

C# 00908

UNITED STATES POSTAL SERVICE

AND

NATIONAL RURAL LETTER CARRIERS'
ASSOCIATION

RE: Case Nos. S4R-3Q-D 20845 and 21666
Suspension and Discharge of
Bernadine Benoit
Place of Hearing - Jennings, La.
Date of Hearing - July 29, 1986

APPEARANCES

FOR THE POSTAL SERVICE

Kathleen McCoy, Acting Supervisor
of Employment and Services

FOR THE UNION

William B. Peer, Attorney

ARBITRATOR

John F. Caraway, selected by mutual
agreement of the parties

On November 21, 1985 the Postal Service advised Ms. Benoit that she was suspended without pay indefinitely effective November 22, 1985. This action was the result of an interview by Ms. Benoit with the Postal Inspection Service. Subsequently under date of December 17, 1985 she was issued a Notice of Proposed Removal which stated as follows:

"You are hereby notified that you will be removed from the Postal Service 24 hours after your receipt of this notice. There is reasonable cause to believe that you are guilty of a crime for which a sentence of imprisonment could be imposed. The reason for this action is:

You are charged with mail theft, fabrication of fictitious addressees in order to receive rebates and using your employment for personal gain. Specifically, on November 20, 1985, at approximately 3:05 p.m., you were interviewed by Postal Inspectors J. J. Puchala, M. A. Mackert and S. T. Wilson. In this interview, you admitted, orally, that you had fabricated

names and addresses in order to receive rebates. An ongoing investigation was conducted by the Postal Inspection Service between November 1 and 20, 1985. The results of that investigation revealed:

1. On October 17, 1985, you deposited 13 rebate checks into your personal checking account. The checks totaled \$39.75.

2. On October 22, 1985, you deposited 5 rebate checks into your personal checking account. The checks totaled \$11.78.

3. On October 24, 1985, you deposited 12 rebate checks into your personal checking account which totaled \$22.79.

4. On November 1, 1985, you deposited 8 rebate checks into your personal checking account, totaling \$14.80.

You have violated the Code of Ethical Conduct contained in the ELM which reads:

"666.3f. Affecting adversely the confidence of the public in the integrity of the Postal Service.

668.27. Obstructing the Mail. The United States Code, Title 18, Section 1701, provides penalties for persons who knowingly and willfully obstruct or retard the mail. The statute does not afford employees immunity from arrest for violations of the law...

661.414. No employee, whether acting for personal benefit or not, will use, or appear to use either official position or information obtained as a result of employment to further any private interest, for self or any other person."

A grievance was filed protesting both the emergency suspension as well as the removal of the grievant.

CONTRACT PROVISIONS INVOLVED

ARTICLE 16

DISCIPLINE PROCEDURE

"Section 6. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or the designee.

In associate post offices of twenty (2) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken."

ISSUES

- I. Did the Postal Service commit a procedural error which is fatal to its action of removal of the grievant?
- II. If there is no procedural error, did the Postal Service have just cause to remove Ms. Benoit from its employment? If not, what is the appropriate remedy?

ARGUMENT

I. Procedural error

The Union contends that the Service committed a procedural error in violation of Article 16, Section 6. It points to the discrepancy between the testimony of Postmaster Latiolais and the immediate supervisor Ms. Hayes as to who made the decision to discharge the grievant. Mr. Latiolais testified that

he received the memorandum of the Postal Inspectors [Post Office Exhibit No. 1] and reviewed that with Ms. Hayes. They reached the decision that a crime had been committed. He then called Mr. Temple, Director of Employee and Labor Relations, to whom he reported for such advice and related the nature of the incident. Mr. Temple drafted the letter of December 17, 1985 which Ms. Hayes, as the grievant's immediate supervisor, signed.

The Union points to the conflict between the testimony of Postmaster Latiolas and Supervisor Hayes. The Postmaster stated that the normal compliment of employees exceeded twenty (20) employees, which would make the first paragraph of Article 16, Section 6 applicable. Postmaster Latiolais denied, however, that he was the deciding official on the removal.

The Union contends that the testimony of Supervisor Hayes conflicted with that of the Postmaster. She said that on an average day, the compliment at the Postal facility was under twenty (20) employees. She further stated that Mr. Latiolais made the decision to remove Ms. Benoit and Ms. Hayes agreed to that decision. Ms. Hayes did not initiate the removal nor did she talk to Employee and Labor Relations.

The Union contends that the Postal Service committed a procedural error by violating Article 16, Section 6 in that it did not obtain the required review and concurrence whether paragraph 1 or paragraph 2 of Section 6 applied.

