

REGULAR ARBITRATION

In the Matter of Arbitration)	Grievant: D. Deshazier
)	
Between)	Post Office: Los Angeles
)	
The United States Postal Service)	Case No.: F11N-4E-D 15381537
)	
And)	DRT No.: 01-356967
)	
The National Association of Letter Carriers, AFL-CIO)	Union No.: UA102315C
)	

BEFORE: Arbitrator Nancy Hutt.

APPEARANCES:

For the U.S. Postal Service: Regina D. Cooks
Labor Relations Specialist

For the Union: James D. Henry
Regional Administrative Assistant

Place of Hearing: Los Angeles, CA

Date of Hearing: July 12, 2016

AWARD:

Date of Award: October 18, 2016

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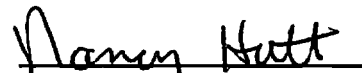
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PANEL: Pacific

Award Summary

The grievance is sustained. The Postal Service violated Article 16.7 as it had no just cause to continue Grievant on an emergency placement indefinitely. The Service is hereby ordered to reinstate the Grievant and make him whole for any wages and benefits he may have lost by virtue of the emergency suspension from September 16, 2015, until he is returned to duty. Jurisdiction is retained for 90 days to resolve any disputes that arise over the remedy.


Nancy Hutt, Arbitrator

INTRODUCTION

The arbitration arises pursuant to the Collective Bargaining Agreement between the United States Postal Service and the National Association of Letter Carriers under which Nancy Hutt was selected to serve as Arbitrator and under which her Award shall be final and binding upon the parties.

The hearing was held on July 12, 2016 in Los Angeles, California. Both parties were afforded a full opportunity to present evidence and argument and to examine and cross-examine witnesses. The arbitrator swore in all witnesses appearing for examination under oath. The record was held open for the parties to file post-hearing briefs. Following receipt of the briefs on or about August 5, 2016, the record was closed.

RELEVANT CONTRACT PROVISIONS

ARTICLE 16 – DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Section 5. Suspension of More than 14 Days or Discharge

In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days.

Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure. A preference eligible who chooses to appeal a suspension of more than fourteen (14) days or his discharge to the Merit Systems Protection Board (MSPB) rather than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement or through exhaustion of his MSPB appeal. When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee the full thirty (30) day advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

Section

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 US 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.

BACKGROUND

On July 17, 2015 Manager Customer Service Cloonan issued Grievant an "Emergency Placement in Off-Duty Status (without pay)" based on the results of an investigation/interview of Grievant by OIG agents. During the interview, Grievant

~~admitted to disposing deliverable mail and taking perfume samples. The Article 16.7 emergency placement notice set forth the following:~~

This letter is in confirmation of the verbal instruction you were given on July 16, 2015. In accordance with Article 16.7 of the National Agreement you were placed ~~in an off duty status (without pay). The reason for this action being taken is:~~

Evidence indicates that you mishandled mail entrusted to you. Specifically, during questioning you acknowledged to OIG Agents that you discarded several good-as-addressed Red Plum mailings rather than ~~delivering them. You also acknowledged taking several perfume/cologne samples from the mail rather than delivering them to customers. Additionally, you left several pieces of deliverable first class and standard mail locked in your postal vehicle overnight on July 15th and left without clocking out. This resulted in a delay of mail.~~

It is believed that retaining you on duty may result in loss of mail or funds...

As a result of Grievant's emergency suspension, the Union filed a grievance.

The Union's grievance was filed on July 21, 2015 alleging a violation of the just ~~cause provisions of Article 16, specifically Article 16.7, when Grievant was placed in an off duty / non-pay status. The Dispute Resolution Team impassed the case on August 31, 2015. Following the Step B decision, a pre-arbitration settlement was reached by the parties on September 15, 2015, which stated "The file establishes that management had cause to place the grievant out on emergency suspension on 7/16/15." Two months subsequent to the settlement, on November 10, 2015, the Union filed a grievance alleging management continued to maintain Grievant in an off-duty / non-pay status indefinitely~~

in violation of the National Agreement.

