

C-27073

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)
between) Grievant: Robert Cassotto
UNITED STATES POSTAL SERVICE) Post Office: Torrington, CT
and) USPS Case No: B01N4BD07022243
NATIONAL ASSOCIATION OF LETTER) DRT # 14-051037
CARRIERS, AFL-CIO)

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BEFORE: EILEEN A. CENCI

APPEARANCES:

For the U.S. Postal Service: Vernon Tyler

For the Union: Ronald Augustus

Place of Hearing: Waterbury, CT

Date of Hearing: March 12, 2007

John J. Casciano, NBA
NALC - New England Region

AWARD: The notice of removal dated October 20, 2006 that was issued to Robert Cassotto was not for just cause. The Notice of Removal is to be expunged from the grievant's file and he is to be reinstated to his position and made whole for any loss of pay, seniority and other benefits, less any earnings or unemployment compensation he received during the time he was out of work

Date of Award: May 2, 2007

Regular Regional Arbitration Panel

Eileen A Cenci

Eileen A. Cenci

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MAY 10 2007

VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

OPINION

STATEMENT OF PROCEEDINGS:

This matter was arbitrated pursuant to the grievance and arbitration provisions of a collective bargaining agreement (National Agreement) in effect between the United States Postal Service (Service) and the National Association of Letter Carriers (NALC or Union). A hearing in this matter was held before me on March 12, 2007 in Waterbury, Connecticut. The parties appeared and were given a full and fair opportunity to be heard, to present evidence and argument and to examine and cross examine witnesses.

The Service called Jay Pompei on direct examination and as a rebuttal witness. The Union called Glen Aeschliman and the grievant to testify. Witnesses were sequestered and testified under oath. At the conclusion of the hearing the parties elected to file post-hearing briefs, to be postmarked by April 4, 2007. However, on April 2, 2007 the arbitrator received a telephone message that the parties had decided not to file briefs and would submit the matter on the basis of the evidence presented at the hearing. The record was closed at that time.

ISSUE:

The parties agreed to adopt the following issue statement from the B team:

Was the notice of removal dated October 20, 2006 that was issued to Robert Cassotto for just cause?

If not, what shall the remedy be?

FACTS:

The grievant has been a letter carrier for almost eighteen years and has been assigned for approximately the last fifteen years to work at the Torrington, Connecticut post office. He was issued a Notice of Removal dated October 20, 2006 for failure to follow instructions (J. 2 #25-27). The removal was based upon incidents that occurred on September 28 and October 7, 2006, as well as upon the grievant's past disciplinary record which includes a Letter of Warning and two seven day suspensions for failure to follow instructions and a fourteen day suspension for unsatisfactory work

performance/violation of postal service standards of conduct (J. 2 #27). The incidents which led to the grievant's removal are discussed below.

On the morning of September 28, 2006 the grievant was issued a fourteen-day suspension by his supervisor, Jay Pompei. The grievant then went to the workroom floor and was in the process of completing Form 3996, a postal service form used to request assistance. Supervisor Pompei believed that the grievant was requesting more assistance than was appropriate and decided to observe the grievant on his route in order to determine the reason he needed so much assistance. While observing the grievant delivering mail, Mr. Pompei observed that the grievant put letter-sized mail into the mailbox and put newspapers and magazines in the rack underneath the box. According to Mr. Pompei the following then occurred: he instructed the grievant to finger the mail between stops and have it ready for delivery when he reached the box, and to deliver all the mail together in the box rather than placing magazines and newspapers to the outside rack. The grievant responded that the union had said he could put the magazines and newspapers in the outside rack and that he was confused because management told him one thing and the union said another. Mr. Pompei told the grievant that he had to follow instructions and that he could file a grievance if he wished, then repeated the instructions. The grievant asked if Mr. Pompei was giving him a direct order and Mr. Pompei said that he was ending the conversation. Mr. Pompei then repeated the instruction to place all mail in the box and explained that if the grievant did not follow the instruction he would be subject to discipline up to and including removal. The grievant continued to say that he was confused by being told different things by management and the union and that he would continue to deliver the way he had always done it. He continued to place newspapers and magazines in the outside rack (J. 2 #25).

