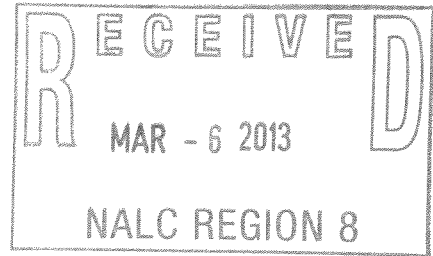


REGULAR ARBITRATION PANEL



In the Matter of the Arbitration *
*
between: *
*
United States Postal Service *
*
and *
*
National Association of *
Letter Carriers, AFL, CIO *

Grievant: W. Youngman
Post Office: Brownsville, TN
USPS Case No: C06N-4C-D 13023538
NALC Case No: D-1697-12-D

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Ronnie Patton

For the Union: Corey Walton

Place of Hearing: Jackson, TN

Date of Hearing: February 7, 2013

Date of Award: March 2, 2013

Relevant Contract Provision: Article 16

Contract Year: 2006

Type of Grievance: Discipline

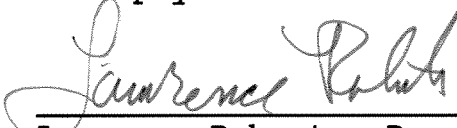
Award Summary:



MAR 22 2013

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The Grievant in this case was issued a Notice of Removal Letter alleging a Violation of the Postal Service Standards of Conduct - Improper Conduct. Mitigating circumstances shows the discipline of removal was punitive rather than corrective in nature. The removal action is reduced to a time off suspension and the Grievant shall be reinstated to his former position within two weeks upon receipt of this Award. There is no back pay awarded in this matter.



Lawrence Roberts, Panel Arbitrator

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 Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 7 February 2013 at the postal facility located in Jackson, TN 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 digital 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 matter is employed as a Letter Carrier at a Brownsville, TN Postal facility. He has been employed by the Postal Service for six years.

On or about 7 November 2012, the Grievant received the following Notice of Removal Letter, signed by a Supervisor.

That document, in pertinent part, reads:

"You are hereby notified that you will be removed from the Postal Service no sooner than thirty (30) days December 7, 2012 from your receipt of this notice.

Charge #1 - You are charged with Violation of the Postal Service Standards of Conduct - Improper Conduct.

On 09/18/2012 you submitted a PS Form 3971 (Request for or Notification of Absence) for sick leave for Thursday September 20, 2012. You were asked to bring in documentation for your absence. Friday was

the next day which is your off day. You called in Saturday (September 22, 2012) and Monday (September 24, 2012). Upon your return to work, you provided documentation from Dr. Joyce Russell, MD in Memphis TN for your absence. Management contacted the OIG about the medical excuse. The OIG after receiving the allegation conducted a database query. It was found that there were no results found in TN Dept. of Health website for a Dr. Joyce Russell or Dr. William Russell in the Memphis Area. Additionally queries for Mississippi Board of Licensure and the Arkansas State Medical Board did not provide any information for these Doctors. It was discovered that the work excuse was fictitious. You were interviewed by the OIG about the work excuse and you admitted that it was fictitious and you thought that you would not be challenged on it. You also admitted In the Investigative Interview that you provided a fictitious medical excuse.

Providing false information and using fictitious work excuses is dishonest and unethical, and against Postal regulations. The Postal Service has the right to expect employees to be honest and maintain a reasonable standard of conduct. You have broken that trust. It is a requirement of your position to abide by the Postal Service's rules and regulations".

The Letter goes on to cite various options and rights available to the Grievant to protest the Removal action.

The Grievant, as well as the Union, refute the charges. The instant grievance was filed in protest. The Union asks the Grievant be returned to work and made whole in every respect. In rebuttal, the Agency argues the evidence supports their removal action and requests their initial decision be upheld.

Obviously, the Parties were unable to resolve this dispute during the prior steps of the Parties Grievance-Arbitration

Procedure of Article 15. An impasse was declared by the Step B Team on 9 January 2013.

