

REGULAR ARBITRATION PANEL

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In The Matter of the Arbitration)
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 between)
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 UNITED STATES POSTAL SERVICE)
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 and)
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 NATIONAL ASSOCIATION OF LETTER)
 CARRIERS, AFL-CIO)
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GRIEVANT: S. Anthony
 POST OFFICE: Warren, RI
 USPS #B11N-4B-D 15023790
 NALC #452-14-W
 DRT #14-327798

BEFORE: HARRY R. GUDENBERG, ARBITRATOR

APPEARANCES:

For the U. S. Postal Service: Steven Allen
 Labor Relations Specialist

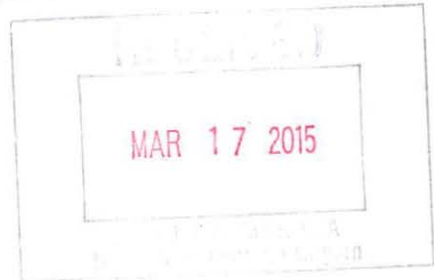
For the N.A.L.C.: Charles Carroll
 Local Business Agent

Place of Hearing: Providence, RI

Date of Hearing: February 12, 2015

Panel: Regular

Date of Award: March 11, 2015



AWARD SUMMARY: The grievance is sustained in part and denied in part. The remedy is discussed on pages 11-13 of this decision.

Harry R. Gudenberg

Arbitrator:

Harry R. Gudenberg

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VICE PRESIDENT'S
 OFFICE
 NALC HEADQUARTERS

In accordance with the terms of the National Agreement the parties appointed the undersigned to hear this dispute and issue a decision and award.

At the hearing the parties were afforded full opportunity to be heard, to examine and cross examine witnesses who testified under oath and to introduce evidence related to the dispute.

Based on the record and examination of the testimony, evidence and exhibits presented, closing statements and arbitral citations submitted as well as arguments made, all of which have been fully considered, the following findings are being issued in this Decision and Award.

ISSUE STATEMENT

The issue statement agreed to by the B Team was: Was the Notice of Removal dated November 21, 2014 charging the grievant with "Unacceptable Conduct" issued for just cause? If not, what is the appropriate remedy?

SUMMARY OF THE CASE

The events that gave rise to this dispute (and a number of related disputes heard in conjunction with this dispute - Case #B11N-4B-D 14311659 and Case #B11D-4B-D 15023709) for which

separate decisions have been issued, took place on September 4, 2014 when the Warren RI police arrested this employee for a domestic abuse allegation and found marijuana on his possession while he was at work delivering mail.

On September 5th the employee was placed on emergency off duty placement in accordance with Article 16.7. This emergency placement action was the subject of the grievance in Case #14311659 which claimed the emergency placement action was improper. Another grievance was filed on November 12, 2014 in Case #15023709 which claimed the Service had improperly placed this employee on indefinite suspension and this action had violated the terms of the National Agreement since it lacked just cause.

On November 21, 2014 a notice of removal was issued to the employee for unacceptable conduct/possession and/or use of illegal drugs while on duty on postal premises.

Included in this last grievance was evidence showing the grievant had been videotaped by agents from the Office of Inspector General on several occasions on September 3rd and 4th using marijuana while in his postal vehicle as well as the charges related to the possession of marijuana during the arrest on September 4.

On October 16, 2014 an initial pre-disciplinary interview

(PDI) was held with the grievant by the postmaster of the Warren RI station to which the grievant was assigned.

At this PDI management did not tell the grievant of the existence of the videotape but asked the grievant if he was aware of the Service's policy on Behavior and Personal Habits found in Section 665.16 of the Employee and Labor Relations Manual (ELM) as well as the Service's policy on the use or possession of illegal drugs found at Section 665.25 of the ELM. The grievant said he did not dispute whatever the policy states.

The grievant admitted he had been in the possession of illegal drugs when he was arrested but denied that he had ever used drugs or had previously had them in his possession while working for the Service.

During this PDI the grievant admitted he had been issued a summons for possession of illegal drugs and had pleaded guilty to these charges.

On November 4, 2014, an addendum to the initial investigative report of the Office of Inspector General (OIG) which was originally issued on September 29, 2014, was filed and included copies of the video showing the grievant using marijuana on September 3 and 4th. A second PDI was then held with the grievant on November 12, 2014. At this PDI the grievant admitted he had been using illegal drugs while working and had

been in possession of such drugs at times on and before September 4, 2014. The grievant, during this PDI, attempted to explain and/or clarify his previous answers when faced with the evidence in the videotape.

At the hearing it was stipulated the grievant had been using illegal drugs on the days included in the record and his use of such substances was not disputed or contested.

The grievant claimed he had been under a great deal of stress arising from a number of personal and family problems and had enrolled in the employee assistance program and had not been using drugs since these events and was receiving counseling for his personal issues.

POSITION OF THE PARTIES

THE SERVICE

The Service asserted they had acted properly in placing the grievant on immediate emergency placement for the possession and use of illegal drugs while at work in accordance with and as provided for in Article 16.7 of the National Agreement.

The Service explained they were waiting for the OIG investigative report to be certain they had a factual basis for determining the appropriate action to be taken against this employee after the initial emergency placement action based on

an evaluation of the charges and facts of his use and possession of illegal drugs and any delay in taking action was based on a desire for accuracy. They also explained the denial by the grievant of his use of illegal drugs during the first PDI added to the delay since the Service wanted to have the videotape to confront the employee with the evidence and to factually overcome his previous denials.

The Service claimed they had followed proper procedure in all the actions taken against the grievant and the allegations of the Union concerning a violation of the grievant's due process rights when the discipline was issued by the postmaster rather than the grievant's immediate supervisor was unfounded and unsupported since the grievant's supervisor had full authority to settle the grievance at the first step of the grievance procedure but did not believe the actions of the grievant warranted reinstatement.

