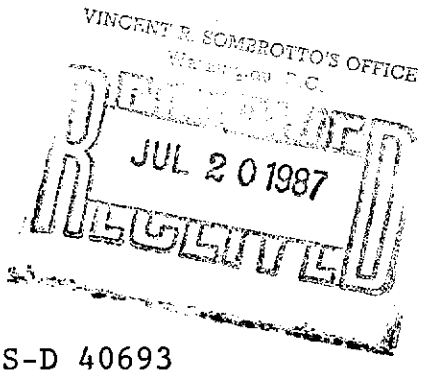
C#07268

REGULAR ARBITRATION



In The Matter of Arbitration Between:

UNITED STATES POSTAL SERVICE)
)
and)
)
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO)

Re: AWARD
S4N-3S-D 40693
F. Mela
Ft. Lauderdale, FL

APPEARANCES

For the Employer:

J. Foster, Lab. Rel. Ass't.
Ft. Lauderdale Post Office
1900 W. Oak Park Blvd.
Ft. Lauderdale, FL 33310

For the Union:

Judson K. Vaughn
Reg. Adm. Ass't., NALC
P.O. Drawer 450709
Atlanta, GA 30345-0709

I. BACKGROUND

This case arose under the collective bargaining agreement effective from July 21, 1984 to July 20, 1987. On or about July 11, 1986 the Employer notified the Grievant that he would be removed from service on August 22, 1986 for being AWOL. The Grievant protested this notice filing his grievance on August 6, 1986. An arbitration hearing was held on May 6, 1987 at which time the parties introduced their evidence, examined all witnesses and argued their respective positions. The issue presented at the

hearing was:

> Whether the Grievant was removed for just cause and, if not, what shall be the remedy?

The hearing was concluded with the closing remarks of the parties.

II. FINDINGS

The Grievant in this case sustained personal injuries in the performance of his assigned duties of September 4, 1984.

> The injury sustained was low back strain; (temporary aggravation of degenerative disc disease, lumbar spine) multiple ruptured discs L3-4, L4-5 and L5-S1 decompensation motion segment cervical spine, sciatica, left femoral neuritis, right.
>
> (Employer Ex.-5)

The Grievant received pay from September 5, 1984 through October 2, 1984. Compensation was paid from November 17, 1984 through May 23, 1986. On or about March 4, 1985 the Grievant returned to work for four (4) hours per day on light duty. On or about April 1, 1986 the Grievant was notified to make himself available for eight (8) hours of limited duty per day. The Grievant failed to report for this work.

The Grievant was observed bowling while claiming compensation for Temporary Total Disability. Initially, the Grievant

was treated by physicians specializing in family practice. He then was referred to Dr. Paul A. Hinenburg for a second opinion including consideration of the bowling incident. This doctor made no reference to the bowling activities in his February 24, 1986 and later reports. On May 15, 1986 he concluded that the Grievant was disabled and needed light duty. His June 2, 1986 report did not include the bowling or a disability determination. As a result, the Grievant was referred to Dr. Peter J. Millheiser. He concluded that there were no "objective orthopedic problems" and the Grievant's bowling was inconsistent with "a possible herniated disc." The Grievant's claim, therefore, was rejected. The Claims Examiner concluded that he had no disability after May 30, 1986.

A report dated April 10, 1986 from Dr. Hinenburg indicated the Grievant could return to light work on April 25, 1986. He did not report before the 25th so management on May 5, 1986 administered a fourteen (14) day suspension which remains a disputed prior disciplinary action. It stated the Grievant was to return to work by June 2, 1986. Before that fourteen (14) day suspension, the Grievant was suspended for seven (7) days on January 9, 1986 for failing to report for a fitness-for-duty lower back examination. Finally, on July 11, 1986 the Grievant was notified he would be removed on August 22, 1986

for being AWOL from June 2, 1986 to July 11th. The fourteen (14) day suspension was cited as an element of past practice even though it remains in dispute.

In any event the Grievant protested his removal, filed his grievance and processed it to this arbitration.

