

REGULAR ARBITRATION PANEL

 In the Matter of the Arbitration *
 *
 between: * Grievant: P. Meadows
 *
 United States Postal Service * Post Office: Chattanooga, TN
 *
 and * USPS Case No: C16N-4C-D 18299895 ^A
 * C16N-4C-D 18320089 ^B
 *
 National Association of * NALC Case No: 18-D-820
 Letter Carriers, AFL, CIO * 18-D-825CP

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Derek Truman

For the Union: Corey Walton

Place of Hearing: Postal Facility, Chattanooga, TN

Date of Hearing: August 29, 2018

Date of Award: September 26, 2018

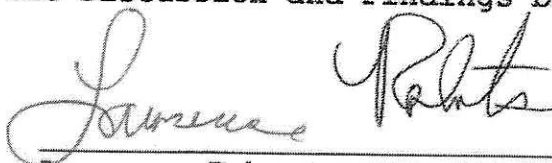
Relevant Contract Provision: Article 16.5 - 16.7

Contract Year: 2016

Type of Grievance: Discipline

Award Summary:

The Grievant in this case was issued an Emergency Placement and a subsequent Notice of Removal. The Emergency Placement grievance is denied. The Notice of Removal is expunged and the Grievant shall be returned to work with the requirement of a successful EAP completion and in accordance with the Discussion and Findings below.



 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 29 August 2018 at the postal facility located in Chattanooga, TN. 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 employed as a Letter Carrier at a Chattanooga, TN Postal facility, the South Station. The Grievant has been employed by the Agency since April 1999.

The Grievant was placed in an **"Emergency Placement in Off Duty Status."** A document, dated 23 May 2018, reads as follows:

"You are hereby advised that you were placed in an emergency off-duty status today, Wednesday, May 23, 2018. The reason for your placement in an off-duty status is that you failed a random drug screen taken on May 1, 2018, for which we received notification on May 17, 2018. Your off duty status will remain in effect until completion of my investigation, at which time you will be advised.

Section 7. Emergency Procedure

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in

damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance.

You shall remain on the rolls in a non-pay status until completion of the investigation is overturned on appeal, back pay may be allowed, unless otherwise specified in the appropriate award or decision, ONLY IF YOU HAVE MADE REASONABLE EFFORTS TO OBTAIN OTHER EMPLOYMENT DURING THE RELEVANT NON-WORK PERIOD. The extent of documentation necessary to support your back pay claim is explained in the ELM, Section 436.

You have a right to file a grievance under the Grievance Arbitration procedures set forth in Article 15 of the National Agreement within fourteen (14) days of your receipt of the notice." (emphasis in original)

The above document was signed by a Station Manager and concurrence by the Postmaster.

A Notice of Removal was then issued to the Grievant on or about 4 June 2018. That document reads as follows:

"You are hereby notified that you will be removed from the Postal Service no sooner than 30 days from your receipt of this letter. The reasons for this action are:

Charge 1: Improper Conduct

Specifically on May 1, 2018, you were taken for a random drug test, as agreed to in a Pre-Arbitration Agreement for grievance #17626293. After this drug test, you returned to the office and carried your route the remainder of the day. On May 17, 2018 the

results of the drug test were obtained. The results reflected "positive" for multiple substances, including Amphetamines, Methamphetamines, Opiates and Morphine. You provided no valid prescription for any of these drugs. The terms of the Pre-Arbitration Agreement included:

"2) Management will be allowed to require random drug testing of the grievant, which he must pass, for a period of 2 years from the date of this agreement."

You have failed to comply with the terms of the Pre-Arbitration Agreement signed on February 27, 2018. You tested positive for multiple narcotics, resulting in a "test failure." You also delivered mail for the remainder of this day after testing positive on the drug test. Postal Employees are expected to report for duty ready, willing and able to perform their duties. This is especially critical for letter carriers who are expected to drive on public streets in the course of their duties. While there are two charges in this action management is of the opinion that Charge 1 in and of itself fully supports the Notice of Removal.

Charge 2: AWOL

Specifically from May 14, 2018 through May 19, 2018 you were AWOL from duty. When questioned regarding the AWOL you admitted you were incarcerated during that time period. Your responses further failed to justify your actions.

On May 23, 2018 you were given an investigative interview, regarding the above. Your responses failed to justify your actions. Your actions constitute serious misconduct that will not be tolerated. You were previously placed on notice, and the Pre-Arbitration Agreement is clear that you must pass your drug tests. You failed toe random drug test submitted on May 1, 2018, therefore you are charges as stated above.

