

NATIONAL ARBITRATION
BEFORE IMPARTIAL ARBITRATOR STEPHEN B. GOLDBERG

In the Matter of Arbitration)
)
between)
)
UNITED STATES POSTAL SERVICE) Case No. Q15C-4Q-C 17697250
) and Case No. Q15C-4Q-C 18033533
and) Hatch Act and LWOP
)
AMERICAN POSTAL WORKERS)
UNION, AFL-CIO)
and)
NATIONAL POSTAL MAIL HANDLERS)
UNION)
And)
NATIONAL ASSOCIATION OF)
LETTER CARRIERS, AFL-CIO)
)

BEFORE: Stephen B. Goldberg, Arbitrator

Appearances:

United States Postal Service: Brian M. Reimer, Isabelle Dorlan, Attorneys,
United States Postal Service; Shannon R. Richardson, Labor Relations
Specialist

American Postal Workers Union, AFL-CIO: Melinda K. Holmes, Jason R.
Veny, Attorneys (Murphy Anderson, PLLC)

National Association of Letter Carriers: Keith E. Secular, Attorney (Cohen,
Weiss and Simon, LLP)

National Postal Mail Handlers Union: Bruce R. Lerner, Andrew Lyubarsky,
Attorneys (Bredhoff & Kaiser, PLLC)

Place of Hearing: United States Postal Service, 475 L'Enfant Plaza,
SW, Washington, D.C.

Hearing Date: May 2, 2018

Date of Award: August 6, 2018

Relevant Contract Provisions: Articles 5, 10.2, 19, and 43.1

Contract Year: 2015-2018

Type of Grievance: Contract Interpretation

SUMMARY OF AWARD

1. The dispute is arbitrable.
2. The Postal Service violated Article 5 and 10.2 by making changes in the ELM, Exhibit 514.4 and PS Form 3971. The Postal Service also violated Article 19 by making these changes without following the procedure set out in that Article.
3. The Postal Service must rescind the changes to the ELM, Exhibit 514.4 and PS Form 3971, and make whole any employees disciplined or whose LWOP requests were denied because they indicated they were requesting “union official” LWOP to engage in partisan political activity.
4. Any further efforts by the Postal Service to change ELM Exhibit 514.4 or PS Form 3971 must comply with Articles 5, 10.2, and 19.



Stephen B. Goldberg
Arbitrator

August 6, 2018

I. SUMMARY OF RELEVANT EVIDENCE

The evidence, which is essentially undisputed, shows that in the fall of 2016, the Office of Special Counsel (OSC), which has exclusive jurisdiction to investigate and prosecute alleged violations of the Hatch Act¹, received a complaint submitted by Senator Ron Johnson, Chairman of the U.S. Senate Committee on Homeland Security and Governmental Affairs. One of Chairman Johnson's constituents, a Postal Service employee, had told Chairman Johnson that the Postal Service was incurring unnecessary overtime costs by releasing employees who were members of the National Association of Letter Carriers (NALC) to participate in the AFL-CIO's Labor 2016 Program (Labor 2016).

Labor 2016 sought to elect Hilary Clinton and other pro-worker candidates across the country by engaging in such activities as door-to-door canvassing, phone banks, and other "get out the vote" efforts. The Union members involved in these efforts were paid by the Letter Carrier Political Fund, which was the NALC political action committee.

1. See 5 U.S.C. 1204 et seq. The regulations implementing the authority of the OSB (and the Merit Systems Protection Board (MSPB)) provide, at 5 C.F.R. Sec. 734.102:

- (a) The United States Office of Special Counsel has exclusive authority to investigate allegations of political activity prohibited by the Hatch Act Reform Amendments of 1993, as implemented by 5 CFR part 734, prosecute alleged violations before the United States Merit Systems Protection Board, and render advisory opinions concerning the applicability of 5 CFR part 734 to the political activity of Federal employees.
- (b) The Merit Systems Protection Board has exclusive authority to determine whether a violation of the Hatch Act Reform Amendments of 1993, as implemented by 5 CFR part 734, has occurred, and to impose a penalty of removal, reduction-in-grade, debarment from Federal employment for a period not to exceed 5 years, suspension, reprimand, or an assessment of a civil penalty not to exceed \$1,000, for violation of the political activity restrictions regulated by this part.

