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Regular Arbitration Panel

In the Matter of the Arbitration)
)
 between) Grievant: Johnson
)
United States Postal Service) Post Office: Orlando, FL
)
 and) USPS Case No: H06N-4H-C 08154647
)
National Association of Letter Carriers,) NALC Case No. B1091-172-08C
AFL-CIO

09-099571

Before: Roberta J. Bahakel, Arbitrator

Appearances:

For the U.S. Postal Service: Ms. Linda Jones

For the Union: Mr. Byron Shelton

Place of Hearing: Orlando, FL

Date of Hearing: August 14, 2008

Date of Award: September 4, 2008

Relevant Contract Provision: Article 17

Contract Year: 2006 - 2011

Type of Grievance: Contract

Award Summary:

The Grievant, a transitional employee of more than 90 days, was denied union representation at his investigative interview in violation of his Weingarten rights. Based on the testimony and evidence presented, the grievance is granted, the discipline issued is set aside and the Grievant is returned to work with back pay.

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BACKGROUND

The Grievant, Mr. Johnson, is a Transitional Employee in Orlando, Florida. On March 4, 2008 he had just finished his route, which is a walking route, and was en route to the station when he was stopped in his vehicle in heavy traffic due to construction. It was a rainy day and the Grievant testified that his shoes were very wet from delivering his route. While stopped the Grievant's foot slipped off the brake and on to the accelerator, causing him to run into the back of the privately owned vehicle in front of him. There were no injuries and no damage to the postal vehicle, but damage to the other vehicle was estimated at \$1,000.00. The Grievant was issued a citation for careless driving. The Grievant called and notified a supervisor of the accident and someone from the station came out to investigate the accident. After driving the postal vehicle back to the station, the Grievant went home and returned the next day at 9:00 a.m. for an investigative interview into the accident. As the Grievant was entering the station he encountered his union steward, Ms. Daly, who asked him why he was there. He told Daly that he was there for an investigative interview and she told him that he should be sure to ask for union representation. The Grievant went on into the station and told his supervisor, Mr. Wehrendt, that he wanted union representation during the investigative interview. Wehrendt told him that he was not entitled to union representation due to the fact that he was a transitional employee and refused to let him call in the steward. The Grievant asked again and was again refused the right to have union representation. The Grievant went ahead and met with Wehrendt for the investigative interview and answered the questions that were posed to him. After the interview he went back out and told Daly what had occurred. She went in and talked with Wehrendt and informed him that the Grievant was in fact entitled to union representation. In the meantime, after the investigative interview was completed, Wehrendt had gone to his supervisor and asked whether he should have allowed the Grievant union representation at the investigative interview. He was told by his supervisor that he should have allowed the Grievant to have his union steward present and was instructed to redo the investigative interview with the Grievant's union representative present. A second investigative interview was held with the Grievant's steward present approximately 20 minutes after the first investigative interview. The same questions

were asked and similar answers given by the Grievant at both investigative interviews. After the second investigative interview the Grievant was sent home and was issued a Notice of Removal on March 25, 2008. There were two grievances filed, one for a breach of the Grievant's Weingarten Rights and a second claiming that the Notice of Removal was not for just cause. This opinion will only address the grievance in regard to the alleged breach of the Grievant's Weingarten rights. The just cause issue will be addressed in the opinion for case number H06N-4H-D 08174087.

ISSUE

Did Management violate Article 17 of the National Agreement and the Grievant's Weingarten rights? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

JOINT CONTRACT ADMINISTRATION MANUAL

ARTICLE 17

REPRESENTATION

Weingarten Rights

Federal labor law, in what is known as the Weingarten rule, gives each employee the right to representation during any investigative interview which he or she reasonably believes may lead to discipline. ...

The Weingarten rule applies only when the meeting is an investigatory interview – when Management is searching for facts and trying to decide whether or not to impose discipline. ... Employees also have the right under Weingarten to a pre-interview consultation with a steward. In a Weingarten interview the employee has the right to a steward's assistance – not just a silent presence. The employer violates the employee's Weingarten rights when it refuses to allow the representative to speak or tries to restrict the steward to the role of a passive observer.

DISCUSSION

I have reviewed the testimony and evidence 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. Management contends that while the Grievant was originally denied union representation during his investigative interview, that when the error was realized, the Grievant was immediately given a second investigative interview with his union representative present. Because these interviews took place within 20 minutes of each other, Management argues that there was no harm to the Grievant and that his rights were not abused.

The Union contends that it does not matter that the Grievant was given a second interview shortly after the first, that he lost his right to meet with his union representative before the interview and was not allowed to have his union representative present at the first interview. The Union therefore argues that the breach was a major one, that the Grievant's rights were violated and that the discipline should be set aside because of Management's actions.

