EDMUND SCHEDLER 2/24/82 WON
Removal - Falsification of Employment Application

REGULAR ARBITRATION

29414 (S8V-3A-D)

C#00076

IN THE MATTER OF ARBITRATION BETWEEN

THE UNITED STATES POSTAL SERVICE
Dallas, Texas "Employer"

and the

AMERICAN POSTAL WORKERS UNION
Motor Vehicle Craft "Union"

Darrell L. Proctor - Removal for Falsification of Employment Application

S8V 3A D 294 14

APPEARANCES

For the Employer: Mr. Robert Moody, Labor Relations Representative
For the Union: Mr. Elehue Traylor, Regional Representative for the Motor Vehicle Craft

At an arbitration at 9 a.m. February 18, 1982 in Dallas, Texas the Employer and the Union authorized the undersigned to decide whether or not the Employer had just cause to remove Darrell L. Proctor from service on April 6, 1981. Both parties attended the arbitration, the parties stipulated this grievance was properly brought to arbitration, all witnesses were sworn, the rule was invoked and the witnesses were separated, both parties received the privilege of cross examination, and both parties made a closing argument at the conclusion of the Hearing. I will relate the chronological events leading up to the remove of Darrell Proctor as I believe those events occurred.

Preliminary Background Discussion

On or about March 23, 1974 Proctor was arrested for having a marijuana cigarette. He was brought to trial on October 4, 1974 in Cause No. 74-2014 - B in the County Criminal Court in Dallas, Texas and he was represented by Mr. James P. Hopkins, attorney. Proctor was found guilty of the charge, he received a suspended sentence, he was placed on probation for 6 months, he was fined $200 + court costs of $ 50. Proctor was a high school student at the time he was arrested.

On or about October 30, 1975 Proctor joined the U.S. Marine Corp. He was honorably discharged on or about August 18, 1977. At the time he joined the Marine Corp. he filled

> I tried marijuana several times. I got arrested in February 1974 for 1 joint of marijuana in Dallas, Texas. I was given a month probation, $250 fine. That was my second and last time smoking marijuana.

On June 23, 1980 Proctor completed an application for Employment (Form 2591) with the United States Postal Service . Question 18 on the 2591 reads as follows:

> 18. Have you ever been convicted of an offense against the law or forfeited collateral, or are you now under charges for any offense against the law. (You may omit: (1) traffic violations for which you paid a fine of $30.00 or less; and (2) any offense finally adjudicated in a juvenile court.)

Proctor put an X in the column headed by the word "NO" to the question. There was a 2nd question for 18, to wit:

> While in the military service were you ever convicted by a special or general court martial?

Proctor put an X in the column headed by the word "NO" to the question. Question 18 had the following additional explanation:

> If your answer is "Yes," give details in Item 22. Show for each offense: (1) date; (2) charge, (3) place; (4) court; (5) action taken. NOTE - A conviction does not automatically mean you cannot be appointed. What you were convicted of, and how long ago, are important. Give all facts so that a decision can be made.

On June 24, 1980 Proctor attended a pre-employment interview with the Employer. At that interview he signed a PRE-HIRE INTERVIEW CHECK LIST FOR NEW EMPLOYEES and item 8 on the check list stated:

> 8. Again, I ask you, have you ever been convicted of an offense against the law or forfeited collateral, or are you now under charges against the law?

Proctor answered item 8 with the word "No." On July 14, 1980 he filled out a 2nd Form 2591 and he answered Question 18 by placing Xs in the column under "No."

On or about February 27, 1981 the Employer's Dallas office received a letter from the United States Postal Service Office of the Inspector in Charge regarding information the Inspector's Office had received from the United States Department of Justice. The letter disclosed that:

> The file contains derogatory information. Immediate

consideration should be given to this derogatory information, and a decision made as to the suitability of this individual for continued employment with the Postal Service

Attached to the letter was a report from the Federal Bureau of Investigation and the report disclosed that Proctor had been charged with violation of the Controlled Substance Act, that he was convicted, and that he was fined $200 + $50 court costs and received a 60 day suspended sentence. Proctor was called into the office for an interview by Labor Relations Representative L. Womack. He was confronted with the FBI report and with the replies he had made on the Form 2591 and the PRE-HIRE INTERVIEW CHECK LIST FOR NEW EMPLOYEES. On March 6, 1981 a Notice of Removal was issued, the Union grieved the letter as a violation of Article XV and Article XVI of the National Agreement. The parties were unable to resolve their differences, and the matter was brought before the undersigned arbitrator for a final and binding decision.

The 1978 - 81 National Agreement contains the following:

ARTICLE XII - PRINCIPLES OF SENIORITY, POSTING AND REASSIGNMENTS

Section 1. Probationary Period

A. The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto.[1] ***

B. The parties recognize that the failure of the Employer to discover falsification by an employee in the employment application prior to the expiration of the probationary period shall not bar the use of such falsification as a reason for discharge.