OSC investigated Chairman Johnson's complaint, and on July 14, 2017, issued a report of the results of its investigation. ("Report of Hatch Act Investigation: Facilitating Labor Union's Political Activity Through Use of 'Union Official' Leave Without Pay".) OSC found the existence of a practice by which NALC would provide a Postal Service Headquarters Labor Relations executive with a list of carriers NALC had recruited and wanted released to participate in Labor 2016. The Labor Relations executive would disseminate the list to the relevant field offices, which would release the designated carriers on "LWOP – Union Official" leave status. While some Postal Service local offices voiced concerns regarding the impact such releases would have on their daily operations, postal field management ultimately instructed their offices to release the designated carriers.

OSC found that such practices were long-standing, going back several election years. It further found that although these practices were intended to engender goodwill with the Union, they constituted a systemic violation of the Hatch Act, and created an institutional bias in favor of the NALC's endorsed political candidates, a result prohibited by the Hatch Act.

OSC concluded that disciplinary action against the Postal Service Labor Relations executive involved was not warranted due to mitigating circumstances. It stated, however, that "OSC recommends that USPS take institutional corrective action" (p. 21). The OSC Report went on to state (p. 23):

USPS must take affirmative steps to prevent future Hatch Act violations. First, to ensure that it is administering its programs in a politically neutral manner, USPS should exclude political activity, as defined by the Hatch Act, from the acceptable uses of union official LWOP. . . . Second, USPS management should not require or suggest that union members be released to engage in political activity. Rather, USPS should implement a "hands off" approach to a union's political activity. . . . USPS headquarters, area LR managers, and district LR managers should not enable a union's political activity through practices that create institutional biases for certain candidates.

Furthermore, OSC stated:

USPS must prevent future violations through changes in its practices regarding corrective action to USPS, and agency representatives appear ready to take the steps necessary to comply with the Hatch Act. OSC asks USPS to notify OSC of its corrective action plan no later than August 31, 2017. OSC attorneys are available to assist USPS in its efforts to take corrective measures.

On August 31, 2017, the Postal Service presented its proposed Four-Part Corrective Action Plan. The first two parts of the Plan, which are at the heart of the instant dispute, state, in relevant part:

A. Amend the Employee and Labor Relations Manual

The Postal Service will amend the ELM to prohibit the use of LWOP - Union Official for partisan political activity as defined by the Hatch Act and its implementing regulations. Specifically, Exhibit 514.4 of the ELM, *Acceptable Reasons and Instructions for LWOP*, will be changed to comply with . . . OSC's decision . . . Exhibit 514.4, Item (j), Instructions for "Union business," will include the following sentence: "Partisan political activity, as defined by the Hatch Act and its implementing regulations, is not an acceptable reason for union business LWOP."

B. Revise Postal Service Form 3971 (Request for or Notification of Absence)

Form 3971 is the form on which postal employees request leave. To request LWOP, an employee checks the box for "LWOP". On the reverse side of the form, there are a variety of LWOP codes that can be used, including code 84 for "LWOP – Union Official." The proposed revised form will include the following statement:

**LWOP – Union Official (Required
Certification)**

By signing this form, I certify that this request is not for the purpose of engaging in partisan political activity as defined by the Hatch Act and its implementing regulations.

The employee's signature is required on the front of the form. The form also includes the following statement:

Warning: The furnishing of false information on this form may result in a fine of not more than \$10,000 or imprisonment of not more than 5 years, or both (18 U.S.C. 1001).

Thus, an employee who seeks "LWOP - Union Official" for the purpose of engaging in "partisan political activity as defined by the Hatch Act and its implementing regulations" has provided false information on Form 3971.

The remaining portions of the Postal Service proposed Corrective Action Plan – Parts C and D – set out the Postal Service's plan to communicate the changes in Parts A and B to all Postal unions, and to educate Postal Service employees about the Hatch Act's restrictions. The Unions do not here challenge Parts C and D of the Plan.

On September 13, 2017, OSC advised the Postal Service in a letter from Acting Special Counsel Adam Miles to Postmaster General Megan Brennan, that OSC accepted the Postal Service's 4-part Corrective Action Plan. The OSC letter stated, in relevant part:

At the conclusion of [its report of July 14, 2017], OSC instructed USPS to devise a plan to correct the institutional practices that gave rise to the Hatch Act violations we identified no later than August 31, 2017.

Specifically, OSC directed USPS to exclude political activity, as that term is defined in the Hatch Act regulations, from the acceptable uses of union official LWOP, and to take a "hands off" approach to union political activities in the future. In consultation with OSC, USPS prepared a corrective action plan and timely presented it to our office.

