

REGULAR ARBITRATION PANEL
In the Matter of the Arbitration Between:
UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION

C - 20999

Grievant: Teddy Cheshire
Newton Square, PA
Arbitrability
USPS #C94C-4C-D 98076377
Local # 987302

Before: M. David Vaughn, Arbitrator

Appearances: For USPS: Ken Giles
For APWU: Wayne D. Maurer

Place of Hearing: Newton Square, PA

Date of Hearing: February 25, 2000

Date of Award: March 24, 2000

Relevant Contract Provisions:

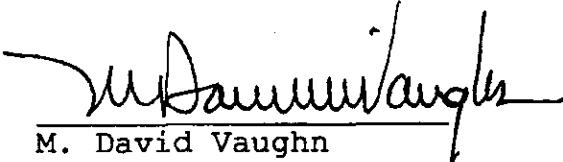
Article 12
Article 15
Article 19

Contract Year: 1998-2000

Type of Grievance: Separation of Employee, Challenge to
Arbitrability: Probationary Status

INTERIM AWARD

The Grievant was a non-probationary employee because the Postal Service failed to give him written notice of his separation prior to the end of his probationary period as required by the Agreement and the ELM. Consequently, he was entitled to utilize the grievance-arbitration procedure to protest his separation. The grievance is arbitrable. I retain jurisdiction to hear and decide the dispute on its merits.


M. David Vaughn

OPINION

This proceeding takes place pursuant to Article 15 of the Agreement ("Agreement") between the American Postal Workers Union, AFL-CIO ("APWU" or the Union"), and the United States Postal Service (1998-2000) ("USPS" or the "Employer") (collectively the "Parties") to resolve a grievance filed on behalf of Clerk Teddy Cheshire ("Grievant"), which protests that he was not properly terminated during his probationary period because he was not given a written notice of his termination, he was not advised of his rights, his sixty (60) day evaluation was improperly altered and he was not given an opportunity to correct his alleged deficiencies in performance. The Parties were unable to resolve the dispute through the steps of the negotiated grievance process and the Union invoked arbitration.

At the hearing, the Employer argued, as an initial matter, that Grievant's separation from service was not arbitrable because Grievant was a probationary employee. After considering the arguments of the Parties, I concluded that the hearing would be bifurcated with the issue of arbitrability heard first, a procedure to which the Parties consented. The Parties were then afforded a full opportunity to present evidence on the issue of arbitrability, including the introduction of documentary evidence and to challenge the documents offered by the other, and to present argument. At the conclusion of this phase of the hearing, the evidentiary record with respect to arbitrability was completed, the parties made oral concluding statements and the record of the proceedings was closed. This Interim Opinion and Award is based on the record and considers the arguments of the Parties. It interprets and applies the Agreement.

THE ISSUE

The issue for decision in this part of the dispute is:

Is the grievance arbitrable in accordance with the National Agreement?

FACTUAL BACKGROUND AND FINDINGS

The essential facts are not in dispute. Grievant was hired as a PTF Clerk on December 20, 1997 and was assigned to the Newton Square Post Office. His 90-day, probationary period ended on March 20, 1998.

Grievant received a 60-day evaluation on February 20, 1998 in which he was rated as "not meeting expectations" for Factor A, Attendance/Punctuality, and as "meeting expectations" on the remaining four evaluation factors.

Grievant received an 80-Day final evaluation report on March 14, 1998, seven days before the expiration of his probationary period. The report rated Grievant as not meeting performance expectations in two areas: Attendance/ Punctuality and Job Knowledge. Grievant received a final overall rating of "Does Not Meet Expectations. Separation Recommendation."

Grievant was verbally advised by his supervisor that he was terminated effective that day. He did not work for the Postal Service after that date. Thereafter, by certified letter dated March 24, 1998, which was not received by Grievant until Grievant was notified in part as follows:

This will confirm your separation from the Postal Service effective 3-14-98, as a result of your failure to meet performance expectations during your probation period; specifically, Factor A: Attendance/ Punctuality, and Factor E: Job Knowledge.
Union Exhibit No. 2

POSITIONS OF THE PARTIES

The positions of the Parties were set forth at the hearing and in their oral closing statements, which are summarized as follows:

The Postal Service argues, relying on Article 12 of the Agreement, that the grievance is not arbitrable because Article 12 provides that the USPS has the right to separate a 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." Relying on a series of arbitration awards and two Federal court decisions, the Employer contends that Article 12's prohibition on access to the grievance procedure applies to Grievant and extends across all issues.