The Postal Service maintains that Article 16, Section 6, first paragraph applies to this dispute. The Postmaster testified

that the office consists of more than twenty (20) employees. Hence, it was required that the immediate supervisor make the proposed removal decision. Ms. Hayes made that decision as is testified by the letter of December 17, 1985. Further, as the Installation Head, Postmaster Latiolais concurred in that decision. This complied with the requirements of Section 6. Insofar as the drafting of the Letter of Proposed Removal is concerned this is normal procedure for this drafting to be done by Employee and Labor Relations rather than the Jennings Postal facility because that facility simply does not have the clerical help to perform this task.

II. Merits

The Postal Service shows that there were over thirty (30) deposits made to the grievant's account with the American Bank. The Postal Service contends that the grievant deposited these checks to this account in the American Bank. She fabricated names and addresses in order to receive rebate checks. The addresses were routed to her for delivery on her assigned route which was Rural Route 1. Since the addressees were fictitious she simply retained those checks and deposited them to her personal bank account. This was in clear violation of Section 661.414 of the Employee and Labor Relations Manual which prohibits any employee acting in a manner to gain personal benefit from his or her employment relationship.

The Union argues that Ms. Benoit could have obtained these

rebate checks as disposed of waste. While undelivered mail would go into the throwback case they would ultimately be disposed of in the dumpster at the Postal facility, it would still be an offense for Ms. Benoit or anyone associated with her to remove the mail from the dumpster while on Postal property. The Postal Service maintains that such a procedure was highly unlikely because of the fact that Ms. Benoit had the addresses of these fictitious individuals on her Rural Route No. 1.

The Union maintains that report of the Postal Inspectors [Postal Service Exhibit No. 1] is only admitted into evidence by the Arbitrator on the minimal basis as a "business record" as an exception to the hearsay rules. The Postal Inspector who drafted that report, Mr. Wilson, did not testify at the arbitration hearing. The Postal Service relied upon the testimony of Postal Inspector Puchala. But Mr. Puchala admitted that he was only present in the investigation as an observer. Mr. Puchala testified that most of the investigation work was performed by Postal Inspector Wilson. He had not cross-checked the names against the actual route as listed on the Postal Investigative Memorandum. He further stated that pieces of bait mail were circulated on Ms. Benoit's on November 25, 1985. She handled these properly.

With regard to the checks, the Union points out that Mr. Puchala did not see the original checks nor did he know if Ms. Benoit had endorsed them for deposit. He could not negate that the checks had been deposited by some other person.

The Union argues that the Postal Service failed to prove how the refund checks got into Ms. Benoit's joint checking account. This account was a joint account which she and a Dusty Doucet maintained. The deposits could have been made legally insofar as the Postal Service is concerned. It did not offer evidence otherwise. The case of the Postal Service was based on assumption and nothing but assumption.

If the Postal Service alleges that it was Ms. Benoit who originated the fictitious names and addresses, its evidence failed to prove this vital element of the case. Further, the Postal Service did not rule out the fact that a substitute also worked on this particular route. Also, the Postal Service did not rule out the possibility that Dusty Doucet, the co-owner of the joint account, could have made the deposits.

Essentially, the Union's position is that the Postal Service failed to establish by the evidence that Ms. Benoit was guilty of the charge of mail theft, fabrication of fictitious addresses and using her Postal Service employment for personal gain. As a result, she should be reinstated to full employment and made whole for all lost wages. Further, the Postal Service should be assessed with all costs of this arbitration.

DECISION

The Union contends that the merits in this case should never be considered because of serious procedural deficiencies in the Post Office case. These deficiencies arise from a failure to

comply with the requirements of Article 16, Section 6.

Article 16, Section 6 provides the employee with "due process". It requires the immediate supervisor or in an installation of less than twenty (20) employees the Postmaster, make a recommendation as to the discipline action to be taken. Once this recommendation is made then it must be reviewed and concurred in by the installation head or his designee. The procedure thus, is a two-tier procedure. The first step is the initial decision by the immediate supervisor or Postmaster and the review and concurrence by higher authority. This assures the employee an objective and fair review of the case before the action of suspension or discharge is taken.

These principles have been recognized by a number of Arbitrators. In a decision by Arbitrator Zumas, [Case No. ElR-2F-D8832, decided February 10, 1984] a Rural Letter Carrier was removed. The local Postmaster, not knowing how to proceed, contacted the MSC. This office took over and made the decision to terminate the employee. Finding that the Post Office's action violated the National Agreement, Arbitrator Zumas stated:

"Implicit in the language of Article 16(6) is the requirement that a supervisor (or a postmaster in a small installation) make a recommendation or decision as to the imposition of discipline before referring the matter for concurrence to higher authority. All such decisions, of course, are subject to review either within or outside the installation depending on the size of the facility. It follows that the decision to impose discipline or the nature of the discipline may not be

initiated, as in this particular case, outside the installation by higher authority. As outlined above, Eberly made no recommendation and no decision with respect to disciplining Grievant; he merely concurred in the termination decision after it came down from the Lancaster MSC. Failure to carry out his responsibility under the National Agreement rendered Eberly's issuance of the Notice of Removal a nullity."