It was found the matter was properly processed through the prior steps of the grievance procedure. Therefore, the dispute is now before the undersigned for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. The record was closed following the receipt of oral closing arguments from the respective Advocates.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.
- 1A. USPS - NALC Joint Contract Administration Manual (in pertinent part)

COMPANY'S POSITION:

It is Management's intent to prove that the discipline issued is justified and warranted. Management contends it has followed the guidelines of Article 16 and issued the discipline that fits the crime.

The Agency points out that it puts a lot of trust in its employees and spends a lot of money in the training and progression of its employees. And the Employer has concluded that the Grievant in this case has broken that trust. The Service has reached the conclusion that this Employee cannot be trusted or expect that this Employee is trustworthy.

Management reasons the Grievant took it upon himself knowing that what he had done was against ethics, postal rules and the most important the trust that it needs from the employee to perform and present a positive image.

The Employer believes the Grievant knew that he was taking a chance with his job but chose to do so anyway. And Management has concluded the Grievant doesn't take his position with the Postal Service seriously.

The Grievant, according to Management, stresses the Grievant has openly admitted to turning in false documentation. The Agency also mentions that the Grievant, in his own statement tells us he is a very honest employee; however, his actions prove otherwise.

The Employer also argues the Parties Agreement does not require a written record of concurrence. The Union, according to the Employer has failed to prove that a concurrence request was ever made in this case.

Regarding any other evidence or documentation, the fact is, according to Management, the Grievant admitted to falsifying the document. The Employer argues that the Grievant did not go to the doctor and the excuse form was not from a legitimate medical practice.

Therefore, Management feels that the Notice of Removal is for just cause and that the Grievant has failed to follow proper procedures for numerous infractions.

As explained by the Employer, the Grievant has not presented himself as an employee who can be trusted or act professionally in the performance of his duties. The Employer has concluded that the decision to remove the Grievant from the Service is appropriate and follows the principles of just cause as called for in the National Agreement.

The Grievant has admitted to what he has done, the facts are indisputable, therefore, the Employer requests the instant grievance be denied and dismissed in its entirety.

UNION'S POSITION:

The Union contends the Notice of Removal was issued with a procedural defect. According to the Union, a concurrence issue was raised at the Formal Step A Level and Management failed to show, before this arbitration that any such concurrence of

discipline every happened. The Union argues that without concurrence, there can be no discipline.

The Union, in their procedural argument relies on the language of Section 16-8 of the Joint Contract Administration Manual. It is the Union's claim this language is quite clear in that respect. And the Union mentions this case file is void of any such concurrence. The Union insists this lack of concurrence must be fatal to the Employer's case.

The Union also insists it is too late for the Employer to offer any evidence regarding concurrence at this hearing. The Union feels it is not necessary or proper to examine the merits of this case due to Management failing to provide a concurring superior to this discipline prior to the hearing as requested at the Formal Step A level.

Regarding the merits, the Union points out the Grievant has been a solid and reliable letter carrier and had no discipline in his record at the time of this removal. It is the argument of the Union that the Grievant has been removed for this single act of bad judgment although he has an impeccable record.

The Union also raises the point that Management's discipline must be corrective and issued in a progressive manner, instead of punitive. The Union claims this did not happen in the instant case.

According to the Union, the evidence at this hearing will prove the Employer did not have just cause to issue a Notice of Removal to the Grievant.

The Union requests the instant grievance be sustained and the Grievant made whole in every respect.

THE ISSUE:

Is the Notice of Removal, issued the grievant, in violation of Article 15, 16 & 19 of the JCAM and the M-39, 115? And, if so, what is the remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 16
DISCIPLINE PROCEDURE

DISCUSSION AND FINDINGS:

This matter involves an issue of removal wherein the burden of proof falls on Management 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.

According to the Agreement, no Employee may be disciplined or discharged except for just cause. In my view the "just cause" provision is ambiguous; however, its concept is well established in the field of labor arbitration. The Employer cannot arbitrarily discipline or discharge any Employee. The burden of proof is squarely on the Employer to show the discipline imposed was supported with sound reasoning.

