C#01030

RA-7550D-75
Howard C. Saunders
Yucaipa, CA
NCW 15,975D

IN THE MATTER OF AN ARBITRATION Between UNITED STATES POSTAL SERVICE And NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	Discharge of Howard C. Saunders, Jr Case No. NC-W-15, 975-D AWARD OF THE ARBITRATOR April 9, 1979

This matter came on for hearing in San Bernardino, California, on November 8, 1978, before Arbitrator William E. Rentfro, selected by the parties to hear and render a final decision on the issue in dispute.

The Union was represented by Frank F. Wetschka, Regional Administrative Assistant, NALC. The Postal Service was represented by Don R. Freebairn, Employee and Labor Relations Executive.

Timely briefs were filed by both parties on or about January 29, 1979.

THE ISSUE

Was the Grievant, Howard C. Saunders, Jr., discharged for just cause, effective July 21, 1978? If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

Article XVI
Discipline Procedure

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 required, 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.

STATEMENT OF THE CASE

Howard C. Saunders, the Grievant herein, had been employed as a full-time regular letter carrier out of the Yucaipa, CA post office for approximately ten years prior to his discharge from the Postal Service on July 21, 1978. The Grievant's discharge was the only disciplinary action taken against him during his Postal career. The reasons for his termination were stated in a Notice of Removal Letter dated June 16, 1978 and signed by the Grievant's immediate supervisor:

> You are hereby notified that you will be removed from the Postal Service on July 21, 1978. The reasons for this removal action are:
>
> #1. A news item appearing in the June 11, 1978 issue of the San Bernardino Sun-Telegram stated that you were charged with two counts of lewd and lascivious conduct with a child under 14 years of age.
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> My investigation into this news item reveals that you were arrested on Jan. 15, 1978 and charged with two counts of lewd and lascivious conduct and one count of corporal punishment upon a child under 14. You were confined in the San Bernardino County jail from Jan. 15, 1978 to Jan. 17, 1978 at which time you were released on your own recognizance.
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> On April 18, 1978, you pleaded guilty to one count of corporal punishment to a child, which is a felony.

> On June 5, 1978, in Superior Court for the State of California, Judge Wm. Hyde issued a pronouncement of judgement that indicated a conviction for corporal punishment of a child. Although such convictions could result in a jail sentence, you were placed on probation.
>
> This type of conduct on your part is detrimental to the best interest of the Postal Service and cannot be condoned.

A second charge alleging misuse of sick leave to cover the Grievant's incarceration following his arrest was conceded by the Postal Service in his post-hearing brief to be unsupported by the evidence, and will therefore not be considered in support of the discharge.

The criminal charges referred to in the Notice of Removal Letter had as their factual basis allegations that the Grievant had engaged in incestuous behavior with his seven-year-old son.

As noted in the Removal Letter, the Grievant was arrested and charged on January 15, 1978. He was released on January 17, and returned to his letter carrier duties. However, the Postal Service was unaware of this matter until mid-June, 1978. On either June 12 or 13, 1978, a supervisor noticed a brief newspaper article reporting the disposition of the criminal charges against the Grievant and called the article to the attention of Postmaster Peters. The next day Peters contacted the Clerk of the County Court and obtained from her the police investigative file on Mr. Saunders. Peters and two supervisors read through the police file. Based solely

on the information it contained, and the newspaper article, they immediately determined to issue the Grievant a 30-day advance notice of discharge. Peters testified at the hearing that his hasty decision to discharge the Grievant was based on his concerns that the Grievant might molest children on his route and that public trust in the Postal Service would be impaired if it were known that the Service employed a suspected sex offender as a letter carrier.

The decision to discharge was made without notifying Grievant, discussing the charges with him or anyone else familiar with the case, or giving him or the authorities investigating the matter an opportunity to explain what had happened. No one from management interviewed the Grievant about the incident giving rise to the criminal charges or sought his explanation of the reported sexually deviant behavior.