ISSUES

The parties submit different issues and agreed the Arbitrator would frame the appropriate issue:

Did management at Dockweiler Station violate the National Agreement when the Grievant was placed on 16.7 Placement Off-duty-non-pay status in excess of 30 days and continue to keep grievant out indefinitely, without any subsequent discipline being issued and/or notification? If so, what is the appropriate remedy?.

POSITIONS OF THE PARTIES

Union

The Union argues the Grievant was improperly kept off work in a non-pay status indefinitely in violation of Article 16 of the National Agreement. At the time of the instant hearing, Grievant still remained off work without an explanation and/or justification from management as to why. Additionally, Grievant received no discipline nor was he permitted to return to carrier work subsequent to his emergency placement on July 16, 2015, pursuant to 16.7. Rather, the Union contends that management treats the emergency placement as an Article 16.6 "indefinite suspension," which is a grievable issue. (Article 16.6.B.) Arbitrator Ames held, "It is well settled that Management cannot use Article 16.7 as a convenient substitute (which was done here) for the required discipline procedures of Article 16." (Case No. F06N-4F-D 08345084, C#27986).

The Postal Service abused Grievant's due process rights when he remained in an off-work, non-pay status in excess of 30 days. Furthermore, the Station Manager failed to

~~conduct an independent investigation, including an investigative interview of Grievant~~
until five (5) months following Grievant's placement on an emergency suspension. No
just cause existed, the Union argues, for Grievant to remain in a 16.7 status exceeding 30
days.

The Union requests the following remedy:

1. Sustain the grievance in its entirety and issue an appropriate remedy
2. Find the Service violated applicable Articles
3. Find the Service lacked cause to place the Grievant on Emergency Suspension in excess of 30
4. ~~Make the Grievant whole to include all lost wages and benefits, overtime,~~
retirement / TSP contributions, seniority rights, less 30 calendar days from
July 16, 2015 until he is returned to work or through the applicable
notification period should he ultimately receive a subsequent Notice of
Removal, (The Service to continue pay and benefits even if he is placed on
~~administrative leave if the Service does not return him to work until~~
disposition of any subsequent discipline consistent with the CBA)
5. Order a cease and desist to Los Angeles management of improperly
keeping employees on 16.7 in excess of 30 days without either returning
them to work promptly or promptly issuing them subsequent discipline
~~consistent with the CBA~~
6. Provide the Union with proof of compliance, copies of processed pay
adjustment forms and the pay/benefit adjustments be processed within 7
days of management's receipt of the award.
7. And/or any other appropriate remedy.

Postal Service

The Postal Service asserts the Union entered a pre-arbitration settlement wherein
the parties agreed management had just cause to place Grievant on an Article 16.7
emergency placement. As known by both parties, the settlement is binding. Management

~~met the "just cause" test as explained by National Arbitrator Mittenthal. With respect to an emergency placement, "just cause" takes on a different case in these circumstances, where there is an allegation of certain harmful misconduct...the level of proof required to justify this kind of 'immediate... action may be something less than would be required had ten or thirty days advance written notice of the suspension been given.'~~ (H4N-3U-C58637, August 3, 1990) Having agreed to just cause for the emergency placement, the Union's second attempt to reargue the just cause issue should be denied.

Station Manager Cloonan testified in order to formulate the questions for Grievant's investigative interview the OIG report was necessary. In the middle of November a copy of the report was received and subsequently the investigative interview was conducted on December 23, 2015. Manager Cloonan testified of his intent to issue Grievant a removal notice based on the facts. However, he further explained the communication with the OIG agents over Grievant's actions further delayed the issuance of the removal notice. Contrary to the Union's contention the 16.7 emergency placement should be construed as an indefinite suspension, there is no set time limit for remaining on an emergency suspension. Management points out the Union does not have the right to file a new grievance every 30 days that a carrier is off-duty. Article 16.7 only permits a separate grievance by the Union following the issuance of a suspension or termination to Grievant. The Union failed to establish a contractual right to file duplicate grievances on the same issue.

