C #16475

ARBITRATOR'S OPINION AND AWARD
for
USPS/ NALC REGULAR ARBITRATION

In the Matter of Arbitration Between:	*	**Grievant: T. Rivera**
United States Postal Service	*	**Post Office: Ashville, NC**
and	*	**Case #: D94N-4D-D-96091114**
National Association of Letter Carriers	*	**NALC #: S-01-96**

BEFORE: Lawrence Roberts, Arbitrator

FOR THE UNION: Mr. Jimmy Mainor

FOR THE POSTAL SERVICE: Mr. Doug Alderman

PLACE OF HEARING: Postal Facility, Ashville, NC

DATE OF HEARING: February 6, 1997

AWARD: The Grievance is Sustained

DATE OF AWARD: March 1, 1997

RELEVANT CONTRACT PROVISION: Article 16

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 6 February 1997 at the postal facility located at 591 Breward Road, Ashville, NC, beginning at 9 AM. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a tape recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

The Grievant in this case is a Letter Carrier employed at the Swannanoa Post Office. On 16 April 1996, the Postmaster issued the Grievant a Notice of Proposed Removal for allegedly violating a Last Chance Agreement. It was the Notice of Removal that gave rise to the instant Grievance.

Being unable to resolve the Grievance, the matter is now before the undersigned for disposition.

Chronology of Events:

940708	Notice of proposed removal which led to Last Chance Agreement
940809	Last Chance Agreement Signed
951212	Grievant back in treatment
960205	Released back to work by Dr. Sweede
960228	Supervisor received call from customer alleging Grievant made unfavorable remarks
960328	Inspection service released their report
960410	Notice of proposed removal issued
960515	Step 1 Grievance Worksheet form signed
960515	Step 1 Meeting Held
960521	Letter of Decision issued
960531	Grievant met with Supervisor Baldwin
960625	Step 1 Decision rendered
960716	Step 2 initiated
960808	Step 2 Decision
960819	Appealed to Step 3
961017	Step 3 Decision

The record shows the grievance was properly processed through the various steps of the grievance procedure and is properly before the Arbitrator.

JOINT EXHIBITS:

1. **1994-1998 Agreement between the National Association of Letter Carriers, AFL-CIO and the US Postal Service.**

2. **Grievance Package**

COMPANY'S POSITION:

The Service will prove that the removal of the Grievant was for just cause.

The Grievant was issued a Notice of Removal in July 1994. That removal was mitigated to a thirty day suspension and a Last Chance Agreement. In that Last Chance Agreement, the Grievant agreed to attend, participate and report that participation to the Employee Assistance Program (EAP).

The Grievant admitted during the investigative interview that he did not do that. The Grievant simply failed to comply with the terms and conditions of the Last Chance Agreement. That non-compliance, on the part of the Grievant, constitutes just cause.

This case is quite simple. The facts will show the Grievant failed to follow the terms of the Last Chance Agreement. Therefore, removal is the only proper penalty. With that, the Service respectfully requests the instant grievance be denied.

UNION'S POSITION:

The Union claims just cause is not present in the instant case. The Grievant was issued a Last Chance Agreement on 8 July 1994. According to the Last Chance Agreement, the Postmaster was to monitor the Grievant on a monthly basis in relation to the Last Chance Agreement. This did not occur until December 1995.

The Union will also raise the issue of timeliness. There was a delay between the proposed removal and the removal. Also in their Step 2 answer, the Service references the removal was not attendance related. The Union does not fully understand the reason for removal.

The Grievant entered a rehabilitation program. During this period, the Grievant had been prescribed several medications. The Grievant was entitled to medical leave as granted by the Family and Medical Leave Act.

The Grievant did speak with the EAP counselor and also attended AA meetings. The Union believes just cause is not present in the instant case and requests the grievance be sustained.

THE ISSUE:

Did the Postal Service have just cause to remove the Grievant? If not, what is the proper remedy?

