C#06012

In the Matter of the Arbitration Between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS	S4N-3A-D 37169 Wanda Blair Dallas, Texas

Before: Dennis R. Nolan, Arbitrator, University of South Carolina School of Law, Columbia, SC 29208-0582.

Appearances:

For Management: John Vallie, Labor Relations Representative.

For the Union: Alex J. Alcorta, Local Business Agent.

RECEIVED
MAR 10 1987
JOE Z. ROMERO
NATIONAL BUSINESS AGENT
N. A. L. C.
DALLAS REGION # 10

OPINION

I. Statement of the Case.

Wanda Blair filed this grievance to challenge her removal for insubordination and failure to follow instructions. The arbitration hearing took place in Dallas on February 6, 1987, at which time both parties appeared and had full opportunity to testify, to examine and cross-examine witnesses, and to present all relevant evidence. The parties submitted post-hearing briefs (with supporting arbitration awards) on February 23, 1987.

II. Statement of the Facts.

Until her removal the Grievant was a letter carrier at Dallas' Airlawn Station. She had worked at the Postal Service for five years. For some time she had had difficulty working with her immediate supervisor, David Mitchell. The reasons for their conflict are not clear from the record but there is some evidence that Mitchell was inconsiderate and overbearing and other evidence that the Grievant was touchy and stubborn.

Whatever the reasons, their difficulties came to a head on June 13, 1986. In the course of a routine case check of all his routes Mitchell examined some of the Grievant's cased mail and asked her questions about it. Depending on which participant one believes the Grievant either yelled at him that he and his questions were stupid, ran toward him and snatched her mail out of his hand, or else told him in a normal voice that his questions were stupid and reached out to retrieve her mail. The most likely interpretation is that she spoke loudly enough to attract attention but did not yell, that the adjective "stupid" applied specifically to his questions (although she no doubt thought it could equally well apply to him personally), and that she grabbed the mail back without running. I base these conclusions on the relative credibility of the witnesses (of which more in a moment), the modest impact of the incident on other employees (no witness other than Mitchell heard yelling but one did look around her case to find out what was going on) and on the small distance between the Grievant and Mitchell.

Mitchell testified that he ordered her to the office rather than continue the discussion on the floor. The Grievant testified that she heard no such order. It is clear however, that Mitchell then had two other supervisors, James Williams and Israel Verver, order her to the office and that she refused to go without a witness. At the hearing the Union attempted to raise the defense that the Grievant was simply exercising her Weingarten right to be accompanied by a union representative during a disciplinary interview. I sustained Management's objection to that line of defense because Article 15.2 requires full disclosure of the parties' positions during the grievance procedure and the Union had never mentioned the Weingarten claim until the arbitration hearing. The Grievant further testified that she feared for her safety if she were in the office alone with Mitchell, but nothing in the record provides the slightest evidence that Mitchell might attack her. Only after Station Manager Gene Hickson warned her that continued refusal would result in her being sent home did she finally go to the office with Mitchell.

This incident is the primary basis for the charge of insubordination.

Once Hickson left the Grievant and Mitchell alone in the office Mitchell began to question her about certain Express Mail items signed out to her but allegedly not returned or accounted for. Proper accounting for Express Mail is a high priority item at the Airlawn Station. Mitchell testified that he had personally conducted three meetings for the carriers to explain procedures for handling the Postal Service's premium class of mail on April 29, May 7 and May 10, 1986 and introduced supporting notes supposedly made on the days of the meetings. On cross-examination he repeated his statement and flatly denied that he was on vacation on any of

those days, even going so far as to say he never took real vacations. The Union demanded to see his pay records and these showed that he was indeed on annual leave for the five days from May 5 through May 9. The Union does not deny that the other meetings took place and I conclude that the Grievant certainly knew how to handle Express Mail, but Mitchell's misstatements and his introduction of a patently inaccurate (if not contrived) document severely undercut his credibility. His later explanation of the contradiction, that someone else conducted the meeting on that date but that he conducted another on some unknown date, is hardly persuasive.

