C-30646

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration between The U.S. Postal Service and The National Association of Letter Carriers, AFL-CIO	Grievant: A. Francis Post Office: Hartford CT Case Number: B06N-4B-D 13014489 Union Number: 1206108504 DRT # 14-251989

Before: Donald J. Barrett, Arbitrator

Appearances:

For the U.S. Postal Service: Vernon N. Tyler, Jr. District Labor Relations Specialist

For the National Association of Letter Carriers: Charles Carroll, Regional Advocate

Place of Hearing: Hartford CT

Date of Hearing: February 7, 2013

Award: This grievance is denied

Date of Award: February 18, 2013

AWARD SUMMARY

The US Postal Service has demonstrated convincingly that they had just cause to remove the grievant for the statements he made that violate the Zero Tolerance Policy and the ELM 665.16

STATEMENT OF PROCEEDINGS

This matter came before me at a hearing on February 7, 2013 at the Hartford Ct district office, pursuant to the grievance-arbitration provisions of the 2006-2011 Collective Bargaining Agreement between the US Postal Service, also known as the Service, or Management, and the National Association of Letter Carriers, also known as the Union.

The parties appearing before me were very well prepared, professional, articulate, and represented their respective positions with distinction.

They were provided a full, fair and impartial opportunity to present their respective positions, present evidence, argument, and witnesses.

The Service presented the following witnesses on their behalf:

Ms. Sara Daddona, Letter Carrier & Union Steward

Mr. Antoine Wilson, United States Postal Inspector

Ms. Bertha Billington, Manager, Customer Services

The Union presented one witness on their behalf, Mr. Ambrose Francis, the grievant

At the request of the parties, each witness was duly sworn by the Arbitrator in advance of their testimony. Each advocate was afforded ample opportunity to examine, and cross-examine each witness.

The Service and the Union provided both written and oral Opening Statements. The Union provided both a written and oral Closing Statement, and the Service provided an oral Closing Statement, all of which were entered into the record.

At the conclusion of this hearing, the Service provided the Arbitrator with three (3) Regional arbitration awards for his consideration. I have carefully reviewed each, and shall offer comment if appropriate.

The parties submitted JOINT EXHIBITS consisting of the following:

J-1, The National Agreement between the parties.

J-2, The Moving Papers, Pages 1-67.

The parties did not agree to any STIPULATED FACTS NOT IN DISPUTE

ISSUE AS FRAMED BY THE PARTIES

The parties at hearing agreed that the Issue to be decided by the Arbitrator would be that as stated by the Step B Team, as follows:

"Did management violate the National Agreement, Article 16, and did just cause exist when they issued the Grievant a notice of removal dated 9/14/12 and a letter of decision dated 9/27/12 and if so, what is the proper remedy?"

BACKGROUND

In a letter dated September 14, 2012 the grievant was issued a Notice of Proposed Removal, and charged with "Unacceptable Conduct", and a violation of the district's "Zero Tolerance Policy". It was alleged that the grievant referred to a female co-worker as a "white bitch".

It was also alleged that the grievant stated to another co-worker that if he (the grievant) had a gun, he would shoot 3-4 employees. On September 27, 2012 the grievant was issued a "Letter of Decision" in which the Service notified the grievant he was being removed from postal employment based on the charges as outlined previously.

CONTRACT PROVISIONS CITED

"ARTICLE 16 - DISCIPLINE PROCEDURE"

Section 1. Principles

"In the administration of this Article, a basic principle shall be that discipline should 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."

POSITION OF THE PARTIES IN THIS MATTER

THE U.S. POSTAL SERVICE

The Service maintains that on July 18, 2012, employee Sara Dadonna notified her manager Ms. Billington that as she walked past the grievant he "mumbled" the words "white bitch".

The Service states further that the manager brought the grievant into the office to discuss the allegations but he (the grievant) became loud, refused to talk to the manager, and left the office, punched out and left the building.

The Service states that the following day, July 19th, employee Dadonna once again sought out the manager, and informed her that she had been told by another employee, Ronald Francis that while the grievant was visiting his home, the grievant told him that he wanted to get a gun and shoot four employees at the post office.

The Service further states that the manager contacted the US Postal Inspection Service, who began an investigation into these allegations. The Service maintains that Postal Inspector Wilson interviewed employees Dadonna and R. Francis. The Service offers that Inspector Wilson attempted to interview the grievant, unsuccessfully, but did converse with the grievant's attorney and relayed the allegations against him. The Service maintains that neither the grievant, nor his attorney responded further to the inspector.

The Service argues that they conducted a pre-disciplinary interview with the grievant, who denied all allegations made against him. The Service argues further that the evidence provided demonstrates the seriousness of the charges, and violations of the policies stated in the notice, and as such requests that this grievance be denied.

THE NATIONAL ASSOCIATION OF LETTER CARRIERS

The Union maintains that the Service as failed to establish just cause for the removal of the grievant, and as such the removal action rescinded and the grievant should be reinstated with full back pay and benefits.