PERTINENT CONTRACT 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 regulation. 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."**

DISCUSSION AND FINDINGS:

Initially, I would like to address a point of procedure raised by the Service Advocate in their opening statement. The Service pointed out the instant removal is based on the alleged failure of the Grievant to comply with the terms and conditions of a Last Chance Agreement. In their view, the Grievant violated the Last Change Agreement. The Service suggests their only burden in this case is to show a violation of the Last Chance Agreement. I disagree with that assertion. A Last Chance Agreement, in and of itself, does not negate the just cause requirement found in Article 16.1.

Therefore, as in any discipline case, the burden of proof is on the Service to establish just cause for their actions. While Article 3, Management Rights, provides the Employer with the power to "suspend, demote, discharge, or take other disciplinary action...", the Employer is limited in any decisions as restricted by other Articles or Sections of the Agreement. In the instant case, the Employer is faced with the burden of

proving just cause in accordance with the disciplinary procedures outlined by Article 16.1.

According to the Agreement, no employee may be disciplined or discharged except for just cause. In my view the term "just cause" is ambiguous, however, its concept is well established in the field of labor arbitration. The Employer cannot arbitrarily discipline or discharge. Whether it be absenteeism, failure to comply with rules of conduct, or a violation of a Last Chance Agreement, the burden of proof remains with the Employer to show the discipline imposed was for just cause. Their reasoning must be shown through the preponderance of the evidence.

A Last Chance Agreement offers the employee a final opportunity to continue employment following committal of an otherwise dischargeable offense. Most Last Chance Agreements contain very strict language focusing directly toward the correction of the problem area(s) of the respective Employee. Although most Last Chance Agreements are very stringent, the willingness on the part of the Employer to offer such Agreements creates, in my opinion, a good Labor-Management relationship. More importantly, the Employee is oftentimes awakened to an otherwise neglected problem.

When offered, the affected Employee must comply with the terms of the Last Chance Agreement. A violation of the language therein would leave little room for mitigation of a discharge penalty. If Last Chance Agreements were freely mitigated in the arbitral forum, their effectiveness would be negated. Furthermore, an Employer would be discouraged from allowing "Last

Chances" in the future if they are allowed to only come back and continually haunt them via the grievance machinery.

On the other hand, removals involving Last Chance Agreements do not nullify the just cause provisions of Article 16. Even though the requirements of Last Chance Agreements are rigid, its terms and conditions cannot be arbitrary, capricious or unreasonable.

In a matter of Arbitration before him, **Arbitrator Thomas F. Levak (Case No. W7C-5S-D-16792)** provided a well reasoned analysis concerning Last Chance Agreements when he wrote:

> **"In the case of an LCA removal, the focus of an arbitrator is upon: first, whether the incident giving rise to the violation occurred, and second, whether the incident is serious enough under the just cause standard to justify summary removal. To demonstrate an LCA violation meriting removal, the Service ordinarily need establish a significant violation of the LCA, i.e., something more than a mere "de minimus" or "technical" violation. An extreme example of such a de minimus/technical violation would be an employee with a perfect record during the first eleven months of his one-year LCA term who is then one minute late to work.**
>
> **The focus of the arbitrator is not on whether the employee has been progressively disciplined since the time of his reinstatement under the LCA. Through his agreement to the LCA, he has recognized that he already received progressive discipline, that removal was justified, and that any further failure in performance will justify removal.**
>
> **Also, the focus of the arbitrator is not on whether the employee has been treated the same as other employees. The LCA expressly recognizes that he will be treated differently.**
>
> **Fourth, to be generally enforceable, an LCA must set forth clear and unmistakable written terms, the most important of which are specific performance requirements. By performance requirements, it is meant that the employee must be specifically made aware by the LCA itself as to what violations will necessarily trigger removal. E.g. "one eight-hour**

AWOL or three AWOLS of more than five minutes will result in summary removal." Or, "Any series of five absences or tardies, including approved absences for sick leave or annual leave, will result in summary removal." Where the LCA is clear and unmistakable on its face, it should be enforced as written. In the absence of fraud or overreaching, the unilateral subjective of intent or belief of the union or the employee should not operate to vary those terms.

Fifth, the performance standards set forth in the LCA should not be so difficult to meet that they themselves violate the just cause standard. Where the service insists upon performance standards that are so onerous that their violation is ipso facto insignificant, technical or de minimus, such standards likely will not be enforced in arbitration.