Your actions, as described above, are in violation of the following sections of the Employee & Labor Relations Manual (ELM);

665.13 Discharge of Duties

Employees are expected to discharge their assigned duties conscientiously and effectively.

665.16 Behavior and Personal Habits

Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of good character and reputation. The Federal Standards of Ethical Conduct referenced in 662.1 also contain regulations governing the off-duty behavior of postal employees. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct prejudicial to the Postal Service. Conviction for a violation of any criminal statute may be grounds for disciplinary action against an employee, including removal of the employee, in addition to any other penalty imposed pursuant to statute.

665.25 Illegal Drug Sale, Use, or Possession

The Postal Service will not tolerate the sale, possession, or use of illegal drugs, or the abuse of legal drugs while on duty or on postal premises. Employees found to be engaged in these activities are subject to discipline, including removal and/or criminal prosecution where appropriate.

665.42 Absence Without Permission

Employees who fail to report for duty on scheduled days, including Saturdays, Sundays, and holidays, are considered absent without leave except in cases where actual emergencies prevent them from obtaining permission in advance. In emergencies, the supervisor or proper official must be notified of the inability to report as soon as possible. Satisfactory evidence of the emergency must be furnished later. An employee who is absent without permission or who fails to provide satisfactory evidence that an actual emergency existed will be placed in a nonpay status for the period of such absence. The absence may be the basis for disciplinary action. However, once the employee provides management with notice of the need for leave in accordance with Family Medical Leave Act (FMLA)-required time

frames, and the absence is determined to be FMLA protected, the employer must change the AWOL to approved FMLA-LWOP, and delete the AWOL status from the record.

14 Day Suspension-Improper Conduct Dated August 29, 2017

You have the right to file a grievance under the Grievance/Arbitration procedure set forth in Article 15 of the National Agreement within fourteen (14) days of your receipt of this notice.

If this action is reversed or modified on appeal, back pay may be allowed unless the appropriate award or decision specifies otherwise, only if you made reasonable efforts to obtain alternate employment during the potential back pay period. The documentation which you must maintain and present to support a back pay claim is described in Part 436 of the Employee and Labor Relations Manual.

The Notice of Removal was signed by a Manager, Customer Service.

The above documents resulted in the filing of two grievances, one protesting the Emergency Placement and the second raising opposition to the Notice of Removal.

The Parties were unable to resolve either of the disputes mentioned above. Both issues were combined for the purpose of arbitration.

It was found both matters were properly processed through the prior steps of the Parties Grievance-Arbitration Procedure of Article 15, without resolve. The Step B Team reached an

impasse on each of the respective issues, the Emergency Placement on 13 July 2018 and the Notice of Removal on 24 July 2018. Therefore, both matters are 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 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.
2. Emergency Placement Package (C16N-4C-D 18299895)
3. Notice of Removal Package (C16N-4C-D 18320089)

COMPANY'S POSITION:

The Agency asserts that just cause exists for both the Emergency Placement and the Notice of Removal.

Management believes the history of the Grievant is extensive with multiple arrests and a live fourteen (14) day suspension as a result of a Pre-Arbitration Award.

The Agency indicates the Grievant has been afforded the opportunity to correct his behavior but has failed to do so.

The Service cites some five (5) previous arrests of the Grievant, most of which are drug related.

According to the Employer, the Emergency Placement was valid and just. It is Management's argument that upon receipt of the drug screen results, the Emergency Placement was in accordance with the applicable contract provisions.

The Employer predicts the Union is going to argue that the Emergency Placement was too late and not immediate. The Service forecasts the Union will try and paint a picture that the Grievant did not fail the drug screen and management acted untimely. The Employer insists all the claims made by the Union are false.

The Agency believes the Union will argue the delay in the results of the drug screen impeded the Grievant's right to mount a credible defense. In Management's opinion, the Union included pages and pages of undocumented, unsubstantiated internet garble that they believe shows knowledge of drug test, results and "false positives." Management projects the Union will try and use Google and WebMD as proof that the test results should have been returned within a few days and the test results are not true.

Management defends their action in this case and insists that expert testimony will show that the test results were delayed due to the positive results and in depth confirmation testing and a review that occurred after by the Medical Review Officer.

The Employer asserts the evidence will show that the test results in the file are not false positives but actual positive results. According to Management, the type of test performed was achieved by using a sophisticated testing technology known as GCMS (Gas Chromatography-Mass Spectrometry). The Service insists the Union's false positive argument is invalid.

As indicated by the Employer, they relied upon the medical knowledge of the Medical Review Officer who signed the test report that determined the results. The Employer claims the Grievant at no point in his Investigative Interview offered any answer to Management as to what medications he was on that would cause the positive result.