The Service said being unwilling to settle a grievance was not a contract violation. They explained the only contractual requirement is that the management representative had the authority to discuss and settle a grievance which the supervisor had in this dispute, but as the supervisor testified, did not believe settlement was proper based on the grievant's actions and policy violations.

THE UNION

The Union asserted management had violated the due process rights of the grievant when all of the discipline was issued by the postmaster and then claimed a subordinate supervisor was empowered to resolve the grievance.

They explained it was the postmaster who called the OIG and arranged for the videotaping of the employee while on duty; the postmaster who issued the emergency suspension; the postmaster who conducted the PDI's and then issued the notice of removal.

The Union explained it was unlikely based on all of the actions of the postmaster that one could expect a subordinate supervisor to have the authority to overrule his boss, especially when one considers all of the actions that had been taken by the postmaster who was the immediate manager of the supervisor.

The Union believed the failure of the Service to follow their own rules in the administration of discipline to be a fatal contract violation, and such failings, together with the grievant's personal problems for which he has been receiving treatment should offset his problems and grant this employee an opportunity to resume his postal career.

ANALYSIS AND DISCUSSION

The grievant, at the hearing, admitted his guilt and his violations of postal rules and regulations. It must be recognized that his actions were clear and certain violations of postal rules and regulations and these rules which he did not dispute, supported the Service's decision to remove him from their employment.

It must be noted that the grievant also had a number of previous disciplinary actions which were cited in the notice of removal.

In November 2011 the grievant served a fourteen (14) day no time served suspension for falsification of MSP scans and in September 2013 the grievant was issued a thirty (30) day no time served suspension for failure to follow instructions. This last discipline was reduced to a fourteen day suspension in discussions held during the grievance process in this earlier discipline; however, this reduction was subsequently reverted to the initial full thirty day suspension since the grievant had not complied with the terms and conditions of the earlier settlement agreement.

The Union believed the inclusion of the 2011 discipline was improper since it was more than two years old. A review of Article 16, Section 10 Employee Discipline Records finds the

following language:

"The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years."

Since these two prior disciplinary actions occurred within a two year period of time it must be held that the Service was within its rights to cite these prior disciplinary actions and they were not time barred from doing so.

The allegations of the bargaining agent that management violated the provisions of the National Agreement and the grievant's due process rights by having the postmaster rather than the grievant's immediate supervisor handle and issue all of the disciplinary action in this case are most troubling.

Article 16, Section 8 Review of Discipline states:

"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.

In post offices of twenty (20) 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."

During his testimony the postmaster explained the Warren post office had less than twenty employees. While the postmaster testified he had concurrence for the removal action,

the notice of removal signed by the postmaster did not include any signature of a concurring official and there was no other evidence presented or included in the record of any concurring official.

During his testimony the postmaster said he ran the office floor in the AM and was the immediate supervisor of the grievant since Warren was a small post office.

The record supported the allegations of the union that the postmaster then had another supervisor indicate that he and not the postmaster was the grievant's immediate supervisor. While it is accepted, that in a small office, both the supervisor and postmaster interacts and supervises and manages employees, when considering severe discipline, including removal action against an employee, the language of Article 16 Section 8 negotiated by the parties in the National Agreement must be given its meaning and consideration.

The Joint Contract Administration Manual (JCAM) in its discussion of Article 15, Informal Step A includes the following language:

"While either representative (at Informal Step A) may consult with higher levels of management or the union on an issue in dispute, this section establishes that the parties to the initial discussion of a grievance retain independent authority to settle the dispute."

The Union claims this language could not be followed in

this dispute when the supervisor's authority was usurped by the postmaster and no matter the testimony of the parties the reality of the issuance of the discipline made the independent authority of the supervisor meaningless.

While it is often difficult to meet the necessary burden to prove a claim, there is logic to the position expressed by the union based on the record and evidence.

While the record of this employee since 2011 is extremely problematical and it is most doubtful that he can be rehabilitated, the due process issue raised and supported require the Service to provide this employee with a last chance opportunity to continue his employment subject to a number of terms and conditions, but without back pay for the period of his removal which shall be considered a long term disciplinary suspension.

At the hearing the grievant claimed he had been drug free for some months and had taken and passed a number of drug tests during this period of time.

The grievant shall be required to submit proof of such drug tests and their results to the Service's medical personnel and shall be required to submit to and pass a physical examination. Failure to provide such results or to pass the physical examination shall result in his removal from

his employment with the Postal Service for being in violation of these terms and conditions.

If the grievant meets these requirements then his reinstatement shall be subject to a Last Chance Agreement (LCA), which is to be drafted by the Service, discussed with and agreed to by the Union, and then agreed to and signed by the grievant.

The terms of such LCA shall be effective for a two (2) year period of time from its execution, include a requirement for the grievant to submit to random drug testing whenever so ordered by the Service, be found to be drug free at all times such tests are conducted (a failure to pass such a drug test shall be grounds for removal); to enroll in and participate in drug and anger management programs as determined by the Service's Employee Assistance Program; to comply with all rules and regulations that are applicable to all employees; and such other terms and conditions the parties may wish to include in such LCA.

The grievant must understand that he must comply with all such terms and conditions and any future violations of the provisions of such LCA and/or postal rules and regulations will result in his removal from employment with the Postal Service and this decision together with his prior discipline, in

accordance with Article 16.10 may be used to support such action.

Should there be any questions over the terms of this reinstatement, jurisdiction limited to the application of such terms and conditions shall be retained by the arbitrator for a period of time not to exceed sixty (60) days from the date of the issuance of this decision.