USPS's plan consists of four parts. The first two address the interpretation of political activity as an acceptable use of union official LWOP. First, USPS will amend the Employee and Labor Relations Manual section concerning LWOP to state that partisan political activity is not an acceptable reason for taking union official LWOP. Second, USPS will revise Postal Form 3971 (Request for or Notification of Absence) to require employees requesting union official LWOP to certify that the request "is not for the purpose of engaging in partisan political activity as defined by the Hatch Act and its implementing regulations." These changes are required to remediate the systemic Hatch Act violations identified in OSC's report. In implementing these changes, USPS will safeguard against future violations.

The third and fourth parts of USPS's plan involve communicating the changes discussed above with the postal unions and educating USPS employees at all levels about the Hatch Act's restrictions. OSC acknowledges that USPS already provides Hatch Act information to employees on a regular basis, but these additional measures are necessary to eradicate the longstanding institutional practices that OSC identified as problematic.

As a whole, USPS's four-part corrective action plan adequately addresses the systemic Hatch Act violations that OSC found during its investigation. OSC attorneys continue to be available to assist USPS as it implements these corrective measures.

On October 26, 2017, the Postal Service notified the APWU that it intended to implement its Corrective Action Plan and comply with the Hatch Act. On the following day, October 27, 2017, the Postal Service sent APWU copies of the revised ELM, Exhibit 514.4; the revised PS Form 3971; and the Corrective Action Plan. (Prior to these communications, the Postal Service had not advised APWU that it was contemplating changes in the ELM or revised PS Form 3971.)²

On November 28, 2017, APWU filed a Step 4 dispute under Article 15, followed by an appeal to arbitration on April 10, 2018. APWU also filed an Article 19 appeal to arbitration on February 15, 2018. These cases were consolidated for hearing on May 2, 2018. NALC and the National Postal Mail Handlers Union (NPMHU) intervened at the arbitration hearing on behalf of APWU. (APWU and the Intervenors will be referred to collectively as "the Unions".)

II. DISCUSSION

According to the Union, the Postal Service's October 2017 changes to the ELM 514 and P.S. Form 3971 violated (1) Article 10.2.A, which bars the Postal Service from making mid-term changes in the leave program and policies in ELM Subchapter 510; (2) Article 5, which bars unilateral changes affecting wages, hours, and other terms and conditions of employment, and; (3) Article 19, which, *inter alia*, bars the Postal Service from making changes in published regulations directly relating to wages, hours, or working conditions without notice and consultation with the Union in a series of carefully defined steps.

² An electronic Postal Bulletin of April 26, 2018, stated that effective that date, the Postal Service was revising ELM 514.4 "to update acceptable reasons and instructions for leave without pay (LWOP)". The same Bulletin stated that the revision would be incorporated into the next online update of the ELM. According to the Union, (Brief, page 9), "The Arbitrator should take judicial notice that as of July 2, 2018 [the date on which briefs were filed], the online ELM had not been updated with the changes."

The Postal Service defense to the charges is two-fold. Initially, the Postal Service asserts that the matter is not arbitrable because the changes at issue were the result of an OSC decision, and the arbitrator lacks the authority to overrule such a decision. Secondly, according to the Postal Service, interpreting the Agreement in light of the OSC decision leads to the conclusion that the changes made by the Postal Service did not violate the Agreement.

A. Arbitrability

The Postal Service asserts (Brief, pp. 8-9):

This case is not arbitrable because neither the parties nor the arbitrator have the authority to override the OSC's determination that the changes to the ELM and the PS Form 3971 were required to comply with the Hatch Act. The OSC's investigation and the Postal Service's compliance with the OSC's decision came under the statutory and regulatory framework for allegations of Hatch Act violations. Here, the OSC investigated the allegations that the Postal Service violated the Hatch Act and determined that regulatory language in a manual (the ELM) had to change to in order to comply with the law.

The Postal Service did not have the option of ignoring the OSC's orders with impunity. Under 5 U.S.C. § 1216(c), “[i]f the Special Counsel receives an allegation concerning [political activity that violates the Hatch Act, among other things], the Special Counsel may investigate and seek corrective action under section 1214 and disciplinary action under section 1215 in the same way as if a prohibited personnel practice were involved.”

Section 1214 provides, among other things, that ‘[i]f, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the [MSPB] for corrective action.’ 5 U.S.C. § 1214(b)(2)(C).

The Postal Service does not have the authority to undo the regulatory changes it made to comply with the Hatch Act, as determined by the OSC. . .

The Postal Service argument fails to take into account the limited authority vested in the OSC. As the Unions point out, the OSC does not have the power to determine whether a violation of the Hatch Act has occurred, much less to determine an appropriate remedy for such a violation. OSC is authorized only to investigate allegations of Hatch Act violations, to prosecute alleged violations before the Merit Systems Protection Board, and to issue advisory opinions. It is only the Merit Systems Protection Board which has the authority to determine whether a violation of the Hatch Act has occurred, and if so, to impose an appropriate penalty. An opinion or allegation by OSC of a Hatch Act violation is thus without legal effect, and, contrary to the Postal Service assertion, may be ignored without penalty.