The Service notes the Grievant only offered a vague response that he was on medication that would cause a false positive yet never told Management what medication he was on.

It is the opinion of the Agency that the Grievant had every opportunity to answer for his actions when he was asked specifically and individually about the drugs he tested positive for and he failed to give management an answer that would explain the positive results. And according to the Employer, it wasn't until the Formal A meeting that the Union provided a list of medications to Management.

The Agency requests these grievances be denied in their entirety.

UNION'S POSITION:

It is the contention of the Union the Employer does not have just cause to support their actions in this matter.

According to the Union, Management failed to conduct a thorough investigation. The Union claims the Service did not have all the facts prior to implementing their actions in this case.

The Union argues the Grievant attempted to tell management that the test results had to be a false positive due to a prescribed medication. The Union contends the Employer failed to follow up on the Grievant's claim.

In their opinion, the Union suggests they did more of an investigation to prove the Grievant's innocence than management did to prove guilt.

The Union insists the investigation conducted by the Service was lazy at best. The Union asserts the overwhelming evidence will show that management not only failed to show just cause for this removal action, but they failed to show any cause.

The Union believes that if management would have taken a few extra minutes to investigate at all, they would have come to a much different conclusion in this matter.

The Union asks the grievance be sustained in its entirety and the Grievant be made whole in all respects.

THE ISSUES:

1. Did Management violate Article 16 and Section 115 of the M-39 Handbook via Article 19 of the National Agreement when they placed Letter Carrier Phillip Meadows on Emergency Placement in Off-Duty Status on May 23, 2018 for alleged "failed" random drug screen taken on May 1, 2018, and if so, what should the remedy be? (Case Number C16N-4C-D 18299895)

2. Did Management violate Article 17 and 31 of the National Agreement by failing to provide all requested information, and if so, what should the remedy be?
(Case Number C16N-4C-D 18299895)

3. Did Management violate Article(s) 15, 16, and/or 19 via Section 115 of the M-39 Handbook, of the National Agreement when they issued Letter Carrier Philip Meadows a Notice of Removal dated June 4, 2018 for "Improper Conduct" and "AWOL", and if so, what should the remedy be? (C16N-4C-D 18320089)

4. Did Management violate Article 16.5 of the National Agreement by failing to give Carrier Meadows the thirty days advance written notice prior to serving a suspension of more than fourteen days or discharge, and if so, what should the remedy be? (C16N-4C-D 18320089)

PERTINENT CONTRACT PROVISIONS:

**ARTICLE 16
DISCIPLINE PROCEDURE**

SECTION 1. Principles

Section 5. Suspensions of More Than 14 Days or Discharge

SECTION 7. Emergency Procedure

DISCUSSION AND FINDINGS:

This case involves two separate issues, the first being an Emergency Placement, the second, a subsequent Notice of Removal. Both issues were merged into this single case. While the quantum of proof may differ between the two matters, many of the facts and circumstances surrounding both cases are similar.

These cases involve an issue of discipline, wherein the conclusions drawn, are contrasting between the Parties.

Regardless of circumstance or respective argument, the burden of proof falls on Management to establish reason 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. Initial allegations must be proven, clearly and convincingly, through the preponderance of the evidence.

And that same just cause provision outlined in Article 16.1, carries forward to Article 16.7, the Emergency Placement provision, albeit, less demanding.

Article 16.1 requires that all discipline meet a just cause standard. The criterion varies from case to case, but, in most

circumstances, just cause is met via the preponderance of evidence rule.

Conversely, Article 16.7 requires a less stringent gauge, something less than the preponderance of evidence. Nonetheless, the Employer is required to show their Emergency Placement decision, made on the facts of the case available at the time of their decision, was reasonable.

And with that in mind, each Emergency Placement rests on its own set of facts and circumstances. Since this case does involve discipline, the Employer retains the burden to show just cause for the Emergency Placement. However, given the language of Article 16.7, the requirements in meeting that burden of proof are somewhat lessened.

Nonetheless, that Article 16.7 language allows the Employer to immediately place an Employee in a non-pay, off-duty status, when allegations meet certain criteria. And that standard must show the conclusions reached by Management, at that time, with the information available, was with reason and not arbitrary or capricious.

However, 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. Furthermore, the purpose and intent of the Section 7 Emergency Procedure allows the Employer to make an immediate, but reasonable response, based on the evidence available to them, at that given "snapshot" of time.

First, Management must show that allegations were real based on an analysis of the information available at that very specific moment in time. There have been cases wherein Employees were absolved of all charges, but the Emergency Placement stood. It's just a matter of whether or not the evidence, available at the time of issuance, shows the Emergency Placement was reasonable and justified, based on the circumstances appearing at that given time.