III. POSITIONS OF PARTIES

Management acknowledges that the Grievant remained on compensation for a considerable period of time. His compensation claim decided on July 21, 1986 set the end of his disability at May 30, 1986. This date was established as a result of the last physician's opinion. In the meantime Dr. Hinenburg concluded the Grievant should be available for light work by April 25, 1986. The Grievant was notified on April 1, 1986 to report to the Compensation Office on April 7, 1986. On May 5, 1986 he was notified to report for work on June 2, 1986. The Grievant failed to make either appointment which resulted in his removal. According to management, the Grievant has been AWOL from June 2nd to July 11th. This failure to report or provide medical documentation is grounds for removal according to management.

The Union essentially argues management failed to meet its burden of proof. The May 15th and June 2, 1986 reports of

Dr. Hinenburg show the Grievant was disabled. Management had these reports when it made its removal decision. If management believed the reports had been tampered with, it had ample time to verify this allegation with Dr. Hinenburg. It did not, so management is bound by these reports according to the Union.

IV. DISCUSSION

The parties have adopted the just cause test for administering discipline. The purpose of the just cause doctrine is to protect employees from unforeseen, unexpected or unanticipated disciplinary action and, at the same time, protect an Employer's right to adopt and enforce generally accepted employment standards. Under the just cause doctrine management has the burden of proving by a preponderance of the evidence that: (1) The alleged offense is generally accepted or recognized as a basis for disciplinary action; (2) The alleged offense is known or should be known by the Grievant as a basis for discipline; (3) The Grievant actually committed the alleged offense and; (4) The discipline administered complied with the steps of progressive discipline or was an offense warranting immediate severe discipline.

In this case the Grievant was contending he was disabled.

His compensation claim was being processed while he was off work. Certainly, if he returned to work he would undermine the validity of his claim. As a result, he failed to report for a fitness for duty examination on January 6, 1986 and received a seven (7) day suspension which was upheld in arbitration. Also, he failed to report on April 25, 1986 in accordance with his doctor's report and received a fourteen (14) day suspension still being disputed. The suspension letter also stated he was to return to duty on June 2, 1986. Nothing in the letter informed the Grievant about the consequences of failing to report. At the time of the removal notice, July 11, 1986, management only had Dr. Hinenburg's CA-17 reports. His latest report dated June 2, 1986 and the earlier one dated May 15, 1986 prescribed sedentary duties. Only, after the Grievant's claim determination dated July 21, 1986 did management know the Grievant was not disabled.

Under the just cause doctrine an employee's failure to report for work is a basis for disciplinary action. The Grievant knew or should have known he was to report for work on June 2, 1986. He failed to report on that date. At that time Management knew he was claiming disability compensation. Dr. Hinenburg reported that the Grievant only was able to perform sedentary duties. The Grievant apparently claimed

otherwise. He did not report. The Grievant was absent. Absenteeism is grounds for progressive discipline under the just cause doctrine.

The Grievant in this case has a prior seven (7) day suspension and a prior disputed fourteen (14) day suspension. If the latter suspension was not in dispute, the Grievant's record would justify discharge as the next step of progressive discipline. Disputed prior discipline, however, can not be considered or serve as a basis for subsequent discipline. Prior contested discipline may be overturned in arbitration. It, therefore, is not a basis for later discipline. At most, the Grievant is exposed to a possible fourteen (14) day suspension since the seven (7) day suspension is the only established prior discipline.

Furthermore, the just cause doctrine recognizes a justification for an employee's refusal to comply with management schedules and instructions. An employee may claim risk to his health or safety prevents such compliance. If, in fact, it is true that an employee's health or safety would be jeopardized, management is prohibited from disciplining the employee. In this case management did not know on July 11, 1986, the date of the removal, that the Grievant was not disabled. At best, Management knew the Grievant could perform sedentary work. Not

until July 21, 1986 could management know from the disability determination that the Grievant was no longer disabled. The Grievant, on the other hand, could honestly believe or contend he was disabled until the disability determination was made. Once the disability decision was made, Management could insist that the Grievant return to work. If he refuses, he could be disciplined. For the reasons given the Grievance must be sustained. No back pay is allowable because the Grievant claims he can not work. The removal simply is premature.

V. AWARD

The Grievance is hereby sustained in accordance with the opinion. The removal shall be deleted from the Grievant's record.

This the 17th of July, 1987.

Robert G. Williams

Robert G. Williams, Arbitrator
Charlotte, N.C.