Article XV - GRIEVANCE - ARBITRATION PROCEDURE

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Section 4. Arbitration

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(6) All decision of an arbitrator will be final and binding. All

[1]The triple asterisk *** is used to denote that language immaterial to the grievance has been omitted. This symbol is used throughout this award for that purpose.

decision of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. ***

ARTICLE XVI - DISCIPLINE PROCEDURE

In the administration of this Article, a basic principle shall be that discipline shall 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 the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay. ***

The Employer's Position

The Employer contended this removal was for just cause for the following reasons:

1. the Grievant had been convicted on October 4, 1974 in Dallas, Texas;
2. he answer Question 18 on the Form 2591 by placing an X in the "NO" column;
3. the Grievant knew he answered Question 18 incorrectly because he disclosed the conviction when seeking admission to the United States Marine Corp.;
4. the Grievant's answer to Question 18 was false;
5. the Employer had a right to have correct information on an employment application in order to properly evaluate an applicant prior to hiring the applicant; and
6. there was just cause to remove the Grievant under the provisions of Article XII Section 1 (B) of the National Agreement.

The Employer argued that the Grievant's impression that Question 18 applied only to a felony arrest and conviction was immaterial, since Question 18 did not distinguish between various types of criminal charges. The Employer maintained that Question 18 was broad, it required a truthful answer for a conviction of any offense against the law, and the Grievant omitted disclosing his conviction for the misdemeanor on October 4, 1974.

Mrs. Linda Morris testified that for approximately 8 years she assisted job applicants in the filling out of employment applications. In that capacity she stated that applicants were instructed to ask questions if the applicant did not understand what information was to be furnished on the Form 2591.

The Union's Position

The Union's position was that the Judge had told the Grievant that his suspended sentence and probation was not final, and the Judge told the Grievant that if anyone asked the Grievant if he had been convicted that the answer was "no." The Grievant testified that he was advised by his attorney and by the Judge that if anyone asked if he had been convicted of a misdemeanor that the correct answer was "no." The Grievant testified that he knew he had not been convicted and he had never forfeited collateral.

The Grievant testified that the question on the U.S. Marine Corp form was worded differently that the question on the Form 2591, and that the trial of October 4, 1974 was more fresh on his mind in October 1975 than it was in June of 1980. He pointed out that while filling out the U.S.M.C. form there was an individual in the room that explained each question, thus he answered the question in accordance with the explanation.

Opinion

In this grievance the Employer maintained there was just cause to remove Darrell Proctor because he falsified his employment application, and the National Agreement provided that an employee can be removed for falsification in the application for employment. The Union maintained that Proctor did not falsify his employment application; therefore his removal was not for just cause. In my opinion, after carefully considering all the evidence, Darrell Proctor did not falsify his employment application; therefore I will order him re-instated to his former job with full seniority and back pay. I will explain my reasons for this ruling.

The word "false" has 2 meanings. Black's Law Dictionary, Fourth Edition, gives the following definitions:

> The word "false" has two distinct and well-recognized meanings: (1) Intentionally or knowingly or negligently untrue; (2) untrue by mistake or accident, or honestly after the exercise of reasonable care. Metropolitan Life Ins. Co. v. Adams, D.C. Mun. App. 37 A. 2nd 345, 350. In jurisprudence "false" and "falsely" are oftenest used to characterize a wrongful or criminal act, such as involves an error or untruth knowingly put forward. A thing is call "false" when it is done, or made, with knowledge, actual or constructive, that it is untrue or illegal, or is said to be falsely when the meaning is that the party is in fault for its error. Fouts v. State, 113 Ohio St. 450, 149 N.E. 551, 554; Monahans v. Mutual Life Ins. Co. of New York, 192 Wis. 102, 212 N.W. 269, 271.

In my opinion, under the meaning of Article XII Section (B) the word "falsification" requires that: (1) an incorrect statement has been made on the application for employment; (2) the applicant knew the statement was incorrect; (3) and the applicant made the incorrect statement with the intention of hiding the information from the Employer. All 3 requirements must be present for falsification to take place; but, in my opinion, none of the requirements took place in the instant grievance. I will continue with my explanation.

