

28739 A+B

Regular Arbitration Panel

In the Matter of the Arbitration)	
)	
between)	Grievant: Oliver
)	
United States Postal Service)	Post Office: Warrior, AL
)	
and)	USPS Case No: H06N-4H-D 09386752
)	H06N-4H-D 10045727
National Association of Letter Carriers, AFL-CIO)	NALC Case No. 5300918002 5300918003

RECEIVED

Before: Roberta J. Bahakel, Arbitrator

APR 12 2010

VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

Appearances:

For the U.S. Postal Service: Mr. Jimmy Jordan

For the Union: Mr. Steve Vadorsky

Place of Hearing: Birmingham, AL

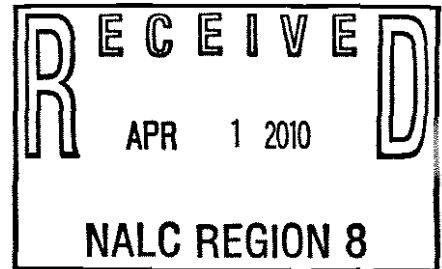
Date of Hearing: March 11, 2010

Date of Award: March 30, 2010

Relevant Contract Provision: Article 16

Contract Year: 2006 - 2011

Type of Grievance: Discipline



Award Summary:

The Grievant was placed on Emergency Placement and subsequently issued a Notice of Removal for alleged theft of mail. The Union raised due process considerations in regard to violations of the Grievant's Weingarten rights and Management's failure to produce requested security tapes. Based on the testimony and evidence presented, the grievances are sustained.

Roberta J. Bahakel
Roberta J. Bahakel

BACKGROUND

The Grievant, Ms. Oliver, has been a letter carrier since 1993. On August 12, 2009 the Grievant went to the doctor because she had not been feeling well due to a history of kidney problems. Her doctor placed her off work until August 17, 2009. On August 14, 2009 the Grievant returned to work, even though she still felt ill, because she knew that the office was short handed and because she had attendance problems in the past and felt she should be at work. The carrier that delivers the route on which the Grievant lives left a packet of mail on the Grievant's case. It was the usual procedure for that carrier to give the Grievant her personal mail at the station and not deliver it on the route. The evidence showed that on August 14, 2009 this packet of mail contained letters addressed to the Grievant, a magazine, and a box of checks with the address facing the back of the magazine. The Grievant testified that she did not look at the individual pieces of the packet once she saw that the mail on top was addressed to her, but took the packet and put it with the rest of her mail and went out to deliver her route. When she returned to the station she picked up the packet and went home. The Grievant testified that when she returned home that she was not feeling well so she put the packet of mail down on her coffee table and took her medication that had been prescribed by her doctor as well as a dose of Ambien, a sleeping aid that had been prescribed for her earlier by her doctor, and went to bed. The evidence showed that later that evening the Grievant took a book of the checks which she had brought home with her and went to several stores and purchased items using the checks. The Grievant testified that she woke up the next day and found various packages in her house that had not been there when she went to bed. She described what she felt was a dream where she recalled being in several places, but did not know how she got from place to place. She stated that she could recall reaching for a can of vegetables, sitting at a stop sign and not knowing where she was, trying to get back into Lowe's, and being at a Barnes and Noble bookstore. She stated that she did not remember any other events of that night.

When the Grievant got ready to leave for work on Saturday, August 15, 2009 she looked in her purse and saw a book of checks which belonged to Vicky Trotter, a customer on the Grievant's route, and realized that some of the checks were missing. The Grievant

determined that the checks she had brought home, thinking that they were a part of her mail, were actually checks that had been misthrown to another route and had been placed with the Grievant's mail so that she could deliver them on her route. The Grievant reported to work, but did not report the incident to Management because no one in management was present in the station. She delivered her route and when she arrived at Trotter's residence she tried to notify Trotter about what had happened. Trotter was not home, so the Grievant left her a note telling her it was very important that she get in touch with her.