The testimony showed that the Grievant, in compliance with *NLRB vs Weingarten*, 420 U.S. 251 (1975), did ask his supervisor twice for union representation before his investigative interview and both times the request was denied. Supervisor Wehrendt testified that he thought that the Grievant was within his first 90 days of employment, which would not entitle him as a Transitional Employee to union representation. It was for this reason that the Grievant was originally denied union representation. The testimony showed that the first question asked by Wehrendt to the Grievant at his investigative interview on March 5, 2008 was how long he had been working for the postal service. The Grievant answered October 15, 2007 which is clearly more than ninety days before the date of the investigative interview. Wehrendt also testified that he had reviewed the accident investigation report before conducting the investigative interview. One document, the Initial Accident/Injury Notification, sets out that the Grievant had been employed for five months. Between the information in the investigation documents, the Grievant's request for representation, and his answer to Wehrendt's first question as to how long the Grievant had been employed, Wehrendt should have been aware that the

Grievant had been employed more than 90 days and should have allowed the Grievant to meet with his steward and to have union representation at the original investigative interview. While the failure to allow the Grievant his union representation at the first investigative interview is clearly a violation of the Grievant's Weingarten rights, the question to be determined here is whether the fact that Management held a second investigative interview immediately after the first investigative interview is sufficient to "heal" the violation and prevent harmful error to the Grievant's due process rights.

Management argues that while Weingarten reserves certain rights to an employee to have his union representative with him at an investigative interview, the Supreme Court case of *Cornelius vs Nutt*, 472 U.S. 648, (1985) establishes the principle that before an arbitrator can set aside the discipline issued to an employee there must be a showing that Management's actions (such as a violation of the Weingarten protections) caused harmful error to the Grievant's due process rights. Management contends that the standard that must be applied is whether a procedural error causes harm to the Grievant in the investigation and presentation of the Grievant's case. If there is no harmful error then the Grievant's due process rights have not been violated.

The evidence clearly shows that Management should have known that the Grievant was entitled to union representation at his original investigative interview, yet he was denied the right to consult with and have a union steward present at the interview. The evidence also shows that a second investigative interview was given to the Grievant immediately after the first one and the Grievant was allowed to have his union steward present. The same questions were asked at both investigative interviews, and the answers given by the Grievant were very similar in both interviews. Management already had evidence that the Grievant had been involved in an at fault automobile accident and that he had been given a citation by the police for careless driving. The investigative interview was to elicit from the Grievant his side of the story to determine why the accident occurred.

The Supreme Court in *Cornelius vs Nutt* stated: "Under any interpretation of the harmful error rule, unions are free to bargain for procedures to govern agency action ..., and agencies are obligated to follow the agreed upon procedures. *If the agency violates those*

procedures with prejudice to the individual employee's rights, any resulting agency disciplinary decision will be reversed by the Board or by an arbitrator.” (emphasis added) at p. 663.

The Union argues that the parties have agreed upon a procedure whereby the Grievant is entitled to meet with his union representative prior to an investigative interview as well as to have his union representative present during the investigative interview. It contends that the Grievant was denied these rights and that the holding of the second investigative interview cannot restore these rights to the Grievant, and that his due process rights were prejudiced by Management’s actions.

The National Agreement between the parties reserves to an employee the right to a pre-interview consultation with a union steward and the right to have a union steward present at an investigative interview. Denying the Grievant these rights is clearly a violation of the contract between the parties as well as a violation of the Grievant’s Weingarten rights. Management’s actions prejudice the Grievant by denying him the right to consult with a union steward as to his rights before being questioned by Management. Once a Grievant’s request to confer with a steward about his rights is denied, and an investigative interview is improperly held, the moment has passed where the Grievant’s rights can be restored simply by holding another interview in accordance with the proscribed procedures. Therefore, when Management has conducted an investigative interview after denying the Grievant his right to a union steward, it cannot “heal” or correct its actions by simply holding another interview with a union representative present.

After considering all of the testimony and evidence presented it is my determination that Management did violate the contract between the parties and the Grievant’s Weingarten rights and that such violation did prejudice the Grievant’s rights and cause harmful error. Based on the foregoing, it is my determination that the discipline should be set aside.

DECISION

The grievance is granted. The Notice of Removal shall be set aside and the Grievant shall be returned to work with back pay to be calculated as follows: The hours worked by the Grievant over the sixty days preceding March 5, 2008 shall be averaged and an average

number of hours worked per day shall be determined. The Grievant shall be paid that average number of hours for each work day for the period from when he was last paid on the payroll through the time he is returned to work. I will retain jurisdiction over this matter solely as to the calculation of back pay for a period of 120 days.

Done this 4th day of September, 2008.

Respectfully submitted,



Roberta J. Bahakel,
Arbitrator