The Grievant was brought to trial on a misdemeanor charge on October 4, 1974. He was given a suspended sentence, placed on probation, and paid a $200 fine + court costs. Article 42.13 of the 1979 Vernon's Texas Statues Annotated Code of Criminal Procedure contains the following:

> Art. 42.13 Misdemeanor Probation Law
>
> Section 1. All probation in misdemeanor cases shall be granted and administered under this Article.
>
> Section 2. In this Article, unless the context requires a different definition,
> (1) "court" means a county court, or a county court at law or county criminal court or any court with original criminal jurisdiction, and includes the judge of any of these courts;
> (2) "probation" means the release by a court under terms and for a period specified by the court of a defendant who has been found guilty of a misdemeanor;
> (3) "probationer" means a defendant who is on probation.
>
> Probation authorized in misdemeanor cases
>
> Section 3. (a) A defendant who has been found guilty of a misdemeanor wherein the maximum permissible punishment is by confinement in jail or by a fine in excess of $200.00 or by both such fine and imprisonment may be granted probation if:

(1) he applies by written motion under oath to the court for probation before trial;

(2) he has not been granted probation nor been under probation under this Act or any other Act in the preceding 5 years; provided that the court may grant probation regardless of the prior probation of the defendant, except for a like offense within the last 5 years;

(3) he has paid all costs of his trial and so much of any time imposed as the court directs; and

(4) the court believes that the ends of justice and the best interests of society and of the defendant will be served by granting him probation.

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Effect of probation

Section 4. (a) When a defendant is granted probation under the terms of this Act, the finding of guilt does not become final, nor may the court render judgment thereon, except as provided in Section 6 of this Article.

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Discharge from probation

Section 7. (a) When the period and terms of a probation have been satisfactorily completed, the court shall, upon its own motion, discharge him from probation and enter an order in the minutes of the court setting aside the finding of guilty and dismissing the accusation or complaint and the information or indictment against the probation.

(b) After the case agains the probationer is dismissed by the court, his finding of guilty may not be considered for any purpose except to determine his entitlement to a future probation under this Act, or any other probation Act.

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I did not include Section 5 and Section 6 of the Code. Section 5 provides for terms and supervision of the probation and Section 6 provides for conditions and procedures for revocation of probation. The Grievant's probation was not revoked; therefore he was, under the terms of the Code, discharged from probation.

When the Grievant was discharged from probation the Code provides that "the court shall, upon its own motion, discharge him from probation and enter an order in the minutes of the court <u>setting aside</u> the finding of guilty and dismissing the accusation or complaint and the information or indictment agains the probationer." I underlined the words "setting aside" because in law those words have a special meaning. Those words mean that the court will cancel or nullify the judgement, decree, award, or the

proceedings of the matter against the Grievant. Furthermore, Section 7 (b) makes it quite clear that the finding of guilty may not be considered "for any purpose" unless the Grievant is involved in other court proceedings where he may be entitled to probation.

In my opinion, the law provides that the Grievant was completely forgiven for his misconduct in March 1974 so long as he maintained good behavior and he did not break the law. The State of Texas imposed a disability on the Grievant for a violation of the Controlled Substance Act; and, what the State of Texas takes away from a defendant, the State can give it back. That is exactly what the State did when the Legislature passed Article 42.13 Section 7 of the Criminal Code. I rather doubt that the Grievant knew the full impact of Section 7 at the time he was placed on probation, except that he understood that salient features of Section 7; and that was that he had not been convicted and he had to behave himself. That is the reason why I believe the Grievant was telling the truth when he answered Question 18 on Form 2591 with the word "No."

I will explain why I am awarding the Grievant full back pay as damages for his removal. The Employer relied upon the FBI report as proof that the Grievant had falsified the Form 2591. It appears to me that law enforcement people, in their zeal to have full information on an individual, do not take appropriate measures to remove derogatory information that no longer applies. My first impression is that what is derogatory goes into the file (and into a computer's memory) but corrections on an individual's record do not get into the file. This is understandable because police tend to think more in terms of what someone has done wrong instead of what someone did right. I rather doubt that Art. 42.13 Section 7 of the Criminal Code was written with computer memories in mind; otherwise the Legislature would have written language into the law so as to protect a defendant from the abuse of derogatory information acquired from the state courts. However, the Employer was aware that the Union was defending the Grievant's record under the provisions of Article 42.13 Section 7 of the Criminal Code, the Employer accepted the FBI report as the final authority as to the Grievant's court record, the Grievant had no responsibility whatsoever for the

inaccuracy of the FBI report, therefore I find that the Grievant is entitled to full back pay for his loss of earnings from April 6, 1981 to the date he offered to return to work.

Award

After a careful consideration of all the evidence and upon the foregoing findings of fact the answer to the question at issue is "No, the Employer did not have just cause to remove Darrell Proctor from service on April 6, 1981." The Employer will immediately offer to expunge Darrell Proctor's file of this removal, the Employer will will immediately offer to return Darrell Proctor to his former position without loss of seniority or other benefits of employment, and the Employer will make Darrell Proctor whole for the wages he has lost by this removal.

Edmund W. Schedler Jr., Arbitrator
February 24, 1982