Management's reluctance to discuss the matter with the Grievant continued through the initial stages of the grievance procedure. At the Step 2A meeting, Postmaster Peters insisted that he did not wish to speak with the Grievant, and requested that he not be present. When questioned about this at the hearing, Peters responded as follows:

> Q. Did you ever at any point through this entire matter, discuss this matter with Mr. Saunders?
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> A. (By Mr. Peters) No, I didn't.
>
> Q. Could you tell me why not?
>
> A. I didn't really see any reason to doubt the court records. (Tr. pp. 28-29)

A more detailed examination of the facts and evidence in this matter will be found in the Discussion and Conclusions below.

DISCUSSION AND CONCLUSIONS

A review of recent arbitral awards in disciplinary cases reveals a growing consensus among arbitrators that a just cause standard, to which discipline is contractually required to conform, embodies the principle of procedural due process. Due process analysis, long used to safeguard the interests of a criminal defendant, has not been mechanically incorporated into the field of industrial relations. Rather, arbitrators have recognized that particular due process concerns are implicitly addressed by the parties in negotiating employee rights to grieve disciplinary action; and are inherent in any contractual provision requiring an employer to establish just cause for disciplining or discharging employees.

> Thus it can be seen that due process is not a mere technical requirement; it is an integral part of the just [cause] clause that the parties have agreed upon. For an arbitrator, in construing a just cause clause, particularly where discharge is involved, to reach a determination without considering whether due process has been afforded a Grievant is to invite the very labor unrest the parties hoped to avoid in including such a clause in their collective bargaining agreement. (Osborn & Ulland, Inc., and Retail Store Employees Union, Local 1001, 77-2 ARB ¶ 8321 (Michael H. Beck).)

Procedural due process is discussed in CCH's Current Comment and CCH Analysis, § 58,572.

> The right of each and every citizen to be accorded the full protection of due process when accused of wrongdoing is one of the fundamental precepts of the entire judiciary system. Failure to afford an accused man his full rights under the law will invalidate the entire proceedings against him, as witnessed by many Supreme Court decisions. It is not strange, then, to find the idea of procedural due process well established in the field of industrial and labor relations dealing with discipline. Where the right of a company to discipline at will once existed, more and more restraints are being applied, if not by unions through contract negotiation, then by arbitrators.
>
> Discipline not only affects a man's immediate relationships at his place of work, but--in case of discharge, the supreme labor penalty--it may dog his heels and keep him from finding other, comparable work. More and more weight is being given to the effects of discipline which reach out beyond the immediate penalty. Failure to weigh these effects in the process of meting out discipline has often resulted in the mitigation or reversal of penalties through arbitration.

The basic requirements of due process in labor-management relations have been identified to include the formulation of reasonable orders and rules; publication of these rules and possible penalties which may be incurred for their violation; even-handed application of the rules and disciplinary measures; and assessment of disciplines appropriate to the severity of the violation and the disciplinary record of the individual; and, above all, conducting a fair, objective, and thorough investigation, including inquiry into the employee's explanation of the incident, before disciplinary action is taken. The foregoing rudimentary due process requirements are discussed in Woods Co. and Teamsters, Local 247, 78-1 ARB ¶ 8186 (James C. McBeaty); Tension Envelope

Corp. and Printing Specialties and Paper Products Union, 70-2 ARB ¶ 8592 (Russell S. Bauder); and Spartan Printing Co., 50 L.A. 1263 (Neil N. Bernstein, 1968).