Sixth, while performance standards should not be onerous, an employee under an LCA may be held to higher standards of performance than other employees, Specifically, where attendance is the problem, it is not sufficient that he merely become average in attendance. He may be placed under an affirmative duty to exceed normal attendance/AWOL standards. When an employee is placed under an LCA, he is being given a second chance, and he must prove that he merits that chance, and will not be heard to complain that he is being treated somewhat differently than other employees. The only caveats are, as stated in the proceeding paragraphs, (1) that he be made well aware of the standards of performance to which he is to conform, and (2) that the standards not be made so onerous or technical/de minimus in nature that they run the risk of non-enforcement under the just cause standard.

Seventh, the LCA must be monitored and applied so as not to lull an employee into believing that violations will not result in his removal. Thus, if an employee violated the LCA by being AWOL, and management decides not to remove him, its failure to specifically warn the employee that the next violation will result in removal, may very well result in a valid "lax enforcement" ruling in favor of the union.

Arbitrator Levak suggests the Last Chance Agreement must be carefully weighed against the just cause standard. I agree with that standard of appraisal. While the criteria of a Last Chance

Agreement may be demanding, the compliance requirements must be reasonable.

Specifically, the Grievant in this case was charged with failing to report his attendance and participation in the Employee Assistance (EAP) Program. What is significant in this case is the fact that the Last Chance Agreement specifically states that failure to comply with the Agreement would result in removal. This caution was reiterated several times. At the end of Paragraph One (1) it states:

> **"The parties understand that it is critical that the Grievant adhere to each of the provisions of this Agreement and that any failure to adhere to those provisions will result in removal."**

At Paragraph Thirteen (13):

> **"It is agreed by all parties to this agreement that any violation of the terms or conditions of this agreement by Grievant will result in the issuance of a removal notice."**

The Agreement was thoroughly explained and agreed to by the Grievant. In this case, the purpose of the LCA is outlined in Paragraph One (1) of the Agreement and stated as:

> **"1. The purpose of this Agreement is to provide the Grievant with a last chance to perform acceptably as a postal employee in that it is recognized that he is fully capable of performing said duties. ..."**

Being that it was an AWOL/attendance problem that caused the LCA to be initiated, it is then obvious that it is the attendance problem that Management desires corrected. Making an issue of not telling his Supervisor about his attendance at EAP meetings appears superficial, absent any evidence the Grievant did not attend. The infraction is a technical one which has nothing to do with the Grievant's actual work behavior. Evidence shows he

did participate in the Program, as suggested by the Agreement. However, the reporting requirement is questionable. In addition, the alleged technical infraction is one that would have only a de minimus affect. Significant to this case is the end of Paragraph Thirteen (13) of the Agreement stating that:

> **"It is further understood that this Settlement Agreement constitutes a last chance for Grievant to correct his attendance problem."**

Again, this solidifies the point that the Grievant's attendance is the problem that needed improvement. The evidence in this case fails to show the work attendance of the Grievant was in default since the initiation of the Last Chance Agreement.

The Supervisor in his Removal Letter indicated several times that it was the Grievants poor attendance that prompted him to take the disciplinary action. However, when the Agency's witnesses were questioned about the Grievant's attendance, they could not show that the Grievant had any unexcused absences and insisted the removal was a result of the Grievant not reporting his EAP meetings as required by the Agreement. I believe there is something more to the Employer's reason for removal, but absent any evidence to substantiate discipline, a case was being made showing failure to comply with all requirements of the LCA. That case is very weak indeed, and the Employer failed to meet their required burden of proof.