The next day, Sunday, August 16, 2009 the Grievant made numerous attempts to contact Trotter and eventually contacted Trotter through Facebook, a social networking site, and left Trotter another message to contact her. On Monday, August 17, 2009 the Grievant again tried to talk with Trotter about what had occurred. Trotter finally contacted the Grievant on Tuesday, August 18, 2009 and they met at Trotter's bank where the Grievant gave Trotter the remaining checks and agreed to make restitution for any checks she had written. The police came and spoke with the Grievant and Trotter. An incident report was filed by the Warrior police and Trotter completed affidavits of Forgery or Unauthorized Signature on the five checks that were written by the Grievant on Trotter's account. Trotter agreed not to press charges against the Grievant if she paid for the amounts on the checks and any overdraft or return charges caused by the Grievant's actions. The Grievant made restitution to Trotter for all amounts and no charges were ever filed against the Grievant. At no time did the Grievant report the incident to Management.

On August 21, 2009 agents from the Office of Inspector General arrived at the Warrior station to interview the Grievant about the events of August 14, 2009. The evidence presented shows that the Grievant began her interview with the OIG agents at approximately 8:15 a.m. The testimony from the OIG agents showed that at approximately 9:52 a.m. the Grievant asked for a Union representative to be present with her for any additional questioning. The Grievant testified that she asked for Union representation at the beginning of the meeting before talking with the agents and that approximately fifteen minutes later Ms. White, the Officer in Charge at the Warrior station, came in and asked her if she wanted Union representation. White testified that at some point the agents came out and told her that the Grievant wanted Union

representation and that she went in and asked the Grievant if she wanted a steward. White attempted to contact a steward, but after an extended period of time it was determined that no one was available, so the Grievant's interview was ended. Based on the information White was given by the OIG agents after the interview with the Grievant, White informed the Grievant that she was being placed on emergency suspension. After the interview had ended the OIG agents determined that they needed to talk to the Grievant about Trotters drivers license, which was also allegedly missing, so they went to the Grievant's house shortly after the interview ended to talk to her. The OIG completed its investigation on September 28, 2009. The Grievant was given an investigative interview on October 26, 2009 and was issued a Notice of Removal for Improper Conduct/Theft of Mail on November 19, 2009. Grievances over the Emergency placement and the Removal were timely filed by the Union and were combined for hearing by the parties.

ISSUE

- 1) Did Management violate Article 16 of the National Agreement when it failed to show just cause for placing the grievant, Nancy Oliver, on Emergency Placement in Off Duty Status beginning on August 24, 2009? If so, what should the remedy be?
- 2) Did Management have just cause via Article 19 when they issued Letter Carrier Nancy Oliver a Notice of Removal on November 19, 2009, and if not, what is the appropriate remedy?
- 3) Did Management violate the grievant's Weingarten Rights, Article 17 and 31 in the course of the investigation, and if so, what is the remedy?
- 4) Did Management violate Article 17 and 31 via Article 19 of the National Agreement by not supplying the Union with all the requested information, and if so, what is the remedy?

CONTRACT PROVISIONS

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.

Section 7. Emergency Procedure

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance.

DISCUSSION

I have reviewed the testimony and exhibits presented at the hearing and considered the closing arguments of the parties. No issue was raised as to the arbitrability of this matter, therefore it is properly before me for decision.

The Union raises several due process arguments, the main ones being that the Grievant's Weingarten rights were violated during the Grievant's meeting with the OIG on August 21, 2009, and that Management failed to produce the security tapes that it obtained in its investigation of this matter to the Union after a request for information was made. The Union

contends that on August 21, 2009 when the OIG agents came to the Warrior station to meet with the Grievant that she requested Union representation at the beginning of the meeting, but that the OIG agents questioned the Grievant for at least one hour without a Union representative present in violation of the Grievant's Weingarten rights.

Management contends that there was no violation of the Grievant's Weingarten rights in that the Grievant did not ask for Union representation until well into the meeting and that once a request was made the meeting was halted while Management tried to contact a Union representative. When no Union representative was found to be available, Management ended the meeting with the Grievant.