The due process concerns raised by the facts of this grievance are serious ones pertaining to the final factor listed above. Failure of management to thoroughly investigate an incident and offer the employee an opportunity to explain his conduct prior to dismissal has frequently resulted in the reinstatement of an employee whose due process rights were violated in this manner. In Globe-Union, Inc. and Auto Workers, Local 119, 78-2 ARB ¶ 83-73, Arbitrator Henry L. Sisk reinstated two Union officials who had been summarily discharged for leading a walkout. Sisk said, in part:

> Management's discipline of the employees was improper. Although the workers were involved in an unauthorized walkout and although the company was authorized to impose varying degrees of discipline, it had to conduct a complete investigation before penalizing any of them. There was, in fact, no showing that the two employees cited as instigators actually led the walkout; rather their dismissal was based on their status as union officials.

Similar reasoning formed the basis of Arbitrator George T. Roumell's reinstatement of a cashier discharged for being rude to customers.

> Since not only oral complaints but also written ones were made to the store's manager accusing the cashier of rude treatment of customers, the store was justified in using these complaints as the basis for disciplining the employee. However, management failed in its obligations to apprise her of the accusations and to give her a chance to explain her version of the incidents prior to her dismissal.

In oft-cited Grief Bros. Cooperage Corporation, 64-2 ARB ¶ 8586 (Carroll R. Daugherty), the arbitrator held that the foreman should have checked the evidence to determine whether a grievant had inadvertently or wilfully damaged material. The arbitrator said:

> Every accused employee in an industrial democracy has the right of "due process of law" and the right to be heard before discipline is administered. These rights are precious to all free men and are not lightly or hastily to be disregarded or denied. The Arbitrator is fully mindful of the Company's need for, equity in, and right to require careful, safe, efficient performance by its employees. But before the Company can discipline an employee for failure to meet said requirement, the Company must take the pains to establish such failure.

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

The reasons why due process requires that an investigation be made into all the relevant facts and circumstances, including the employee's explanation, before disciplinary action is taken are several. If this is not done, the employer risks nondisclosure of essential elements of the case. A thorough investigation reduces the likelihood of impulsive and arbitrary decisions by management and permits

deliberate, informed judgment to prevail. By giving the grievant an opportunity to present his side of the story and point out mitigating factors raises the possibility that the employer would have been dissuaded from discharging him in the first place. The same evidence presented prior to decision may have a more important effect than when offered at the grievance level. This is so simply because it is human nature to stick to and defend a decision already made. This reluctance to reconsider, even in the light of new information, is more pronounced in labor-management relations because the employer has an additional institutional interest to "stand firm" and defend the authority of the supervisory personnel who made the decision to discharge.

Turning to the facts of this grievance, it must be concluded that the manner in which the Postal Service reached its decision to discharge Mr. Saunders was in utter violation of the Grievant's right to procedural due process. Mr. Saunders was not given an opportunity to rebut the charges against him or explain the presence of mitigating circumstances before he was terminated. The Postal Service relied exclusively on the information contained in an abbreviated newspaper notice and the police arrest files in discharging the Grievant. No inquiry was made into the reliability of the allegations contained in the police file; and, more importantly, no effort was made to ascertain if any changes in the Grievant's situation had occurred during the five-month

interval between the compilation of the police records in January and their perusal by the Postmaster in June. This failure is particularly appalling in view of the efforts made in the Grievant's behalf by the sentencing judge and the probation officers assigned to the Grievant's case who contacted Postmaster Peters (after the Notice of Removal Letter), informed him of extensive professional evaluations made of the Grievant during this five-month period, and offered their assistance to explain or discuss these evaluations with the Postal Service.

The Postmaster's exclusive reliance on the police reports to provide the background information on the criminal charges against the Grievant reported in the newspaper was improper. The function of those reports was to compile evidence sufficient to satisfy all the elements of a criminal offense. As such they present only half a case--the prosecution's half--and do not contain any refutation of the allegations made in them. Much of the information contained in those reports was gathered in the course of police intervention in a fight between the Grievant and his wife. In such a situation Mrs. Saunders could have been fast and loose in her accusations. At the hearing she testified that a good bit of the information contained in those reports was exaggerated and inaccurate. While certainly the police reports contained pertinent information which the Postmaster was entitled to consider, the discovery of these five-month-old

records should have prompted him to accept the invitation of the Judge and probation officers to explore with them how factual these records were and whether there were any mitigating or aggravating factors which the records failed to disclose.

