

C# 6464

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In the Matter of the Arbitration between :
NATIONAL ASSOCIATION OF LETTER CARRIERS, :
AFL-CIO :
-and- : OPINION
UNITED STATES POSTAL SERVICE :
Case No. N4N-1A-D 15722 :
Walter Baginski, F.D.R. Station, N.Y. :
_____ X

Before DANIEL G. COLLINS, Arbitrator

Appearances:

For National Association of Letter Carriers, AFL-CIO

James H. Lucas, Vice President, Branch 36

For United States Postal Service

Sidney L. Zinstein, Hearing Officer

This proceeding involves a claim that the Postal Service violated the parties' 1984-87 National Agreement when it discharged Walter Baginski (the "grievant"). The dispute being unresolved was submitted by the Union to arbitration. A hearing was held before the undersigned Arbitrator at the Morgan G.M.F., 341 Ninth Avenue, New York, New York on August 19, 1986, at which the parties were afforded full opportunity to present oral and written evidence, cross-examine witnesses, provide argument and otherwise support their respective positions. The evidence adduced and the

positions and arguments set forth at the hearing have been fully considered in preparation of the accompanying Award.

The Issue

Did the Postal Service have just cause to discharge Walter Baginski and, if not, what shall be the remedy?

Facts

Walter Baginski, the grievant herein, was employed by the Postal Service in November 1979. He was discharged on January 10, 1986 pursuant to a Notice of Proposed Removal dated November 22, 1985 and a Letter of Decision dated December 20, 1985. The Notice charged that Baginski had been continuously AWOL beginning September 30, 1985. It also referred to the following elements of the grievant's past record: a Letter of Warning in April 1983 for failing to meet the requirements of his position; a Letter of Warning in August 1983 for AWOL; a 3-day suspension in September 1983 for AWOL; and Proposed Notices of Removal, modified to 14-day suspensions, in March 1984 and January 1985 for AWOL. The modification of the latter Notice of Proposed Removal was accompanied by a "Last Chance" Agreement executed by the Union, under which Baginski was placed on a year's probation.

It is undisputed that the grievant on October 10, 1985 received a Form P2-72 request that he report to duty or submit a "signed and dated medical certificate immediately ...indicating period of incapacity, giving basic prognosis as to when he may return to duty, and whether you are able to return to full duty".

Baginski testified as follows: He seriously injured his hand late in August 1985 and went to St. John's Hospital where he received stitches. After the stitches were removed his injury did not heal properly, and he was unable to work. He was treated by a private physician, whose office colleague on October 10, 1986 gave him a Certificate, on medical stationary, stating that he had been "treated for a deep laceration...beginning Sept. 16th and will return to work on October 11th." He had a successful fitness for duty examination on October 11th and in connection therewith submitted the medical certificate to supervision at the F.D.R. Station. He did not, however, report for duty on his next scheduled workday because of recurrence of the psychological depression that had plagued him for some time and had been responsible for his extended, and approved absence during the summer of 1985. On November 26, 1985 he went to the F.D.R. Station seeking to schedule a new fitness for duty examination, and presented a medical

certificate on the stationery of a psychologist, Lucy Angeleri, stating that he had "experienced a relapse of depression since October 14th '85"; that she had "decided to counsel him again as of today, November 26 '85", and that she had "advised him to see Dr. John Vetter, psychiatrist for antidepressant treatment." She added that she would "keep you apprised of his condition in the future". Supervision at the Station initially refused to schedule him for a fitness-for-duty examination because of alleged inadequacy of that medical certificate. After bringing in a Union Shop Steward he was examined on November 27 and worked thereafter on his normal schedule until his discharge. He had changed his residence in August 1985 and had properly submitted change-of-address information. He received the P2-72, addressed to his old residence, on October 10, 1986. He did not receive, though, by either registered or regular mail, the Notice of Proposed Removal sent to his old address and dated November 22, 1985--the signature on the registered mail receipt for that item is not his. He did receive the Letter of Decision dated December 20, 1985. The depression which had been the cause of much of his absence was family related, but his family situation has improved.