The Grievant signed for the three Express Mail items in question on May 28. When the carrier returns the receipts or the items, the clearing clerk makes a notation on Form 3867. None appears on the form after the Grievant's signature, so in due course a clerk mentioned it to 204-B Charles Calloway. Calloway asked the Grievant about these items on June 12. The removal letter reports her response as "That's your problem," a callous statement suggesting she did not care about the matter. The Management representative admitted at the beginning of the hearing that she did not use those words; Calloway testified instead that she asked "What are you trying to do to me?" and then charged that "they were out to get her," statements reflecting outraged innocence rather than guilt. He also testified that he could not remember what explanation she gave for the missing receipts. The Grievant testified that she did in fact turn the receipts in and blamed the failure to record them on the clerk.

When Mitchell began to question her about the receipts the next day, her fear of being set up was renewed. She told him she did not want to hear anything more about it and left the office, telling him to put her off the clock. This abrupt exit is also a part of the basis for the insubordination charge. The removal letter and Mitchell say that she left yelling and thus distracted other employees. She denies yelling or disrupting others, and the only other Management witness to the event to testify, Station Manager Hickson, said that he heard nothing when she left the office. I conclude that there was little or no harm done by her departure other than to Mitchell's pride.

Two aspects of the removal decision are important. The first concerns its origin. The removal letter purports to be from Mitchell with Hickson's concurrence. Hickson testified, though, that Labor Relations Representative Linda Womack "instigated" the removal and Hickson concurred because of the Grievant's past record.

The second aspect concerns that past record. The removal letter cites three negative elements of her past record: a letter of warning dated September 29, 1984, a seven day suspension dated

March 9, 1985 which was a later reduced to a letter of warning, and a seven day suspension dated March 28, 1986. The second letter of warning should have been removed from her file on March 14, 1986. Mitchell denies that he knew this, but Freddie Watson, the Steward at Step 1, said he told Mitchell that the past element was cited in error and Mitchell replied that he could do whatever he wanted to do. Given Mitchell's other misstatements, I accept Watson's version. The last suspension was in the grievance procedure at the time the removal letter was issued; ultimately the suspension was reduced in arbitration from seven to two days.

III. The Issue.

Did Management remove the Grievant for just cause? If not, what shall the remedy be?

IV. Relevant Contractual Provisions.

Article 15.2 Step 1(a): "Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days. . . ."

Article 15.2, Step 1(b): In any such discussion the supervisor shall have authority to settle the Grievance. . . ."

Article 16.1: "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 . . . insubordination, . . . failure to perform work as requested. . . .

Article 16.8: "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 designee. . . ."

V. Management's Position.

Management emphasizes the facts of the case, arguing that these amply document the charges. Her words to Mitchell, her refusal of direct orders by three supervisors to go to the office, and her abrupt and noisy departure from the office clearly amount to insubordination, and her failure to submit receipts for three Express Mail items constitutes failure to follow instructions.

VI. The Union's Position.

In contrast to Management, the Union emphasizes the procedural aspects of the case, in particular these matters:

A. Article 16.8 requires that discipline be imposed by the immediate supervisor but here a labor relations representative "instigated" the action and the Station Manager concurred. This in turn creates doubt as to whether Mitchell had authority to settle the case at Step 1, as Article 15.2 says he must.

B. Management relied on one past element that should not have been in the file and on another that was in the appeal process.

C. Since the only past element that could have been relied upon was a letter of warning, removal was not progressive and corrective discipline but rather punitive in violation of Article 16.1.

As to the merits of the insubordination charge, the Union argues that she did not yell, that she justifiably refused to go to the office without a witness, and that none of the three supervisors warned her of the consequences of refusing to go. As to the charge of failure to follow instructions, the Union's chief argument is that Management failed to show she did not return the receipts; it merely demonstrated that a clerk failed to record these receipts.

VII. Discussion.

Procedural objections to the validity of discipline must be resolved before turning to the merits of a discipline case. The most important procedural objections in this case concern the origin of the discipline and Management's reliance on certain inappropriate past elements.

Article 16.8 requires that a supervisor must discipline and that higher authority must concur. Article 15.2 requires that Management's Step 1 representative have authority to settle the grievance. The rule of Article 16.8 is a debatable one. Most of the private sector, for example, gets along quite well without it. Were this a case of first impression, and were that section to be read alone, I would be inclined to interpret that provision loosely as allowing discipline so long as the immediate supervisor participated in the decision. Article 16.8 cannot be read alone, however, and this is not a case of first impression. Article 15.2 clarifies the intention of 16.8 by assuring that the immediate

supervisor can resolve disciplinary grievances at Step 1; this would make sense only if the same supervisor initiated the discipline, for if higher authority initiated it the first-level supervisor would hardly be in a position to reverse that decision.