To be sure, ignoring an OSC opinion or allegation creates the risk that OSC will institute proceedings before the MSPB. The possibility that it will do so does not, however, lead to the conclusion that the Postal Service need not abide by its contractual commitment to arbitrate. The Postal Service and APWU have agreed to arbitrate all disputes arising under the Agreement, and it is well-settled that only clearly-defined exceptions to such a broad agreement are to be inferred.³ There exists no basis for inferring that the arbitration provision of the National Agreement was intended to exclude any dispute in which the arbitrator's decision may create the risk of legal proceedings against one of the parties.

Furthermore, to the extent that the Postal Service argument rests upon the proposition that the arbitrator cannot overrule an OSC decision, it is wide of the mark. The question before the arbitrator is not whether the OSC "decision" is sound, but solely whether the Postal Service has violated the Agreement. Hence, an arbitral decision sustaining the Union's position would not overrule the OSC

³ See Case No. HOC-NAC-12 (Snow, 1999; see also Elkouri & Elkouri, Chapter 6, How Arbitration Works (7th ed. 2012)).

“decision”. Such an arbitral decision would serve merely as the arbitrator’s interpretation of the Agreement, leaving the legal merits of the OSC “decision” untouched.⁴

In sum, I reject the Postal Service contention that the instant dispute is not arbitrable.

C. Did the Postal Service Changes in the ELM and Form 3971 Violate the Agreement?

The Union’s arguments that the Postal Service violated the Agreement are each facially valid. The changes in ELM Subchapter 514 and PS Form 3971, which is encompassed in Subchapter 514, violated Article 10, Section 2, which provides:

The leave regulations in Subchapter 510 of the Employee and Labor Relations Manual, insofar as such regulations establish wages, hours and working conditions of employees covered by this Agreement, other than PSEs, shall remain in effect for the life of this Agreement.

These changes also violated Article 5, which provides:

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

Finally, by making these changes without notice to, or consultation with, APWU, the Postal Service violated the procedural requirements of Article 19, which require notice and consultation prior to making changes that directly relate

⁴In light of my conclusion that the opinions expressed by OSC had no legally binding effect upon the Postal Service, I express no view on the Unions’ argument that OSC did not intend its statements to have a binding effect, but were mere recommendations regarding appropriate Postal Service action. Furthermore, I express no opinion on the OSC view that the Postal Service administration of its LWOP policy violated the Hatch Act, or that the revisions in the ELM adopted by the Postal Service were necessary to remedy any violation that did occur.

to wages, hours, and working conditions, and the substantive requirement of Article 19 that any such changes must be not inconsistent with the Agreement, and be fair, reasonable, and equitable. I have found the changes to be inconsistent with the Agreement, and as such they cannot be fair, reasonable, and equitable.

The Postal Service's primary argument in defense to the allegations that its changes in the ELM violated Articles 5, 10.2, and 19, is similar to its argument that this matter is not arbitrable. It points out that Article 5 provides that the Postal Service will not take any action which is inconsistent with its obligations under law. Similarly, Article 43.1 contemplates that portions of the Agreement may be declared invalid by a court of competent jurisdiction.⁵ It concludes (Brief, page 11):

Here, the agency with authority to enforce the Hatch Act – the OSC – ruled that the Postal Service's administration of its leave program violated the law, and required regulatory changes as a fix.

Articles 5 and 43.1 contemplate that the National Agreement will be consistent with the law. Thus, even if this case were arbitrable, the Postal Service's actions did not violate the National Agreement.

The flaw in the Postal Service's argument on the merits is the same as in its argument on arbitrability. The OPS does not have the authority to enforce the Hatch Act; only the Merit Systems Protection Board possesses that authority. Hence, the OSC opinion that the ELM violated the Hatch Act is not that of a court (or agency) of competent jurisdiction, and the Postal Service may not rely on the OSC ruling as a defense to the otherwise valid Union allegations that the Postal Service's changes in the ELM violated Articles 5, 10.2, and 19 of the Agreement.⁶

⁵ Article 43, Section 1 provides:

Should any part of this Agreement or any provision contained herein be rendered or declared invalid by reason of any existing or subsequently enacted legislation or by a court of competent jurisdiction, such invalidation of such part or provision of this Agreement shall not invalidate the remaining portions of this Agreement, and they shall remain in full force and effect.