USPS argues that Article 12 "trumps" Article 19 of the Agreement and all provisions of the USPS' Employee and Labor Relations Manual (sometimes, "ELM"). In the alternative, the Postal Service claims that it satisfied the requirements of the ELM that it give the probationary employee written notice of the employee's termination before the end of the employee's probationary period by giving Grievant his 80-day written evaluation on March 14, 1998. According to the Employer, the ELM does not require two separate notifications, and its letter of March 24, 1998, was merely intended as a follow-up. The Employer argues that it would raise form over substance to conclude otherwise because Grievant knew that he was terminated on March 14. It points out that he did not return to work.

The Postal Service urges that the grievance be dismissed as non-arbitrable.

The Union does not dispute that Article 12 of the Agreement gives the Employer the right to terminate a probationary employee at any time during the probationary period. Nor does it dispute that the Agreement denies a probationary employee access to the grievance procedure to protest such employee's separation. The Union contends, however, that Grievant was not terminated until March 24, 1998, by which time he was no longer a probationary employee. The Union cites in support of its position those provisions of the ELM which require that a probationary employee be given a written notice of the employee's separation before the end of the employee's probationary period.

The Union argues that the form provided Grievant on March 14 was insufficient to separate him, since it was simply an evaluation form and noted only that his separation was "recommended". It asserts that the oral notice allegedly provided to Grievant at that time was insufficient because it did not meet the requirements of the ELM.

The Union contends that, since Grievant was not provided with a written notice of his separation until March 24, 1998, when the Employer sent Grievant by certified mail a letter "confirming" Grievant's termination, and since Grievant's probationary period had already expired on March 20, 1998, Grievant was not terminated during his probationary period as required by Article 12; and he thereby became a non-probationary employee covered by the grievance-arbitration provisions of the Agreement and could, therefore, properly grieve his separation through those procedures.

The Union relies on a number of arbitral awards in which it prevailed because the Employer did not give a written notice of termination to the employee during the employee's probationary period. It argues that these awards are dispositive of the issue of arbitrability presented here. The Union claims the arbitral awards and court decisions cited by the Employer are not on point because they do not address timeliness and the effective date of the employee's termination.

The Union urges that the grievance be found arbitrable and that the dispute proceed to further hearing for determination on the merits.

DISCUSSION AND ANALYSIS

Issues for Determination, Conclusions

The issues for decision are whether the provisions of the ELM - which require that a probationary employee be given written notice of the employee's termination, with reasons therefore, prior to the end of the employee's probationary period - are binding on the Parties through Article 19 and, if binding, whether the Employer's failure to meet those requirements in a timely manner negated Grievant's probationary status and entitled him to access to the grievance procedure as a non-probationary employee.

From a review of the facts of the case, in light of the Agreement and the authorities cited by the Parties and for the reasons set forth below, I conclude that the requirements of the Agreement and the ELM are binding on the Employer and that

its failure to comply with those requirements in a timely manner meant that he was no longer a probationary employee at the time of his actual termination. I hold, therefore, that he was, therefore, entitled to access to the grievance procedure to test the propriety of his termination and that the grievance is, therefore, arbitrable.

Applicable Provisions of the Agreement

Article 15 of the Agreement allows, in part, for employees to protest management actions affecting their wages, hours and conditions of employment. Article 12 of the Agreement, which relates to the separation of probationary employees, contains an exception to access to the grievance procedure. It provides in part:

The probationary period for a new employee shall be ninety (90) 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.* Emphasis added.

Article 19 incorporates into the Agreement by reference provisions of handbooks, manuals and regulations of the USPS which do not conflict with the Agreement. Section 365.326 of the Employee and Labor Relations Manual ("ELM") provides with respect to the separation of probationary employees that an employee serving a probationary period may be terminated "by notifying the employee *in writing why she or he is being terminated and the effective date of the action.*" Emphasis added.

Article 12, which allows the Postal Service to separate probationary employees during their probationary periods, is supplemented by Section 365.327 of the ELM provides specifically that the notice of separation must be given to the employee before the end of the probationary period.

The requirement of written notice does not conflict with Article 12 of the Agreement. On the contrary, this requirement

gives the Article effect. It identifies the method to be used "to separate from [the USPS] employ any probationary employee at any time during the probationary period." See Article 12 Section 1. A. Neither, obviously, is there a conflict in the requirement that notice be given within the probationary period. Both are made part of the Agreement by Article 19 and were applicable in Grievant's situation.