The Employer insisted the LCA was for a two year period and the Grievant was required to stay in the EAP program for that period. I do not agree with the Employer's suggestion. that the Grievant was required to stay in the EAP program for the entire

two years. The LCA is for the two year period, but there is nothing in the Agreement that specifically requires the Grievant to continue with the EAP program or to continue to attend meetings for the entire two year period. According to the language of Paragraph 7:

> **"Grievant agrees to enroll and actively participate in a structured Employee Assistance Program <u>if deemed appropriate/necessary</u> by the Employee Assistance Program counselor. Grievant's satisfactory participation, <u>if deemed appropriate/necessary</u>, in such a program is mandatory. "Satisfactory participation" is defined, for the purposes of this agreement as "attending all scheduled meetings and any and all prescribed treatment <u>as required</u>." Grievant's participation must commence within two (2) days of signing this agreement by contacting the Postal Service Employee Assistance Program counselor. Grievant must begin prescribed outside counseling/treatment, <u>if deemed appropriate/necessary</u>, within ten (10) days of signing this agreement." (emphasis added)**

As I read the Agreement, it states the Grievant will continue in the EAP program "as deemed necessary and appropriate". This is stated three times in the above paragraph. The duration of time is not specific.

The evidence shows the Grievant complied with the participation portion of the Agreement. The language required the Grievant to begin participation within two (2) days which he did. On the other hand, the language is silent regarding the duration of that participation.

The Employer also insisted that the Grievant was required by the terms of the agreement to continue reporting his meeting attendance and progress to the Supervisor every two weeks, which

he failed to do. This is the only issue the Employer has with any merit. On this issue, as the Union points out, the Employer shared equal responsibility with the Grievant, should the requirement to continue reporting remain in force. The Grievant signed a release allowing information pertaining to his progress to be disclosed to his Supervisors. Those same Supervisors had access to the same information relevant to the Grievant's progress in the Program. There was no evidence showing any Supervisor queried the EAP Counselor regarding the status of the Grievant. In addition, it is important to note the Grievant began voluntarily participating in a treatment program before being required to do so by the Last Chance Agreement. The Grievant testified that he continues to participate in a program recommended by his Counselor and there is no evidence to suggest otherwise.

There is no evidence of unexcused absenteeism since the signing of the Last Chance Agreement and the Employer did not pursue absenteeism as an infraction of the Agreement. It appears the absences that occurred beginning in December, which were later determined to be subject to the Family Medical Leave Act, could have caused the Supervisor to initiate his removal action. In addition, there was an incident where a customer called the Postal Service and advised the Supervisor that he overheard an unfavorable comment made by the Grievant in the post office. An investigation later indicated an unfavorable comment was made by the Grievant. However, the investigation concluded without any negative findings and no action was taken against the Employee.

The only possible case for Management would be failure to comply with the Last Chance Agreement based on the allegation that the Grievant failed to report his EAP attendance to his supervisor. Since the crux of the Last Chance Agreement was absenteeism, I consider that his failure to report as being de-minimus in nature. On the other hand, I find his work attendance and the absence of unexcused absences to be most significant.

The EAP Counselor that the Grievant was first assigned to is no longer employed by the USPS. However, a telephone interview with that counselor provided testimony favorable to the Grievant regarding his participation in the EAP program. The mere fact that the Grievant failed to report his meeting attendance to the Service must be considered de-minimus. The Grievant has complied with the spirit and intent of the Last Chance Agreement. The primary issue, that of the Grievant's work attendance, was not shown to be a problem since the inception of the Last Chance Agreement.

The evidence in this case convinces me that a removal and discharge action would be arbitrary, capricious and unreasonable. The arguments of the Employer in this case fails to meet the just cause standards set forth in Article 16.1.

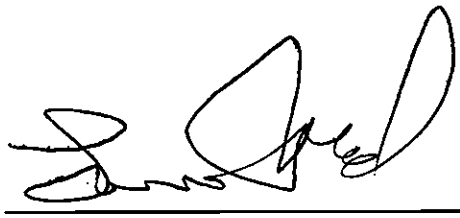
Accordingly, with respect to the above reasoning, the Grievance is sustained and the Grievant shall be made whole in accordance with the provisions of the Agreement. The Service is entitled to credit for any earnings or other income for which the Grievant may have received up to the time of reinstatement. It

is also noted that the Grievant was ill at the time of his termination and was not available for work.

To ensure the proper remedy is effected, I shall retain jurisdiction over this matter for 90 days.

AWARD

The Grievance is sustained. The Grievant shall be made whole.



Lawrence Roberts, Panel Arbitrator

Dated: March 1, 1997
Fayette County
Uniontown, PA