⁶ The Postal Service also defends against the charge that it violated Article 19 on the grounds that APWU counsel conceded at the arbitration hearing that the absolute bar in Article 10.2 on making changes in Subsection 510 of

For these reasons, I conclude that in making changes in the ELM, Exhibit 514.4, and PS 3971, the Postal Service violated Articles 5 and 10.2 of the Agreement. The Postal Service also violated the Agreement by making these changes without following the procedure set out in Article 19.

III. REMEDY

According to the Union, it expects that if the changes in the ELM and Form 3971 are rescinded, the Postal Service will take some action to change its practices. It states (Brief, page 22):

There are ways for the Postal Service to act on OSC's recommendations without violating the APWU National Agreement. Obviously, management was free to educate and direct its managers on the proper application of the existing LWOP rules. But if the Postal Service is insistent on changing more than its managers' practices, and is also genuinely committed to the importance of providing increased Hatch Act education to all of its employees, it must bargain with the Union. To that end, the APWU requests the following 3-part remedy to provide relief for the Postal Service's contract violations but also address the underlying issue of managers violating the Hatch Act.

The 3-part remedy requested by the Union is that the Arbitrator direct the Postal Service to:

the ELM renders Article 19, which deals in large part with the procedures that must be followed in making changes in Postal Service regulations, is inapplicable to this case. APWU counsel did not, however, so concede. Rather, she stated, at the transcript page relied upon by the Postal Service:

[M]uch of what Mr. Reimer described is really their defense to those unilateral changes, and if you were to accept that defense and excuse the Postal Service entirely from its obligations in Article 10.2 and Article 5, *then, at a minimum, we believe that these changes to the ELM had to be made following the process of Article 19.* (Emphasis supplied.)

As is evident from the transcript, the position taken by APWU was not that Article 19 is inapplicable to this case, but that even if, contrary to the APWU arguments, the Postal Service did not violate Articles 10.2 and 5 in making the changes, it nonetheless violated Article 19 by failing to follow the procedure set out in that Article for making changes in Postal Service regulations.

- (1) Rescind the changes to ELM 514.4 and Form 3971 until two further steps (set out below as (2) and (3)) are taken, and to make whole any employees disciplined or whose LWOP requests were denied because they indicated they were requesting “union official” LWOP to campaign;
- (2) Notify the Union within 15 days of the Award of the Postal Service’s plan and proposal to correct the misconduct of its managers found by OSC in its Report;
- (3) Bargain with the APWU for 90 days from the date paragraph (2) is completed over any changes to ELM Subchapter 510 or other changes to wages, hours, and working conditions. If, after 90 days, the parties have not reached agreement, return the matter to the Arbitrator for prompt resolution of any unsettled issues or proposals.

The remedy requested by the Union will be granted only in part. I have found that the Postal Service violated Article 10.2, Article 5, and Article 19 in the changes it made to ELM Exhibit 514.4 and Postal Service Form 3971, and will, as the Union requests, direct the Postal Service to rescind those changes. I shall also direct the Postal Service to make whole any employees disciplined or whose LWOP requests were denied because they indicated they were requesting “union official” LWOP to engage in partisan political activity

Implicit in my finding that the Postal Service violated Articles 5, 10.2, and 19 in making changes to ELM Exhibit 514.4 and Postal Service Form 3971 is that any further efforts to ELM Exhibit 514.4 and Postal Service Form 3971 must comply with those Articles. Lest there be any doubt that such compliance is an integral portion of the remedy, the Award shall so state.

I see no valid reason, however, for the Arbitrator to specify the details by which the Postal Service is to comply with Articles 5, 10.2, and 19. To the contrary, I conclude that doing so in the manner sought by the Union would involve the Arbitrator further into enforcement of the remedy portion of the Award than is warranted by the facts elucidated in this proceeding. Accordingly, I shall not grant paragraphs (2) and (3) of the Union’s remedy request.

IV. AWARD

- The dispute is arbitrable.
- The Postal Service violated Article 5 and 10.2 by making changes in the ELM, Exhibit 514.4 and PS Form 3971. The Postal Service also violated Article 19 by making these changes without following the procedure set out in that Article.
- The Postal Service must rescind the changes to the ELM, Exhibit 514.4 and PS Form 3971, and make whole any employees disciplined or whose LWOP requests were denied because they indicated they were requesting “union official” LWOP to engage in partisan political activity.
- Any further efforts by the Postal Service to change ELM Exhibit 514.4 or PS Form 3971 must comply with Articles 5, 10.2, and 19.



Stephen B. Goldberg
Arbitrator

August 6, 2018