The evidence presented showed that the OIG agents in their Report of Investigation, stated that the meeting began at approximately 8:30 a.m., that the Grievant signed her Acknowledgement of Rights form in regard to her Garrity Rights at approximately 8:45 and that she did not request Union Representation until approximately 9:52 a.m. The OIG report states that at that time the agents made known to the Officer in Charge, Ms. White, that the Grievant had requested Union representation and White attempted to contact a representative. When no representative was found to be available the meeting was terminated. The Grievant testified that she requested Union representation when she first went into the meeting. She stated that approximately fifteen minutes later that White came in and asked her if she wanted a Union steward and she replied that she did. The Grievant also testified that she repeatedly asked for a Union Representative while the interview was taking place. On September 25, 2009 the Union steward, Mr. Thomas, interviewed OIC White in regard to the Grievant's removal. One of the questions White was asked was "Did Nancy request a shop steward?" White's response was that about fifteen minutes into the interview (approximately 8:30) the inspectors asked her to contact the Union. At the hearing White testified that she answered Thomas' questions based on her memory of what occurred on August 21, 2009, but that later, when she read the Inspector's report, that her memory was refreshed as to the actual time line of events. It is interesting to note that White's independent recollection of the time that the Grievant requested Union representation, prior to receiving the Report of Investigation, is the same as the time line testified to by the Grievant. If White had not been able to recall when the Grievant asked for Union

representation, then she could have stated so in her interview with Thomas. Based on the testimony and evidence presented at the hearing, it is my determination that the Grievant did request Union representation at the beginning of her interview with the OIG agents and that the interview proceeded until such time as the Grievant again requested Union representation during the interview. The continuation of the interview without a Union representative present after a request has been made is a violation of the Grievant's Weingarten rights.

The Union also contends that the Grievant's due process rights were violated when Management failed to produce the security tapes which the OIG agents obtained and reviewed as a part of their investigation after the Union made a proper request for the production of the tapes. The evidence presented shows that the Union's request, in part, was for:

“A copy of any and all documents, past disciplines with settlement agreements, statements, records, reports, *audio/visual tapes*, photographs, *or other information learned, obtained, developed, or relied upon* by the Postal Service and the Office of the Inspector General's Office in the issuance of the Notice of Removal, dated November 19, 2009 and signed for on November 20, 2009 involving employee City Letter Carrier Nancy Oliver.” [emphasis added]

The testimony and evidence showed that the OIG agents, as a part of their investigation of this matter, obtained security tapes from at least two of the stores, Lowe's and Food World, which the Grievant visited on the night of August 14, 2009. The Report of Investigation shows that the agents were given security tapes which showed the Grievant both inside the store and conducting her transactions, but those tapes were never shared with the Union. The Union is entitled to see any security tapes that Management obtained or reviewed in its investigation even if the tapes were not ultimately relied on in the charges against the Grievant. The purpose of sharing information is to make sure that both Management and the Union have the opportunity to review all evidence against an employee charged with wrongdoing as well as any evidence which might mitigate that wrongdoing. The evidence presented showed that the security tapes were not relied on by Management when it issued the Notice of Removal to the Grievant, but these tapes were reviewed by Management and might have supported the Grievant's version of the events of August 14, 2009. The Union's request was for any tapes learned of or obtained by Management

or the OIG in its investigation of this matter. The security tapes were learned of and were obtained by Management specifically in regard to the Grievant's discipline, but were not provided to the Union, even after a proper request was made. This failure violates the Grievant's due process rights by affecting her ability to develop her defense to the charges against her.

Based on the finding above in regard to the violation of the Grievant's Weingarten rights, together with the violation of the Grievant's due process rights in regard to Management's failure to produce the security tapes obtained by the OIG agents, it is my determination that the due process violations in this matter are sufficient to require the setting aside of the Emergency Placement and the Notice of Removal without discussion of the merits of this case.

DECISION

The grievances are sustained. The Emergency Placement and the Notice of Removal are to be set aside and the Grievant returned to work with full back pay and no loss of benefits. No award is made in regard to any overtime the Grievant might have worked during this time. I will retain jurisdiction over this matter as to the calculation of the remedy only for a period of 120 days.

Done this 30th day of March, 2010.

Respectfully submitted,



Roberta J. Bahakel,
Arbitrator