The grievant's version of what occurred on September 28, 2006 differed from that of his supervisor. He testified that Mr. Pompei told him to deliver mail the same way he does every day, then told him, "I only want you to go to the mailbox one time" and that he should only "make one pass". The grievant says that Mr. Pompei characterized his comments as "suggestions" and said that the grievant didn't have to listen to the suggestions. The grievant has read the M-41 Handbook, which governs procedures for the delivery of mail, on his own time and he typically delivers newspapers and magazines by placing them in the rack under a mailbox. He was delivering the

Hartford Courant on September 28 and placed it in the rack as he usually does. The grievant claims that he would have followed a clear instruction had one been given, and that is why he asked his supervisor whether he was being given a direct order. He claims that management has a history of confusing him and changing things on him and also says that it would have been impossible to fit all the newspapers and magazines inside the boxes.

A pre-disciplinary interview (PDI) regarding this matter was held on October 4, 2006. Supervisors Dave Gelzinis and Jay Pompei attended the meeting, as did the grievant and union steward Glen Aeschliman. The grievant was asked a series of questions. According to the grievant's testimony he was required to answer "yes" or "no" to each question, and told that if he did not do so, his answers would be recorded as "refused to answer." Mr. Pompei denies that the grievant was given those instructions at the PDI. In the course of answering the questions posed to him, the grievant acknowledged his obligation to follow the instructions of his supervisor. He repeated that he had been given conflicting instructions by management and the union. He also stated that the boxes were too small to fit all the mail into them (J. 2 #15).

On October 7, 2006 the second incident leading to the removal of the grievant occurred. Mr. Pompei observed the grievant filling out Forms 3996 for pivots he was giving off that day. Mr. Pompei first instructed the grievant to fill out the 3996's but then told him to stop filling out the forms and get the mail ready to hand off, because carriers were waiting to receive the mail so they could leave the office. According to Mr. Pompei the grievant was taking his time filling out the forms and was including unnecessary information which he had previously been instructed not to include on the forms. Mr. Pompei says he told him several times to stop filling out the forms. The grievant responded that he wanted to finish the form he was working on, and Mr. Pompei instructed him to stop. Approximately five to ten minutes later, Mr. Pompei walked past the grievant again and saw that he was continuing to fill out 3996's. The grievant testified that he stopped filling out the forms as soon as he was instructed to do so.

A PDI concerning the October 7 incident was held on October 11, 2006 by Supervisor Dave Gelzinis. The grievant was represented by union steward Glen Aeschliman and was again asked a series of questions that could have been answered "yes" or "no." He acknowledged his responsibility to obey the instructions of his supervisor, but could not recall being given the instruction to stop

filling out 3996's (J. 2 #17).

A Notice of Removal dated October 20, 2006 was issued to the grievant by Mr. Pompei. The Union filed a grievance and on November 17, 2006 the postmaster notified union steward Glen Aeshliman that management was willing to offer the grievant a Last Chance Agreement (J. 2 #19). The grievant refused to sign and accept the agreement that was drafted, however, and the parties were unable to resolve the grievance. It was appealed by the Union to arbitration.

CONTRACT

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...

Section 8. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

POSITIONS OF THE PARTIES:

United States Postal Service [Service]

The Service argues that the elements of just cause have been established and that the removal of the grievant should be upheld. The grievant refused to follow clear and unequivocal instructions on both September 28 and October 7, 2006, despite being warned that the consequences of his refusal could be discipline up to and including removal. The grievant has a history of discipline for similar infractions and has been given numerous opportunities to correct his behavior. He was afforded due process by being given two PDI's and the discipline was timely. The grievance should be denied.

National Association of Letter Carriers [Union]

The Union argues that the grievant was given confusing and conflicting instructions that violated the mandates of the M-41 Handbook. Some of the instructions were presented and understood by the grievant to be suggestions, further confusing matters. It was impossible for the

grievant to follow the instruction to place all mail inside the box, due to the volume of mail. The charges are not serious enough to warrant removal of a long-term employee.

In addition, discipline was not issued in a timely manner, since no discipline was issued for the September 28 incident until the Notice of Removal was issued on October 20, 2006. This delay resulted in “pyramiding” of charges and led to the removal.

The grievance should be sustained and the grievant should be returned to work and made whole for any losses he has sustained.

DISCUSSION:

In order to prevail in an arbitration concerning the removal of an employee, the Service must prove that it has met all of the tests of just cause. The Service thus has the burden of proving that it conducted a thorough, objective investigation prior to imposing discipline and that it complied with all procedural requirements set forth in the contract, in addition to proving that the employee engaged in the accused conduct and that the conduct warranted removal. The requirement of a thorough and objective investigation is explained in the JCAM, which represents the negotiated agreement of the parties as to the interpretation of the National Agreement. It states: “Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective. This is the employee’s *day in court* privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves *before* the discipline is initiated.” (J. 2 #14). In this case, I am not convinced that the two PDI’s conducted prior to the grievant’s removal met the standard set forth in the JCAM.