Moreover, several prior arbitration awards interpret these provisions strictly and overturn disciplinary decisions imposed from above. See in particular the award of Arbitrator Zumas in Case No. E1N-3B-D 15278 (Philadelphia, PA, February 8, 1985) and the other awards cited there at pages 7 and 8. Those awards interpret these contractual provisions as creating fundamental due process rights, not least because disciplinary decisions made at higher levels turn the first step of the grievance process into a sham.

Stability and consistency in labor relations oblige later arbitrators to defer to their predecessors in all but the most egregious cases. If they failed to do so, parties would lack guidance for their day-to-day decisions and would be tempted to relitigate every issue in hope of a more favorable arbitrator. Station Manager Hickson's uncontradicted statement that Womack, not Mitchell, initiated discipline establishes that Management violated Articles 16.8 and 15.2. Accordingly, I follow the rulings of Arbitrator Zumas and the others and hold that Management improperly disciplined the Grievant. Arbitrator Zumas denied the grievant in his case back pay after the date of the Step 1 hearing because the Union should have raised the procedural objection at that time. In this case such a limitation would be inappropriate because the Union did not learn of the procedural error until the arbitration hearing. To the contrary, Management misled the Union by issuing a removal letter purporting to come from Mitchell.

The second of the Union's procedural objections concerns Management's reliance on inappropriate past elements. Reliance on a letter of warning that should have been removed from the file was patently wrong, but this error alone would not suffice to invalidate discipline if Management could properly have relied on the March, 1986 suspension. It could not. For good or ill, binding arbitration awards prohibit Management from relying on past elements still in the appeals process. In 1977 Arbitrator Paul Fasser, then Associate Impartial Chairman between the Postal Service and the National Post Office Mail Handlers, stated that rule in a decision approved by Impartial Chairman Sylvester Garrett, Grievance No. MC-S0874-D (Memphis, TN). The rule has been regularly applied then by other arbitrators as in the cases submitted by the Union, W8C-5D-D 4441 (Arbitrator Thomas Levak, Auburn, WA, October 26, 1982) and S1N-3Q-D 26601 (Arbitrator J. Earl Williams, Kenner, LA, July 16, 1984).

Were this a case of first impression I would not adopt such a rule. While Arbitrator Williams is correct that disciplines may be eliminated or modified on appeal and thus provide a shaky basis for the most recent penalty, prohibiting reliance on appealed disciplines creates other, potentially more common problems. Consider the case of an employee who commits a series of offenses which under a system of progressive discipline would merit, in turn, warning, suspension, and removal. Final resolution of appeals takes many months. That means that if the employee's offenses are reasonably close together, no one of them could be relied upon to support a higher level of discipline in the next instance. The initial warning, for example, could not be used to justify a suspension on the second offense. In theory, and except for extreme offenses which would justify major discipline without following the progressive steps, Management could not suspend the employee until at least one discipline had been finally upheld in arbitration. A far more reasonable rule would allow Management to rely on grieved disciplines -- but at its peril. If one of earlier disciplines was modified or revoked on appeal, then the later level of discipline would become questionable. Such a system would work even better if the parties routinely consolidated all pending disciplinary grievances in one arbitration hearing.

This is not a case of first impression, of course. With ten years of arbitral authority holding that Management may not rely on grieved disciplines, no regional arbitrator should adopt a contrary position. Change must come, if at all, in negotiations or at national arbitration. I must therefore conclude that discharge was far too severe a penalty for these offenses, even if Management proved her guilty of them.

Since the removal was improper on each of these grounds it is unnecessary to consider the Union's remaining procedural arguments or the merits of the charges. There remains the question of remedy. Improper reliance on two past elements would only result in reducing an otherwise valid discipline to one step above the remaining letter of warning -- that is, to a suspension. Imposition of the removal decision from above, on the other hand, infects the justice of that decision from the start. This mandates reinstatement with full back pay, and that is what I shall order.

AWARD

1. The grievance is sustained.

2. Management shall reinstate the Grievant with full back pay and other benefits less any alternative earnings she had or reasonably should have had since her discharge.

3. Should the parties be unable to implement this award, they are to bring their disagreements before me at the first opportunity.

3-6-87
Date

Dennis R. Nolan, Arbitrator