In addition, the just cause standard cannot be gauged in the same matter in all cases since each discipline case is unique to its own set of facts and circumstances.

The chief negotiators of Article 16 suggest progressive discipline. In many cases, that guideline prevails and progressive discipline works to serve both the Employer and Employee. As an example, absenteeism is oftentimes corrected with progressive discipline.

Then, there are those infractions, whereby progressive discipline, is simply improper. Theft would certainly be a good example of one of these instances. In this business, such an act would be intolerable and removal following the first occurrence would only be appropriate. I'm sure the chief negotiators would agree with this reasoning.

However, each matter of discipline rests solely on its own merits. What is found to be applicable in this case cannot be applied evenly to other similar issues. In fact, this case is totally unique when compared to other matters of discipline that I've decided throughout my arbitral career.

The one constant is the burden of proof rests with the Postal Service. It's their obligation to establish just cause or, at the very least, via their case in chief, demonstrate the presence of clear and convincing evidence.

It is not up to the Union to prove innocence, instead, for the moving party to establish guilt. In order to prevail however, Management need not prove their case beyond a reasonable doubt.

Instead, in arbitral matters, the preponderance of evidence rule applies. Clear and convincing evidence is proof via the preponderance. Regardless of the specific term employed, this Agreement, like most others, requires a showing, via evidence, that, more likely than not, the Grievant is guilty as charged.

This is based on the probability of the evidence, it's probable truth and accuracy, not necessarily the quantity. In any case, the meaning is somewhat subjective and this forum lacks a steadfast rule that can be applied to all cases. Instead, only a guideline delineates the evaluation of the evidence and accordingly, is considered on a case by case basis.

This particular Article 16 case involves one of an alleged misconduct. There are certain acts that are certainly dischargeable offenses, even on the first occurrence. While progressive discipline is certainly recommended by the negotiators, that particular theory of discipline is based on the infraction and is to be determined on a case by case basis.

At the onset of this matter, the Union raised a procedural issue claiming the Grievant was denied his right to due process. Specifically, it was the belief of the Union that Management failed to provide a review and concurrence of the removal decision by a higher level authority.

However, the evidence in this case only shows that the Union requested a copy of a written concurrence. On that note, there was no other evidence indicating a requirement that a review and concurrence at a higher level be documented in writing.

Controlling in my decision regarding this procedural allegation is the fact the Employer presented a witness stating she did in fact completely review all the evidence and issue concurrence with the decision to evoke removal action. Yet, to that end, the Union failed to offer any credible evidence to the contrary.

And based on that reasoning, I am of the considered opinion the issue is properly before me. It was quite clear to me that the due process rights of the Grievant were not violated in any way.

The Grievant in this case was asked by the Employer to produce a physician's slip to certify an absence with the physical inability to work. The excuse provided by the Grievant in this case was a fabrication. There was no dispute between the Parties regarding the facts relating to this matter. The Grievant admitted, from the onset, to the falsehood of the document.

With that said, there are certain acts that simply do not deserve the progressive discipline procedures outlined in Article 16. And the act committed by the Grievant in this matter could certainly be slotted into such parameters.

Following careful evaluation and consideration of all the facts and circumstances surrounding this matter, the undersigned is of the considered opinion the Employer clearly miscued in this matter. I agree with Management, in that, the act committed by the Grievant may be deserving of capital punishment, even as a first time offense. However, the mitigating circumstances clearly exhibit to me as a case more akin to that of progressive discipline being the better alternative.

Reason being here, the Employer has a fully trained Employee that, other than this one singular act, has been an

exemplary Employee. However, paramount, I was convinced this was a singular occurrence only by the Grievant. And I am of the considered opinion, that Management was so overcome by the event, that to contemplate any type of mitigation was not even considered.

However, I believe one more opportunity will be beneficial to both Parties in this case. First, the Employee garners a last opportunity to maintain a successful and productive career. And of equal importance, the Employer is able to maintain an otherwise competent and valuable Employee.