The purpose of the PDI or day in court is simple and straightforward: to notify the employee of the charges against him and give the employee an opportunity to respond, or tell his side of the story. In this case the grievant was asked a series of fourteen or fifteen questions at each PDI. There is a dispute as to whether he was instructed to answer only “yes” or “no” to each question, but a review of the questions shows that they were leading in nature. Most called for “yes” or “no” responses, although notes of the meetings also show that the grievant gave some explanation beyond answering “yes” or “no” to many of the questions. The questions more closely resemble cross-

examination or questioning of a hostile witness than an objective investigation designed to allow an employee to tell his own story in his own words.

Each of the typed questions asked at the October 4, 2006 PDI was leading and none gave the grievant an opportunity to explain what happened in his own words. For example, the first question was, "Are you aware of your obligation to follow the instructions of your supervisor?" and the last was, "Would following Mr. Pompei's instructions to place all mail into the mailbox cause any risk to your safety or health?" The only question that did not call for a "yes" or "no" answer was printed at the bottom of the page and was apparently added by Mr. Pompei. It reads, "Please help me to understand why you didn't follow my instructions. So far, the only things you have said is that you were given multiple instructions and the mailboxes were too small. I know the boxes were large enough because I was there. And, you haven't told me what other instructions you were given...(remainder illegible). While this question gave the grievant some opportunity to explain, it was still worded in a leading manner since it contained the assumption that the grievant had refused to follow instructions. The question also included contradictions of some things the grievant had said earlier in the meeting. Moreover, no response by the grievant to this question was recorded in the notes of the meeting.

The October 11, 2006 PDI also consisted of fourteen questions which were posed to the grievant. The first twelve of these were clearly leading questions that called for "yes" or "no" answers. The first was identical to the first question asked on October 4: "Are you aware of your obligation to follow the instructions of your supervisor?" The grievant was then asked, "On Saturday October 7th 2006, did supervisor Jay Pompei instruct you to stop filling out the forms 3996 and begin pulling down your pivots?" Although the grievant responded to this and subsequent questions by saying that he did not recall an instruction, the meeting apparently continued with the scripted questions being asked in order. There is no indication that the grievant was given an opportunity to explain his answers. The last few questions asked of the grievant gave him some opportunity to explain, but only in response to very leading questions that assumed he had failed to follow the instructions of his supervisor. Those questions and the grievant's answers were:

12. Are you aware that when a supervisor gives you instructions, you are to immediately follow those instructions and if you don't agree with them, you

- have the right to grieve them? Yes, absolutely.
13. Can you explain why you are not following that procedure? Not true, did not happen.
14. Please tell me why you chose not to follow the instructions Mr. Pompei gave you? Not true, did not happen.

Despite answers indicating that he understood the rule requiring him to obey a supervisor and did not believe he had violated it, the grievant was apparently given no further opportunity to explain his position.

The grievant was never, in either PDI, asked a completely open-ended question that would have allowed him to explain what happened in his own words. The right to tell one's side of the story before a decision to impose discipline is made is the fundamental right that is guaranteed by the requirement of a day in court or PDI. The grievant in this case was not afforded that right in a meaningful way. The leading nature of the questions at the two PDI's also call into question the objectivity of the investigation, since the questions seem carefully worded to lead to a pre-determined result.

The Service has failed to meet its burden of proof in this case with respect to another of the procedural requirements of Article 16, since there is no evidence of review and concurrence as required by §8. The removal notice itself was not signed by a concurring official and the record is devoid of evidence that review and concurrence took place.

The National Agreement does not permit the Service to remove an employee unless it has met its burden of proving each and every element of just cause. Since the Service has not proved in this case that it conducted a thorough and objective investigation before imposing discipline, or that there was review and concurrence by the installation head or his designee in the decision to remove the grievant, the Service has not met its burden of proof. Finding these flaws to be dispositive, I do not reach the other arguments advanced by the parties. The grievance is sustained and the grievant is to be reinstated and made whole for all loss of pay, seniority and other benefits, less any earnings or unemployment compensation he received during the time he was out of work.