~~The Service argues since no violation of the National Agreement occurred,~~ Grievant should not be reinstated or receive any back pay due to a delay in his removal action. In the September 15, 2015 pre-arbitration settlement language, there is no mention

~~Grievant should receive monetary compensation. It is the position of the Service that~~
Grievant should not be awarded compensation “particularly prior to September 15, 2015
and up until the present.” The Postal Service requests the instant grievance be denied in
its entirety

OPINION

This Arbitrator has carefully reviewed all the evidence, pertinent testimony, and the parties post-hearing briefs, as well as the cited arbitration cases regarding the present dispute. The Postal Service violated Article 16 of the National Agreement when it ~~continued Grievant in non-pay, off-duty status for an unjustifiable and extensive amount~~ of time following his emergency placement.

As a threshold matter, the Union initially claimed in the first grievance that Management violated Articles 3, 5, 8, 15.3.a. and the just cause provisions of Article 16 when ~~Grievant was placed on an Article 16.7 on July 16, 2015 for mishandling the mail~~ entrusted to him. The Union also claimed that Management failed to provide information. In the Step B Decision issued by the Dispute Resolution Team on August 31, 2015, the case was impasse.

~~Subsequent to the issuance of the Step B Decision, management and the Union~~ reached a settlement of the first grievance on September 15, 2015. The terms of the settlement were, “The file establishes that management had cause to place the grievant out on emergency suspension on 7/16/15.” No additional language was included in the ~~agreement between the parties, other than the intro line in the settlement that states,~~ “The undersigned mutually agree to the following Pre-Arbitration Settlement of the above

captioned case." I find the settlement wholly resolved the Union's claims in the first grievance.¹ Under these circumstances, to hold otherwise, would undermine the negotiated grievance process and relationship between the parties.

Turning to the grievance before me, the Union claims that Management continues to keep Grievant on an emergency suspension indefinitely without the issuance of subsequent discipline.² When the grievance was filed on November 10, 2015, it was two (2) months following the settlement of the first grievance. By the time of the arbitration, Grievant was in an off-duty, non-pay status for eight (8) additional months. Manager Cloonan's rationale for the delay is found in his written response to the charges at Formal Step A, which follows:

Management based its decision to place the Grievant off duty back then on the verbal information received from the OIG agents. We did not use the information included in the OIG report, or the investigative interview (which was done today-12/23/15) to keep Grievant off duty. So it is not relevant. Management did have to wait to receive the OIG report, and then analyze it and draft the investigative interview questions, before proceeding with corrective action. The OIG report was received sometime in mid-November. The Grievant's original supervisor, Ana Hernandez, who was familiar with much of the information in the file, has transferred to another District. So the current supervisor for 90007 zone needed to get familiar with the issues involved in this case. That is why there was a delay.

¹ The parties mutually agreed that Management had just cause to issue Grievant the

³ At the hearing an attempt to elicit additional reasons from Manager Cloonan to support the delay was denied as new evidence as management never raised this argument prior to the hearing. However, the Postal Service's post-hearing brief contained additional explanations for the delay contrary to my ruling. The new contentions are given no consideration.

Management further contends that the Union's argument is misplaced in relation to 16.7. There is no right for the Union to file a new grievance every 30 days that an employee is off duty. That is not the intent of that provision...this grievance is just another bite at the apple by the Union and it is not grounded on a sufficient contractual basis.³

Manager Cloonan credibly testified that management intended, based on discussions with the OIG agents, to issue Grievant a notice of removal.

A few Pacific Regional arbitrators issued awards on emergency suspension delays under similar circumstances. Arbitrator Lumbley found a violation of Article 16 when the Service continued Grievant in a non-pay status for 58 days with "no justification for retaining" him.⁴ Arbitrator Monat issued an award finding a violation of Article 16.7 stating:

An Emergency Placement cannot be used as an indefinite suspension...Article 16.6.A provides that an indefinite suspension may only be used "in those cases where the Employer has reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed." A much higher standard of just cause must be established in such cases. In the instant case, there is no allegation...Using Article 16.7 as the basis for an indefinite suspension is improper under the terms of the National Agreement. One was not proposed, but Management's failure to act to dispose of the 16.7 case, the Emergency Placement has *de facto* become an indefinite suspension."
(F06N-4F-D 12211064, CY-1884-12D)

⁴ Case Numbers: F06N-4F-D 11137405, F06N-4F-D11148858, DRT 01-196080, 01-198138.