Postal Service records show that the grievant returned

from an extended, approved absence in late August 1985, and was again absent beginning on September 30. He returned to work on November 29, 1985. Records also show that a copy of the Notice of Proposed Removal was given to a Union official on November 26, 1985. Baginski testified that a Union Shop Steward on another shift had shown him a copy of the Notice at some point.

The Parties' Positions

The Postal Service argues as follows: The grievance is not arbitrable because it was not timely filed at Step 1. Assuming arguendo that the matter is arbitrable, the grievant was discharged for just cause. He was on a last-chance probation and he failed to provide acceptable medical documentation for his continuous absence.

The Union argues as follows: The grievant never received the Notice of Proposed Removal and only saw a copy of it after the time for the Step 1 filing had passed. Furthermore the Postal Service impliedly waived any arbitrability objection by addressing the grievance solely on the merits at Step 3. As to the merits, the grievant did submit medical documentation, and he was never told that such documentation was inadequate--if he had been told he could have corrected any deficiency. In this connection there is no reason to doubt that the grievant was incapacitated--

he had in fact been on an extended approved leave earlier for the depression that recurred in October of 1985.

Discussion

A. Arbitrability

The Postal Service argues that there is a legal presumption of proper mailing where as here a certificate was executed. The Arbitrator does not disagree. However, he also believes that here that presumption was effectively rebutted. Not only did the grievant testify credibly that he had not received the Notice, but the signature on the certified mail receipt was obviously not that of Baginski. Moreover, Baginski had changed his residence and the Notice was addressed to his old, not new home--about which, he testified he had notified the Service. The Arbitrator finds on these facts that the Service has not demonstrated that the grievance was untimely filed. There is, of course, no dispute that Baginski promptly protested the Notice at the time he testified he became aware of it.

B. The Merits

The disciplinary action at issue here was not taken against the background of a clean slate. On the contrary, Baginski was serving a year's probation on a last-chance basis for previous AWOL. That probation had been agreed

to by the Union, in return for the Service's rescinding a Notice of Proposed Removal and reducing the discipline in that instance to a 14-day suspension. Moreover, there had been within the prior year another Proposed Removal that had been modified to a 14-day suspension, as well as a 3-day suspension and two Letters of Warning, all relating to Baginski's attendance. Under the circumstances the Arbitrator believes that he has very limited discretion in this matter. The only question really is whether Baginski was AWOL during the period beginning on September 30, 1985. If he was, the Service had ample cause to discharge him.

Arguably a case might be made that Baginski on October 10 presented medical evidence to the Service documenting his absence from September 30 to that date. Whether the Service should have regarded that documentation as acceptable is, though, a moot question. The fact is that Baginski did not, as that documentation stated he would, return to work on October 11. On the contrary, he did not report for work or provide any documentation for his absence until the end of November, and the documentation he then supplied was clearly defective. That documentation did not even purport to offer a medical opinion that Baginski was incapacitated for work from October through November--

the writer, on the contrary, reported that Baginski had become her patient on November 26. Furthermore the writer gave no indication as to Baginski's prognosis. It seems reasonable to conclude that this medical note was obtained as an after-the-fact attempt by Baginski to provide some rationalization for an absence of more than six weeks during which he had not sought medical assistance. Under the circumstances the Arbitrator concludes that Baginski was continuously AWOL, and that the Postal Service therefore had just cause to remove him.

Dated: September 5, 1986

Daniel G. Collins

DANIEL G. COLLINS, Arbitrator

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated 1984-87, and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

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The Postal Service had just cause to discharge Walter Baginski. The grievance accordingly is denied.

Daniel G. Collins

DANIEL G. COLLINS, Arbitrator

State of New York)
) ss.:
County of New York)

On this 5th day of September, 1986, before me personally came and appeared DANIEL G. COLLINS to me known and known to me to be the individual described in and who executed the foregoing instrument and that he acknowledged to me that he executed the same.

JOSEPH A. YANNANTUONO
Notary Public, State of New York
No. 31-4359370
Qualified in New York County
Commission Expires March 30, 1995