At the onset of this case, several matters of procedure were raised. And since the Emergency Placement and Notice of Removal are based on the same set of facts and circumstances, both will be discussed concurrently.

Initially, regarding the Emergency Placement, a second issue statement indicates the Union contended that Management failed to provide certain requested information. The Union also suggested the Emergency Placement was not immediate, instead untimely, in that, the drug test was conducted on 1 May 2018 and

the Emergency Placement did not occur until some three weeks later. I disagree with both assertions.

The results of the test were received by Management on Thursday, 17 May 2018. However, Wednesday, 23 May 2018 was the first day of the Grievant's return to work. And the Emergency Placement occurred on that Wednesday. In my view, it was only logical for the Employer to withhold any action until the results were obtained. And the Union was unable to show that management could have forced an earlier access to those results. In that regard, there is no doubt the Emergency Placement was issued at the earliest practical time.

Secondly, the Union contends that certain requested information, regarding the Emergency Placement was not provided. And that may be so. However, the entire premise of that Emergency Placement was based solely on the result of the "Specimen Result Certificate" which the Agency received on 17 May 2018. And as I have stated many times in the past, Management, in an Emergency Placement, is only required to show their decision was based on the evidence available at that specific "snapshot" in time.

And in this case, the Employer's decision was based on the results of that Specimen Result Certificate. And in my

considered opinion, those results certainly certified their reasoning to evoke the Emergency Placement. It was only reasonable to conclude that a positive result satisfied one of those allegations mentioned in Article 16.7. In my considered opinion Management had reasonable proof to conclude the Grievant met one of the conditions set forth in Article 16.7 to satisfy the necessary criteria to evoke an Emergency Placement. And with that reasoning, the Emergency Placement grievance (C16N-4C-D 18299895) is hereby denied.

The evidence presented in the Notice of Removal (C16N-4C-D 18320089) becomes a little more in-depth. Not only does that record involve the same "Specimen Result Certificate" mentioned earlier, but also arrests, incarceration as well as AWOL. And all of that is related, in some form or another to the Grievant's drug addiction.

The Union argues the validity of that "Specimen Result Certificate" as well as the lack of an investigation on the part of the Employer. But giving the Union the benefit of the doubt, the fact remains the Grievant was removed due to the consequences of the adverse relationship between his drug addiction and his employment. And regardless of any argument the Union makes, the fact of the matter is the Grievant must be held accountable for his own actions.

The Grievant's 27 February 2018 "Pre-Arbitration Settlement" in pertinent part reads as follows:

"As a result of pre-arbitration discussion, we (NALC/USPS) have mutually agreed to full and final settlement/remedy of the above referenced cases as follows:

- 1) The Removal Notice issued to the grievant is reduced to a 14-day suspension.
- 2) Management will be allowed to require random drug testing of the grievant, which he must pass, for a period of 2 years from the date of this agreement.
- 3) The grievant will be required to contact the Employee Assistance Program (EAP) and he will participate and complete any or all structured rehabilitation programs and/or any other programs or meetings as determined necessary by his assigned EAP Counselor.
- 4) The Grievant will receive a one-time lump sum payment in the amount of \$1200 minus standard deductions.

This settlement is reached on a non-precedent and non-citable basis and does not alter the position of either party in future similar grievances except for enforcement of this settlement.

The Grievant should have been well aware of its contents. Contrary to the last sentence, a portion of the above document was referenced in the Notice of Removal document.

Furthermore, the Union's case concerning due process was not validated. I was not convinced the ability of either the Union or the Grievant to present a formidable defense was

limited or hampered in any way. The Union was quite concerned about false positives caused by prescription medications.

Management's witness discussed false positives from screening tests and the extensive testing done with expensive complex testing equipment. He also testified about confirmation testing when there is a positive result. I was convinced the drug test was valid.

The Union argued that M-00984 effectively prohibits "**across the board drug testing.**" I agree with the Union, in their interpretation of that document. However, the language is not relevant because it does not speak to random testing that is absolutely necessary in this type of case. In fact, the origin of this entire case was based on the agreement made by the Parties in the Pre-Arbitration Settlement to random drug testing.

Equally significant was the fact that same Pre-Arbitration Settlement failed to suggest removal action as a result of the required random drug test. It was the Employer that based their entire removal action on the result of that random drug test. In their opening statement, in referencing the Pre Arbitration Settlement, the Employer Advocate stated that "**the Grievant MUST pass his drug tests.**" And given the emphasis of that statement, the same document fails to make mention of any removal action.