Even if the information contained in the police reports is accepted as the gospel truth, and that no refutation of the charges is possible, they still do not present a complete picture of the Grievant's situation. During the five-month interval between the compilation of the police reports and their examination by Postmaster Peters the Grievant underwent psychological testing by a clinical psychologist and was evaluated by probation officers, a social worker and a counselor in the alcoholic recovery program. It was the consensus of these professionals, and of the sentencing Judge, that the Grievant's sexually deviant behavior was attributable to his chronic alcoholism.

Dr. Stephen B. Lawrence, a clinical psychologist, performed a series of psychological tests on the Grievant, interviewed him, and examined the police reports and a transcript of the Grievant's preliminary hearing. It was Lawrence's professional opinion that . . .

> The test results are consistent with my behavioral observations and this man's past clinical history in revealing an individual addicted to alcohol to a chronic and severe degree. No other mental or emotional disorder was elicited from this examination. At present, the defendant gives no evidence of any psychological symptoms. (Page 6 of Dr. Lawrence's report of March 7, 1978.)

His diagnosis was "Alcoholism, alcohol addiction, chronic."

Two probation officers assigned to the Grievant's case wrote letters to Postmaster Peters urging the Postmaster to reconsider his decision to discharge the Grievant. In a letter to the Postmaster, dated June 26, 1978, Probation Officer Brown stated, in part:

> In May of 1978, I investigated the recent case in which Howard Saunders was involved. In talking with Mr. Saunders, his wife, and in reviewing recent psychiatric work-ups on the defendant, it seems clear that he in no way can be considered a Mentally Disordered Sex Offender and that the offenses were precipitated by chronic alcoholism..."

Probation Officer Adams, in her June 21, 1978 letter to the Postmaster, explained:

> He (Saunders) seems to be dealing with his problem and he is not viewed as a career criminal. He has no prior record. While on probation he shall be required to participate in a program of family counselling and his actions in the community will be carefully monitored to prevent any further criminal behavior.

Judge Hyde, who presided over the Grievant's criminal case, testified at the hearing and explained why the Grievant pled guilty to the lesser charge of corporal punishment of a child and the charges of lewd and lascivious conduct were dismissed.

> The reason for that disposition was ... the District Attorney's office was satisfied that insofar as ... this case was concerned, this was not a case in which the prosecution was particularly concerned about Mr. Saunders being within the mentally disordered sex offender area.
>
> It recognized that his problem was an alcohol problem, and absent the alcohol abuse there was no reason that anybody had any concern about his ability to function. (Tr. p. 56)

Judge Hyde was asked what his own professional opinion of the Grievant was.

> Q. Would you see any problem, inasmuch as Mr. Saunders delivers mail to six or seven hundred patrons every day, encountering children, that that would be a problem?
>
> A. (By Judge Hyde) No, I can't see--as I said, I don't think that is an area of problem. His area of problem was the alcohol, and as long as that problem is resolved, I don't think that he has these other problems.
>
> He may have them, but they are not in any way, shape, or form, a threat ... (Tr. p. 58)

Peters was questioned at the hearing about the consideration he gave to this information and responded as follows:

> Q. When you received these letters from the probation officers Brown and Adams, and you received a telephone call from Judge Hyde, relative to a request for reconsideration in this matter, and as both the probation officers indicated in their letters that his problems have stemmed from alcoholism and they see no further problems, did you investigate further?
>
> A. (Mr. Peters) No, not really.
>
> Q. In other words, at that point your mind was made up?
>
> A. Yes. (Tr. p. 39)

This distressing refusal to consider this important information is, I should like to think, but an example of an institutional tendency to defend the authority and finality of a decision already made and, had the Postmaster questioned the Grievant, and thereby obtained this information prior to sending him notice of discharge, it would have received the fair and adequate consideration it deserved. However, instead

of inquiring of the Grievant or consulting with anyone, even though five months had elapsed and extensive investigation had been undertaken by numerous trained professionals, the Postmaster leapt to a hasty conclusion based on his preconceived notions of what the charges against the Grievant entailed.

