severe progressive notice that further offenses will subject her to removal ... administrative reductions of 14day suspensions to two-day suspensions can only lead an employee to believe ... the offense was not as serious as she was initially lead to believe ... the next offense would lead to a penalty less severe than removal."

7. Discipline was not corrective.

C#09548 - Rentfro - 1989 - denied - In this case the arbitrator outlined the steps that were taken in the removal action in his "Statement of the Case." August 1987, Letter of Warning for 76 hours of LWOP; October 1987, 7-day suspension for 64 hours of LWOP/No Call; February 1988, 14-day suspension for failure to report; May 1988, Removal for 98 hours of AWOL/No Call.

Page 5 - paragraph 3

In this paragraph the arbitrator outlines the steps taken by the Postal Service: Notification from the USPS "stressed to him the importance of regular work attendance". . ."urged him to meet with his supervisors in order to find a solution". . grievant was "referred to the employee assistance program ... refused to participate."

B. Grievant was due Reasonable Accommodation..

C#09929 - Zumas - 1990 - denied - In this case the arbitrator allowed the removal of the grievant, a PTF letter carrier, for charges of AWOL and driving without a valid state driver's license. Unfortunately, the grievant also had an attendance problem when it came to abiding by his EAP agreement. The arbitrator included the following ELM provision in his "Statement of the Facts." In his findings the arbitrator stated that the Service repeated opportunities for the grievant to participate in EAP, but the grievant did not avail himself of them until he was in the "shadow of termination."

Page 7 - paragraph 1 - ELM 871.3 Participation in EAP is voluntary and will not jeopardize the employee's job security or promotional opportunities. Although voluntary participation in EAP will be given favorable consideration in disciplinary action for failure to meet acceptable standards of work performance, attendance, and/or conduct problems. Further, participation in EAP does not shield an employee from discipline of prosecution for criminal activities.

Page 12 - paragraph 2

In the past, this Arbitrator has not hesitated to reinstate an employee afflicted with drug or alcohol addiction, even where the rehabilitation came after termination.

Page 9 - paragraph 3

Position of the Union - The Union pointed out that the grievant's dual addiction to drugs and alcohol was the basis of his termination.

The Union made the argument that the grievant "has made, and continues to make, a considerable effort to rehabilitate himself" under Article 35 of the Agreement.

9. Employee was held to a different standard.

C#08386, Axon - 1988 - sustained (reinstated and made whole "last chance" agreement extended) - The grievant in this case was in a "last chance" agreement that was a settlement agreement stemming from a previous removal attempt for unacceptable attendance. Upon an illness during the last chance period management took the opportunity to again attempt removal. "Failure to abide by the terms of a 'Last Chance Agreement.'"

Page 10 - paragraph 2

The Union argued that seven (7) other carriers in the same office had worse attendance records than the grievant and were not disciplined.

The Union also argued that the "last chance" agreement did not demand perfect attendance and that the grievant had been regular in attendance.

Page 11 - paragraph 4 and Page 12 - paragraph 1. Also, of great help to the Union in the winning of this case is the fact that the arbitrator found the removal action is tainted." In a local program called CAN DO past elements of discipline that were cited in the removal were supposed to have been purged. Also, dates of previous discipline, contained in the removal notice were incorrect.

**E. The documentation/evidence that should be jointly developed/reviewed to establish relevant evidence is:**

1. Article 10
2. Local Memorandum (if appropriate)
3. Article 35 (if appropriate)
4. Medical certification notice (if applicable)
5. Postal Forms - 3971, 3972, 3997
6. Time cards and Employee Activity Reports
7. Supervisor's notes concerning specific incidents on which discipline is based.
8. Medical certificates covering absences in question
9. Relevant medical documentation substantiating and explaining the employee's absences
10. Employee statement explaining the absences
11. Statement of physician
12. Employee and Labor Relations Manual Chapter 5 Employee Benefits

510 Leave

511.4 Unscheduled Absence

513 Sick Leave

514 Leave Without Pay

666.8 Attendance

666.82 Absence without permission

666.83 Tardiness

870 Employee Assistance Program (EAP)

13. EL-307 - Guidelines on Reasonable Accommodation

**F. Remedies**

1. Rescind and purge the discipline, make whole any lost time plus benefits, interest at the Federal judgment rate.
2. Make whole for any time grievant could have worked on limited or light duty.

Back to [[The Carrier Connection](#)] [[Alert Contents](#)]