While one may argue removal was certainly an unwritten understanding, the document remained silent regarding failure to pass drug tests.

The Grievant is a long term postal Employee with addiction issues. With that being said, mitigation of this removal action benefits both Parties. The Grievant receives a final opportunity to salvage his career albeit, under very stringent guidelines. And on the other hand, if the Grievant is successful, the Postal Service retains an experienced employee and avoids the necessity of training a new hire.

The just cause standard of this Wage Agreement is not simply a black and white issue. The matter of proving guilt is only the first aspect. The second phase is a showing that the discipline rendered was appropriate given the circumstances of any particular case. And in this matter, I am of the considered opinion the Employer failed to consider other contractual requirements.

As I've stated many times, there are certain deeds that certainly deserve removal action, even on the first occurrence. Acts such as theft or involving physical violence provide only a few examples. And based on the language of the Parties Agreement, I am of the considered opinion that not every case

involving drug and/or alcohol abuse necessarily fit into that same category.

At first blush, the acts of the Grievant appear heinous and reprehensible in this particular work environment. And Management's reaction was immediate removal. However, in my view, the chief negotiators would have considered this particular case just a little differently.

The very first sentence in that Article 16 language defines the basic principle of discipline to be corrective in nature. And, as a more detailed reinforcement of that language is the entire content of Article 35. Specifically, those same chief negotiators included this very specific language stating that:

"The Employer and the Union express strong support for programs of self-help. The Employer shall provide and maintain a program which shall encompass the education, identification, referral, guidance and follow-up of those employees afflicted by the disease of alcoholism and/or drug abuse. When an employee is referred to the EAP by the Employer, the EAP staff will have a reasonable period of time to evaluate the employee's progress in the program. This program of labor management cooperation shall support the continuation of the EAP for alcohol, drug abuse, and other family and/or personal problems at the current level.

An employee's voluntary participation in the EAP for assistance with alcohol and/or drug abuse will be considered favorably in disciplinary action proceedings."

The above language is paramount and controlling in my decision in this matter. Management in this case considered the actions of the Grievant atrocious and comparable to either theft or violence. And the action of removal was immediately applied.

However, the unambiguous language of Article 35 clearly defines, in no uncertain terms, drug abuse as being a disease rather than a crime. And that certainly changes the whole perspective in this matter. Specifically to this case, Article 35 directs that **"a reasonable period of time to evaluate the employee's progress in the program"** be provided.

The 27 February 2018 Pre-Arbitration Settlement requires the Grievant to "contact the Employee Assistance Program." To me, that indicates to me that prior to the date of that Settlement Agreement, the Grievant had no contact with the EAP. And with that being said, I was not convinced that "a reasonable period of time" to evaluate the Grievant's progress was provided. In my view, the Employer simply ignored the language of Article 35.

This Agreement is not prioritized. Article 16 and 35 are of equal weight. And in this case, I was not convinced the proven guilt and its subsequent penalty meted out by the Agency outweigh the unequivocal language of Article 35.

Based on the convincing evidence introduced in this case, I am of the considered opinion that while positive test results were seemingly egregious, his exemplary long term service is deserving of a final opportunity and last chance to salvage his Postal career.

My Findings certainly do not overlook that positive drug test. However, the Article 35 language, as applied to all the facts of this case, is certainly applicable to the Grievant.

Management shall work with the EAP Staff to ensure the Grievant is in full compliance with all the mandates of that particular Program. Lack of participation or failure to successfully complete any phase of that process by the Grievant will be just cause for removal without any further mitigation.

It is my order, the removal action will be reduced to a fourteen (14) day suspension, however, the Grievant will not be made whole in any respect. The grievant will be returned to work but there will be no back pay.

The Grievant will continue to be subjected to random drug testing for an additional year as well as complete a successful Employee Assistance Program. Should the Grievant fail another

drug test or if the Grievant fails to participate in the EAP program or if Management receives a negative report from the EAP, the removal action will be reinstated. In the meantime, I will retain jurisdiction over this matter.

AWARD

The Emergency Placement grievance is denied. The Notice of Removal grievance is settled in accord with the above. It is my order, the removal action will be reduced to a fourteen (14) day suspension and the Grievant returned to work but there will be no back pay.

The Grievant will continue to be subjected to random drug testing for an additional year as well as complete a successful Employee Assistance Program. Should the Grievant fail another drug test or if the Grievant fails to participate in the EAP program or if Management receives a negative report from the EAP, the removal action will be reinstated. In the meantime, I will retain jurisdiction over this matter.

Dated: September 26, 2018
Fayette County PA