Admittedly, the charges against the Grievant, and the information contained in the police reports, are ones that most people would find personally abhorrent. But it is the very purpose of procedural due process to counteract a decision-maker's tendency to allow a strong, subjective reaction to cloud his reasoned judgment. If management had observed even the rudimentary protections of due process by giving the Grievant an opportunity to explain his actions, offer any defense he might have, and listen to and consider the mitigating information offered by the Judge and probation officers, and then made an informed judgment that removal was the only proper course of action, it is very unlikely that an arbitrator would fail to confirm that good faith decision. In this case, however, the Postmaster did none of these things. This decision was not based on informed judgment--it was based on blind and biased judgment--after refusing to consider any facts in mitigation. For this utter failure of due process alone, the grievance must be sustained.

A second ground upon which the grievance is sustained is the Postal Service's failure to shoulder its burden of proof

on an important element of its case. It is a well-established arbitral principle that when the basis for disciplinary action is misconduct occurring during nonworking hours and off company premises, management must show that this misconduct relates to and impairs the employee's usefulness as an employee.

The Postal Service has suggested two ways in which Mr. Saunders' conduct was detrimental to his work as a letter carrier. The first is a concern that public trust in the Post Office would be impaired if it were known that it employed a letter carrier who had been charged with the conduct involved in this case. The only evidence offered on this point was the June 11, 1978 newspaper notice, which identified the Grievant by name and stated that he had been charged with lewd and lascivious conduct, but had been convicted of corporal punishment of a child and placed on probation. The Grievant was not identified as a Postal worker. The only evidence presented on the issue of the community's reaction to this was offered by the Union, and is that the community was not disturbed.

Realizing the difficulty of presenting evidence to support its first theory, the Postal Service relied heavily on its argument that the Grievant should not hold a position which places him in contact with small children in an unsupervised setting. In its brief the Postal Services cites recidivism statistics pertaining to sex offenders which, it

is contended, support the Service's claim that the Grievant did not belong on the street as a letter carrier. Even if these statistics are a factor which the employer should take into account, they require further investigation as to the type of sex crimes and patterns of recidivism they cover. There was no investigation by the Postal Service as to the connection between the Grievant's incestuous conduct and these figures. When compared to the specific psychological examinations made of this Grievant, I must conclude that these statistics are insufficient to satisfy the Postal Service's burden of proving the Grievant dangerous to children on his route.

The evidence primarily relied on in support of the Service's position that the Grievant posed a threat to children was contained in the police files. The problems with relying exclusively on these documents has been amply discussed above. Whether the Grievant would repeat his misconduct and endanger other children was explored by the probation officers, social worker, and psychologist. Their findings were evaluated by Judge Hyde, who concluded that with treatment for his alcoholism, recidivism would not be a problem for Mr. Saunders. The PAR counselor, Mary Ayers, testified that Grievant had been a regular attender in the program since mid-April, and that she had noticed a "remarkable change." Since Postmaster Peters did not consider all of the evidence and these other

professionals did, this Arbitrator is persuaded that the Postmaster's conclusion that Grievant posed a threat to children on his route is not supported by the evidence. In fact, the weight of the evidence is to the contrary.

AWARD

For all of the reasons set forth above, it is determined that the Grievant, Howard C. Saunders, Jr., was not discharged for just cause, effective July 21, 1978. He is reinstated to his former position with back pay, less any earnings and/or unemployment compensation received by him since the effective date of discharge.

William E. Rentfro

William E. Rentfro
Arbitrator