The Union argues that the Service failed to conduct an appropriate investigation prior to taking the action against the grievant - that no written statements were ever obtained by the inspectors or Service from the two employees making the allegations, with the Service relying upon hearsay only.

The Union argues further that neither of the employees making the allegations could be specific regarding the dates such allegations were to have taken place, that the two employees, who both claim to be fearful of the grievant cannot recall exactly when the grievant was supposed to have made such statements to them - thereby calling into question the veracity of such claims.

The Union offers that the Service failed to act in a timely manner, taking over a month to make a decision to remove the grievant, after having the only evidence against the grievant, that of the Inspection Service Report in hand for weeks previous.

The Union offers further that the Service denied the grievant his due process, they failed to provide any evidence beyond questionable hearsay offered by two employees who could not account the exacts date/time of these allegations, and would not give a statement in writing, and they acted without just cause in removing a long time employee.

OPINION OF THE ARBITRATOR

Oliver Wendell Holmes, the noted jurist once said, "...The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger..."

The paramount question placed before me remains the words, if in fact stated by the grievant, were used in this manner, and in violation of policy.

In matters such as this, the removal of a long term employee, with no prior discipline the burden of proof rightfully rests with the Service. As stated in the parties Agreement, "...discipline should be corrective in nature, rather than punitive." And, "No employee may be disciplined or discharged except for just cause." The concept of "Just Cause" as stated by the parties in their Joint Contract Administration Manual has" no precise definition", and "contains no rigid rules that apply in the same way in each case of discipline or discharge." (See J-CAM, Page 16-1) It is an inexact standard that may be most comparable to another known as the "reasonable person" standard. That standard requires that an individual act as a person of ordinary sense, and exercise ordinary caution and judgment. (See Just Cause, The Seven Tests, Koven & Smith, 2nd ed. BNA, 1992) In questions such as the imposition of discipline, the "ordinary person" is normally viewed by arbitrators to be management, and when deciding if the burden has been met, the arbitrator must be that "reasonable person."

Therefore, a question before me is whether the Service had just cause, and acted as an ordinary person would act in response to the statements leveled against the grievant.

First, it must be determined if the grievant, in fact uttered such statements that led to this action, and I find that he did. The grievant offered a complete denial, during his pre-disciplinary interview (PDI) with management, and under oath during this trial. The grievant offered that he never called an employee a "white bitch", and in fact respects women. The grievant also denied stating that he wanted to get a gun and shoot fellow employees, in fact doesn't own a gun and has no intention of getting a gun. The grievant, while appearing before this arbitrator appeared sincere and sure.

However, I find the testimony offered by Ms. Dadonna, Ms. Billington and Inspector Wilson to be exceedingly more credible. Further, the statements offered by employee Ronald Francis, the more serious of the two utterances were unprovoked and without malice.

There appeared to be little doubt that the relationship between the grievant and Dadonna, a Union steward was strained. However there was no evidence that this strain would be cause for the steward to fabricate such a statement. The evidence does demonstrate that soon after the grievant made this statement, she reported it to the manager, Ms. Billington, who took it seriously enough to initially seek out advice. Ms. Dadonna expressed concern to her manager, later to law enforcement, and later still at hearing regarding her fear of the grievant. She was found to be credible and forthright with no discernible reason to make such an accusation without good cause.

The statements offered by Mr. Francis to the manager and postal inspector must be viewed within the context in which they were given, as this employee did not appear before me. I find, however that this employee, who also expressed concern for his personal safety to postal officials nonetheless provided oral statements to these same officials soon after learning about Dadonna's complaint to the manager. I find those statements, as expressed in the Investigative Memorandum (See J-2, Page 24), and as relayed by the manager and inspector at hearing to be credible, and unprovoked. Mr. Francis had no reason to fabricate such a serious accusation. He offered that this statement was made in his own home during a time when he was attempting to assist the grievant – hardly circumstances under which Mr. Francis had reason to make up such a statement. He also offered that the grievant was intoxicated during his visit, while the grievant also denies this, offering that he never drinks outside his own home.

One must view the statements offered by these two employees, and the grievant through the context in which they were made. The only commonality between Dadonna's and Ron Francis's statements was the concern for their wellbeing. Other than that, while one apparently had a strained relationship with the grievant, the other apparently had a close enough relationship that he welcomed him into his home, and offered the grievant advice. The grievant, on the other hand has obvious reason to deny such serious allegations. The grievant denies making the statement to Dadonna, denies making the statement to Francis, denies even being intoxicated when making the statement to Francis, (a condition that some might find to offer mitigation for such a serious offence) and denies making statements attributed to him by manager Billington. In sum, I find that the grievant simply denies everything. I find no reason, however to dispute the offerings of the two employees, the manager, and the postal inspector – either of which have any reason or benefit to fabricate these accusations.

Therefore finding just cause due to the validity to the claims made against the grievant, one must turn to the penalty imposed by the Service against the grievant for making such statements, and whether this penalty is appropriate.

The Union's advocate, an experienced, highly qualified and capable representative argues passionately that the grievant was denied his due process, that the Service failed to conduct the required investigation, and imposed a penalty too severe for this infraction. With all due respect, I disagree. The Service, within a reasonable time period after they first learned of the allegations contacted the US Postal Inspection Service, who conducted an independent investigation into the allegations.