Arbitral Authorities

The wisdom of the requirements is evident from some of the awards relied on by the Union in which there was a dispute between the USPS and the Union as to whether an employee knew during the employee's probationary period that he was being terminated. For example, in *USPS and APWU*, arbitration Case No. E4C-2M-D 36879 (Cushman, Arb.) the Employer contended that the oral notice provided to the employee one day before his probationary period ended was sufficient to comply with the Agreement and the ELM. The testimony of the USPS witness as to what he told the employee, however, was equivocal; and the employee denied that he was told he was terminated. According to the employee, the word "terminated" was never used. In the absence of proven notice, the grievance was sustained.

Similarly, in *USPS and APWU*, arbitration Case No. I90C-4I-D94017480 (Krider, Arb.) the Union contended that the employee did not know that he was being terminated when he received his evaluation form. While both the Union and USPS agreed that the provisions of the ELM were applicable, the Employer contended that employee's written evaluation form was sufficient written notification. As the arbitrator pointed out, however, the evaluation form did not state that grievant was terminated. The grievance was held arbitrable and was sustained.

Obviously sensitive to the need for finality and to avoid disputes as to what a probationary employee is told and when she or he is told it, Arbitrator Cushman, in *USPS and APWU*, discussed above, concluded, without considering the conflicting testimony of the witnesses, in the grievance before him, "that a written notification of separation is the sole and exclusive method of separation of a probationary employee for the reasons set for under 365.326 [of the ELM]."

The arbitral authorities cited to exclude this dispute from arbitration are distinguishable. This dispute does not involve the merits of a probationary employee's evaluation (as in *USPS and APWU*, Arbitration Case No. H1C-5L-C 25010 (Zumas, Arb.), claims that probationary employees' separations were discriminatory or for an unlawful or wrongful purpose (as in *USPS v. APWU*, Civil Action No. 90-1592 (5th Cir.1991); *USPS and APWU*, Arbitration Case Number H1C-4C-C 27351 (N. Zumas, Arbitrator) or a claim that the written notice given a probationary employee was failed to meet certain contextual requisites of the ELM. *United States Postal Service v. American Postal Workers Union, AFL-CIO*, Civil Action No. 98-1355-A. (E.D. Va 1999)

Purpose of the Requirement

The Employer's suggestion that a conclusion requiring written notice exalts form over substance is without merit. Article 12 requires that the probationary employee be "separated from service" during the employee's probationary period. A USPS rule, incorporated into the Agreement by Article 19, which requires that the notice given the probationary employee be in writing describes the method of separation and avoids misunderstandings and protects the Parties¹.

Enforcement of agreement reached by the Parties needs no justification. However, it is clear that the common sense requirement that the notice of separation or termination to be given a probationary employee be in writ This is particularly the case when terminating an employee, where opportunities for miscommunication abound. The requirement to give a written notice of termination to effectuate the separation of a probationary employee avoids this result and protects the Employer's rights under Article 12.

1/ Other provisions of the Agreement have a similar purpose. For example, the grievance procedure includes a requirement that the employee's "supervisor shall, at the request of the Union representative, initial the standard grievance form that is used at Step 2 confirming the date upon which the decision was rendered." It could be argued that this requirement is superfluous but it is not since it avoids disputes as to when the Step 1 oral decision was given the employee.

Application of Contractual Requirements to the Facts

As indicated, Grievant received an 80-Day final evaluation report seven days before the expiration of his probationary period. His final overall rating was "Does Not Meet Expectations." The report contained the notation "Separation Recommendation." From that report, it can certainly be concluded that Grievant's performance was unsatisfactory and that he had been recommended for separation. But a performance evaluation is not a notice of separation; it is in a different format and serves a different purpose. Such an evaluation, even if unsatisfactory, does not, in and of itself, constitute notice of separation.

The written notation that separation was recommended not only fails to meet the requirements to constitute notice of separation, but requires that some other authority act on the recommendation - at some time in the future. Contrary to the Postal Service's interpretation, the implication of "Separation Recommendation" is that a final decision on separation had not been made as of that time. Indeed, the recommendatory language supposes that the decision with respect to termination has not yet been made; not until the Employer's March 24th letter is there indication that the "recommendation" had been acted on.