~~In yet another case, Arbitrator Monat ruled that the Postal Service cannot abuse the emergency placement of Article 16.7 by continuing an employee in a non-pay status indefinitely, which is analogous to a disciplinary indefinite suspension examined in Articles 16.5 and 16.6. of the National Agreement.~~

Arbitrator Armendariz, in a similar case, held the Postal Service did not violate Article 16.7 when grievant was placed on an emergency suspension, but did, in fact, violate the National Agreement when the employee was kept in a non-pay status for a lengthy and indefinite amount of time. Arbitrator Armendariz opined:

Here, if Grievant's actions rose to the level of misconduct, management had ample resources available for it to take corrective measures that would include disciplinary action, under the guided provisions of Article 16. They do not intend for management to use the emergency placement procedures of Article 16.7 as a means for taking "punitive suspension" actions. This punitive suspension would not survive under 16.1. thus, that was the effect of the emergency placement disputed in this case. The Service apparently views the sentence in Article 16.7, "The employee shall remain on the rolls (non-pay status) until disposition of the case has been had," as giving Management the "absolute authority" to suspend an employee indefinitely without any regard to any of the other provisions in Article 16 which are equally applicable and controlling. Such an approach is inconsistent with both the intent and spirit of the parties when they bargained for the language contained in Article 16, which are equally applicable and controlling.

Finding a violation of Article 16.7, Arbitrator Armendariz ordered the Postal Service to make Grievant whole for any wages and benefits he may have lost as a result of the ~~indefinite suspension (conclusion of the investigation) up to the date he is returned to~~ duty.

Turning to the instant case, Manager Cloonan's testimony concerning the Service's reasons for the excessive and unreasonable delay in issuing a termination letter does not alleviate Management from complying with the mandates of Article 16.7. Grievant was continued in a non-pay status in excess of 30 days without Management issuing discipline or returning him to work. The language in Article 16.7 includes the phrase: "The employee shall remain on the rolls (non-pay status) until disposition of the case has been had." At the time of the arbitration hearing, Grievant was still in a non-pay status for the foreseeable future as there was no disposition of the case. Contrary to the Service's contention that that the Union has no right to file a duplicate Article 16.7 grievance regarding the same issue, I point out the germane issue of just cause for the "immediate" emergency placement was resolved between the parties. The actual question before me raises the issue of whether the Service's indefinite delay in the issuance of discipline and/or notification to the Grievant is a violation of Article 16.7. There is no convincing evidence to conclude the parties negotiated the language "the disposition of the case has been had" with the intent management can place an employee on an emergency suspension for an unbounded amount of time. Clearly, Management does not have an unfettered option or freedom to continue Grievant on an open-ended emergency suspension as was done here.

To permit the Postal Service to take an unlimited amount of time to determine what action to take while keeping the Grievant on an emergency suspension would run contrary to the presumption that an Article 16.7 has an ascertainable end – an action that will bring the suspension to a close in a reasonable amount of time. Following the emergency placement and the completion of the pending Postal Service investigation of

the conduct that resulted in the suspension, Management failed to initiate an administrative action. Grievant remained on an emergency suspension for approximately ten months without communication or notification or discipline from Management. As known and accepted by the parties, Article 16 requires that discipline be corrective rather than punitive. To retain Grievant on an Article 16.7 for an unreasonable and excessive period of time resulted in a punitive action in violation of the National Agreement.

AWARD

The grievance is sustained. The Postal Service violated Article 16.7 as it had no just cause to continue Grievant on an emergency placement indefinitely. The Service is hereby ordered to reinstate the Grievant and make him whole for any wages and benefits he may have lost by virtue of the emergency suspension from September 16, 2015, until he is returned to duty. Jurisdiction is retained for 90 days to resolve any disputes that arise over the remedy.