They attempted to interview the grievant, who failed to respond, other than having his attorney seek information from this investigation.

The Service, through the manager, and with the Union present conducted a PDI, where the grievant responded to the allegations. The manager, relying upon the PDI, and the IM made a decision to propose the grievant's removal, and this proposal was affirmed by the next higher level manager, who detailed her considerations of the "Douglas Factors" in accordance with Article 16 protocol. I do not find that the period that elapsed between the proposal and the decision to be excessive, under the circumstances. I find this process as it was employed to be in conformance with an overwhelming amount of arbitral precedence, and the requirements of Article 16 of the Agreement/J-CAM.

The Agreement rightfully offers that discipline be corrective, rather than punitive - that the penalty imposed may not be arbitrary or capricious, and must be reasonable in view of the nature of the offense, with consideration for the employee's entire record. Thus we return to a "reasonable person" consideration, and how would a reasonable person be expected to respond to the statements made by the grievant, and how would a reasonable person view the penalty imposed for the infractions.

Arbitrator Carlton Snow offered the following, "If an employer has acted in good faith after a fair investigation and has imposed a sanction which is not inconsistent with discipline used in other cases, an arbitrator must scrutinize the evidence carefully before too quickly substituting his own judgment for that of management." He offered further, "There are basically two areas of proof in a discharge case. The first issue involves proof of the wrongdoing. Second, assuming that guilt is established, there is a question concerning whether the sanction imposed by the Employer fits the infraction."(See Case No. W8N-5B-D-12613, 7/20/1981)

In the matter before me, the grievant is an employee with many years of service. He has no prior discipline noted to the arbitrator, and in consideration of these facts, as noted above the arbitrator must completely scrutinize the penalty imposed upon him. The statement made to Ms. Dadonna, calling her a "white bitch" is reprehensible. The use of language such as this in the workplace, particularly directed at someone else is particularly egregious and unacceptable, and worthy of discipline.

However, threats of violence against others cannot, and must not be tolerated under any circumstances. Such threats, in today's world and workplace must be taken with the utmost seriousness, no matter the circumstances under which the statements were made, or to whom.

The grievant was charged with a violation of the Connecticut Valley District policy of "Zero Tolerance" of acts or threats of violence in the workplace. This policy, which was not in dispute by the Union precludes "any act of physical violence", "any actual, implied, or veiled threat made seriously or in jest", and "any type of vulgar language which would lead to a hostile workplace." Clearly the second and third of these prohibitions occurred by the grievant's statements to the two employees.

The grievant was also charged with a violation of the Employee & Labor Relations Manual, Chapter 665.16, "Behavior and Personal Habits." This states in relevant part, "Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service." An argument that this statement, if made was done so outside of work and the Service has no right to interfere in someone's personal life is only partially true. To sustain a violation of this charge, the Service must prove there is a nexus between the off duty behavior of the employee and the relationship to his employment, and if the employee's conduct may impair the Postal Service. A reasonable person will conclude that threatening to shoot three to four postal employees, no matter the reasons for such a statement provides a viable nexus to their employment, and without doubt impairs the work environment of the Postal Service. It is also reasonable to conclude that referring to another employee as a "white bitch" would lead to a "hostile workplace", and be unacceptable.

As stated above, I find credible the testimony offered verbally that the grievant made such serious statements to the two employees, and while the grievant offers a denial of such, I find that I must suspend any reasonable thought process to believe him. It is not the role of the arbitrator to substitute his reasoning for the reasoning employed by the grievant when making such unacceptable statements - whatever the reasons the grievant had for making such statements, he alone must be responsible for such actions, particularly when he chooses not to divulge such reasons in his defense, or acknowledge any liability. Further, such statements as made present a clear and present danger.

The threat to get a gun and shoot others, especially naming those whom you would shoot, no matter the circumstances or reasons under which such a statement was made, even outside of the workplace directed at the workplace, must be responded to with the utmost consideration for that workplace and all who may inhabit it. To do anything less would be a dereliction of one's responsibility.

In "Labor and Employment Arbitration, Section 14.03, M. Bender & Co., 2005, it offers that, "The rationale for termination without progressive discipline in such cases is that the infraction is so obviously unacceptable that the employee should have known that it would not be tolerated. To condone egregious behavior by imposing a penalty less than termination would set a precedent for others to claim a right to reinstatement after such an infraction." I find, in and of itself, the threat to get a gun and shoot other named employees to meet that standard warranting the grievant's removal despite his long term employment status, and no previous discipline.

Arbitral precedent has long ago established that an arbitrator should not substitute his judgment for that of the Service unless he finds the penalty to be excessive, unreasonable, or that the Service abused, or exceeded its discretion. In the matter before me, I do not find that to be the case. A reasonable person could not do otherwise.

DECISION

Based on the reasons as stated above, this grievance is denied.

Respectfully Submitted,

Donald J. Barrett, Arbitrator

Date Feb. 18, 13