The evidence indicates - and I assume for purposes of this analysis - that Grievant was told orally that he was being terminated when he was handed his evaluation form on March 14th. However, the regulation adopted by USPS and binding on the Parties expressly requires a written notice of termination to separate a probationary employee. Not only does the oral notice not satisfy that requirement, but an oral statement made at the same time as a notation of "Separation Recommendation" is given suggests that the decision has not been finally made.

Arbitrator Cushman correctly states the rule, and I follow his conclusion. I find that the oral notice of termination given to Grievant was insufficient to effect his separation from employment under Article 12 of the Agreement and that the written performance appraisal was likewise insufficient. Thus, the separation action was not consummated prior to the end of the notice period and the object of the notice - Grievant - thereby continued in employee status. Since he passed the end of his probationary period in employee status, he became a non-probationary employee.

The March 24th Letter

As indicated, the March 24th letter appears to contain all of the elements to constitute proper notice of separation of a probationary employee. However, the notice was dated - let alone when it might have been mailed or received - subsequent to the expiration of Grievant's probationary period. It was, therefore, addressed to a non-probationary employee and, I am persuaded, could be of no force and effect as a device to exclude Grievant from access to the grievance procedure.

The Employer's effort to relate the notice of separation back to the March 14th communications is ineffective. The March 14th communications did not constitute a valid separation at the time they were made and cannot be made retroactively valid by reference.

Arguments Against Arbitrability Based on Court Cases

At the hearing, the Employer argued that the dispute is not arbitrable, despite any infirmities in its notice, because it involves a probationary employee, who is excluded from access to the grievance/arbitration process. USPS relied on the broad language used by the Fifth Circuit in its decision in *USPS v. APWU*, above. The Fifth Circuit said:

When a specific [referring to Article 12] and a general [referring to Article 19] provision of an agreement conflict, well-established principles of construction require that the specific trump the general provision.

The Court's broad language, however, cannot be relied upon in the abstract. It must be considered in context with the facts of the dispute before the court.

In the Fifth Circuit case, above, the Union had sought to grieve a probationary employee's separation from service claiming that the employee was discharged as a result of being on compensable leave pursuant to the Federal Employee's Compensation Act. 5 U.S.C. Sections 8101 et. seq. There was no dispute that the employee was a probationary employee. The arbitrator had found that the probationary employee could assert rights under Section 546 of the ELM and grieve his

separation. Thus, the employee's status, for purposes of Article 12 was not disputed; and the Court held that Article 12's specific denial of access to the grievance/arbitration procedure was entitled to priority over the more general provisions of Article 19. That Circuit Court Opinion is not dispositive of this dispute, which challenges whether Grievant was, in fact, a probationary employee.

In the District Court case, above, the Union filed a grievance challenging a probationary employee's separation from service because the written notice of termination did not comply with provisions of the ELM requiring that the proper USPS official initiate the separation and specifying the contents of the notice. The District Court cited approvingly the Fifth Circuit Opinion and the language quoted, above. It found that the arbitrator in that case modified by his ruling the meaning of Article 12 of the Agreement and thereby exceeded his authority. However, whether correct or incorrect, the clear premise of the District Court was that the arbitrator had ruled on the grievance of a probationary employee who was separated during his probationary period. Opinion at p. 7.

The District Court's premise in the cited case is, by contrast, the very question at issue in this proceeding. To answer the question whether Grievant was, in fact, a probationary or non-probationary employee at the time he was given notice of termination requires interpretation and application of the language of the Agreement, which is precisely the jurisdiction conferred by the Agreement on the arbitrator. Thus, I conclude that neither Federal court decision is dispositive of the issue presented by the instant grievance, namely, whether Grievant was or was not a probationary employee for purposes of the Agreement.

Conclusions and Holdings

This matter involves the threshold issue whether Grievant was a probationary employee at the time his employment was terminated. I hold that the Employer's failure to comply with the contractual notice requirements in a timely manner meant that Grievant was a non-probationary employee at the time of his actual termination through the March 14th letter. My conclusion is in accord with those reached by other arbitrators in awards cited. My conclusion is reached by applying Articles 12 and 19 to the facts of the case, as is my obligation

pursuant to Article 15. My conclusion does not "alter" the meaning of Article 12, much less a "considerable alteration" as the United States District Court found in *USPS v. APWU*, above.

I hold, therefore, that Grievant, as a non-probationary employee, entitled to access to the grievance procedure to test the propriety of his termination and that the grievance is, therefore, arbitrable. The Award so reflects.

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