To the same effect see the decision of Arbitrator Dworkin in Case Nos. ClR-4A-D 31648 and 31707 decided on January 12, 1985.

In a case in which the facts are analogous to the instant case, Arbitrator Howard reversed a discharge, Case No. E4R-2F-D 2136, decided November 14, 1985. In this case the Arbitrator found the Postmaster made the decision to remove the employee and also concurred in his own decision. Explaining his reasoning, the Arbitrator stated at page 7 of his decision:

"Secondly, the provisions of Article 16, Section 6 of the Agreement were clearly violated in the manner in which the discipline was assessed. The Notice of Removal was signed by Manager of Customer Services Donald C. Norman and concurred in by Postmaster George A. Fahey. (Joint Exhibit 3, Service Exhibit 7). Yet, the testimony of Postmaster Fahey makes clear that Manager Norman had nothing to do with the decision at all, and, in effect, Postmaster Fahey either concurred in his own decision or one from higher authority, rather than one from lower authority, as the provisions of Article 16, Section of the Agreement require. In either case, the grievant failed to receive an independent review of his removal as the language of Article 16, Section 6 requires. A subordinate manager as contrasted to a superior manager cannot be expected to accord the independence of review that the Agreement requires,

and obviously the review of one's own decision is no review at all. On these narrow grounds, the discharge of the grievant must be overturned."

Turning to the facts of this dispute, there was some conflict as to whether the first paragraph or the second paragraph of Section 6 applied. The second paragraph requires that the decision to recommend the suspension or discharge be made by the Postmaster at facilities where there are less than twenty (20) employees. The Postmaster stated that the facility had over twenty (20) employees but there were only nineteen (19) employees working on the date of the arbitration hearing. Ms. Hayes testified that the facility had twenty-six (26) to twenty-seven (27) employees being regulars, part-time flexibles and substitute employees. She further said that on an average day there would be under twenty (20) employees. Applying Section 6, the interpretation must be based upon the complement of the facility and not based on the average daily work force. Reasonable interpretation requires that it be based upon the number of employees assigned as the complement to a particular postal facility. Since the Jennings, Louisiana postal facility has regularly assigned over twenty (20) employees, the first paragraph of Section 6 applies.

This provision requires that the immediate supervisor recommend the disciplinary action to be taken. It then must be reviewed and concurred in by the installation head. In this case, Ms. Hayes was the immediate supervisor while Postmaster Latiolais

was the concurring official. The testimony of Ms. Hayes was that she did not initiate the removal. That decision was made by Mr. Latiolais. Ms. Hayes agreed to the decision. This is the reverse of what the first paragraph of Section 6 requires. The immediate supervisor must initiate the disciplinary action and the Postmaster must review and concur. Therefore, there was no independent review by higher authority as required by Article 16, Section 6. The Postmaster assumed the decision-making role thereby eliminating the immediate supervisor from her responsibility of recommending initially the disciplinary action. This was in violation of Article 16, Section 6.

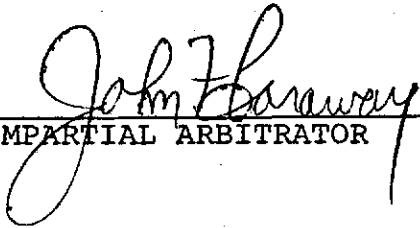
Based upon arbitral precedent as discussed herein and the strong language of Article 16, Section 6, the Arbitrator finds that the grievant was not given "due process". The necessity of strictly following this procedure is demonstrated by the use of the phrase in Article 16, Section 6, "In no case". There were no exceptions intended to be made in following the initiating and concurrence process.

The Arbitrator, therefore, must sustain the grievance on procedural grounds. He is, therefore, precluded from considering the case on its merits.

AWARD

The Union grievance is sustained. The Postal Service shall immediately reinstate Ms. Benoit to full employment, restore all lost seniority and make her whole for all lost

wages. The Postal Service shall deduct any earnings received by Ms. Benoit from other employment. Pursuant to Article 15, Section 5A of the National Agreement, the Arbitrator's fees and expenses are assessed against the Postal Service.


IMPARTIAL ARBITRATOR

New Orleans, Louisiana

September 8, 1986