But what was misconstrued in this matter was the anger of the Employer over this particular act by the Grievant. And that is understandable. However, I am of the considered opinion, this was a single, one time occurrence. And should the Grievant ever commit another act of dishonesty, regardless of degree, progressive discipline will be set aside.

What the Grievant did here is an embarrassment on not only the Grievant but also the Postal Service. However, what is paramount here is the fact the Grievant acknowledged the mistake and was remorseful.

When questioned about his actions, the Grievant did not deny any of the Charge and confirmed all allegations. The Grievant was contrite and actually authored a statement that the undersigned recognized as being a sincere apology. While the action of the Grievant is a very serious matter, the undersigned was convinced the Grievant is otherwise an honest person, was remorseful and sincerely regretted his action.

My decision in this matter certainly differs from a previous case decided by the Undersigned (Case #: B06N-4B-D 10317352) where it was written that:

"The way it stands, the act of fraud, in any setting is an egregious act deserving of removal. The act of fraud, without remorse, is certainly a dischargeable offense. As previously stated, there are certain acts, such as fraud, that do not fall in line with any progressive discipline. The fact the Grievant in this case had been disciplined previously for absenteeism has absolutely no bearing on my decision in this matter. Fraud is dischargeable offense, period. Without any contrition or remorse, I see no reason here to consider any form of mitigation, even though the Grievant is a long term Employee."

In the above cited case, the Grievant submitted a fabricated CA-17 in an attempt to obtain Worker's Compensation. That case, in particular, was much more egregious than the matter before me. In the instant case, the purpose of the fabrication was to document an absence of several days, nothing more. What separates the above case from the instant matter is the fact the Grievant in the instant case admitted guilt, took

full responsibility for his actions and was remorseful. The Grievant in that 2011 Newark NJ decision claimed total innocence, even to the point of implying that he was coerced into a confession.

Moreover, I agree with the mindset of **Arbitrator Donald E. Olson, Jr.**, where, in a **2004 Award (Case No: F01N-4F-D 04056581)** states that:

"This arbitrator is of the school of thought that "just cause" seems to be a cause which appears to be fair and reasonable when all of the applicable facts and circumstances are weighted in a given case, and are viewed in the light of the time and place when the alleged violation of either the labor agreement or a managerial policy actually occurred. In short, was the employee given a "fair opportunity under the unique circumstances of a particular case" by his or her employer..."

Not only do I agree with Arbitrator Olson, that very same concept has been applied to all of my previous matters involving discipline. And as I have stated so many times before, each matter of discipline rests on its own very unique set of facts and circumstances. I have yet to find a matter of discipline wherein the doctrine of res judicata could be applied from one case to the next.

There is conduct that is very well deserving of removal action at its first occurrence. This could have very well been

such a case. Management's Advocate did an excellent job of presenting the Employer's position in this matter.

However, I was moved by the Grievant's testimony, written letter of apology and a promise that he would never commit a similar act in the future. But paramount is the fact I was convinced the Grievant to be an otherwise honest person who places great value on his employment with the Postal Service.

And equally as important, the Agency will retain an otherwise exemplary Employee, however, without any cushion of committing any similar acts in the future. The remainder of the Employee's career, regardless of length, is expected to be exemplary as well.

The removal action of the Employer will be reduced to a suspension of lost time. The Grievant will be returned to work within two weeks of the receipt of this decision. There will be no back pay. In addition, the Grievant will be on strict probation for a period of one year and I will retain jurisdiction over his employment.

In the event the Grievant is found to be in any way dishonest, his employment with the Postal Service will be terminated at that time.

AWARD

The grievance is sustained. The removal action of the Employer will be reduced to a suspension of lost time. The Grievant will be returned to work within two weeks of the receipt of this decision. There will be no back pay. In addition, the Grievant will be on strict probation for a period of one year and I will retain jurisdiction over his employment.

Dated: March 2, 2013
Fayette County PA

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