

C. 26204

REGULAR ARBITRATION PANEL

BEFORE: Gary L. Axon, Arbitrator

APPEARANCES:

For the U. S. Postal Service: Kevin Gray

For the Union: Carlos Molina

Place of Hearing: Hawthorne, California

Date of Hearing: August 30, 2005

Date of Award: October 4, 2005

Relevant Contract Provision: Article 16.1

Contract Year: 2001-2006

Type of Grievance: Discipline

Award Summary:

The Postal Service did not have just cause to remove Grievant Fernando from his position as a letter carrier. The Postal Service did have just cause to suspend Grievant for 30 calendar days. The Postal Service is ordered to reinstate Rohan Fernando to his former position and to make him whole for all wages and benefits lost, minus the 30-day suspension.

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I. INTRODUCTION

This case arises out of the removal of Rohan Fernando (Grievant) on March 22, 2005, from the United States Postal Service (Postal Service). The National Association of Letter Carriers (Union) filed a grievance challenging the removal as without just cause. When the grievance was not resolved during the lower levels of the grievance procedure, the Union elevated the case to arbitration.

II. STATEMENT OF THE ISSUE

The parties stipulated to a statement of the issue, which read:

Was the Notice of Removal dated March 22, 2005, for Unsatisfactory Work Performance/Unsafe Act and Unsatisfactory Work Performance/Deviating From Route, issued for just cause? If not, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL 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. 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.

IV. STATEMENT OF FACTS

The basic facts in this case are not in dispute. Grievant Fernando was employed as a letter carrier and began service on July 28, 1990. The incident, which caused the Postal Service to remove Grievant from his position as a letter carrier, occurred on February 17, 2005. On February 17, 2005, Grievant was assigned to perform a 25-minute collection run. Grievant Fernando left the assigned line of travel to stop at a fast food restaurant for a milkshake. As Grievant was returning to his assigned line of travel, he pulled his Postal Service vehicle out from a private driveway and collided with a private vehicle traveling southbound on Hawthorne Boulevard in the number three lane. Grievant claims the private vehicle struck his Postal Service vehicle. The Postal Service asserted Grievant struck the private vehicle with his Postal Service vehicle.

Fernando called the Post Office to report the accident. Supervisor Anna Aguilar and Postmaster Jonathan Nguyen went to the scene of the accident to investigate. Photographs were taken and the police were called. The driver of the private vehicle refused to exchange insurance and driver license information. Supervisor Aguilar took photographs of the damage to the private citizen's vehicle. The private citizen left the scene of the accident before the police arrived to investigate.

Grievant was not cited as the result of the accident. However, the police report identified the cause of the collision as "failing to yield to an approaching vehicle when entering a roadway from private property, violation 21804 (a)cvc." Jt. Ex. 1, p. 68. An investigatory interview was held following the accident between Fernando and Postal Service managers.

Supervisor Aguilar prepared a rough draft of a letter of discipline suspending Grievant for 14 days. The draft suspension letter cited two charges as the basis for the suspension. Charge number one alleged Grievant performed an unsafe act and charge two alleged Grievant deviated from his route without authorization on February 17, 2005. The draft of the suspension letter was sent to Wanda Sanders in Labor Relations for review. Janice Wilkins, a supervisor at the Lawndale Post Office, testified she typed the proposed letter of suspension using an old form management used in suspension situations. Both Wilkins and Aguilar testified they believed the discipline to be imposed should be removal, but used the form letter for a suspension to avoid re-typing the entire letter.

Sanders replied to Postmaster Nguyen that she had made many revisions to the 14-day suspension for Fernando and commented it "definitely should be a removal." Jt. Ex. 2, p. 24. Sanders testified at the arbitration hearing that the role of Labor Relations is to advise and assist the local managers.

Supervisor Aguilar signed a Notice of Removal dated March 22, 2005. Jt. Ex. 1, pp. 2-4. In the Notice of Removal Aguilar charged Grievant with committing an unsafe act that caused the motor vehicle accident on February 17, 2005. Aguilar alleged that Grievant's actions constituted an unsafe act under Postal Service safety rules and was a violation of the California Motor Vehicle Code because he failed to yield the right of way to all traffic when entering Hawthorne Boulevard.

The second charge was based on unsatisfactory work performance asserting Grievant Fernando deviated from his route when he took an unauthorized break to stop for a milkshake. The Notice of Removal also cited eight elements from

Grievant's past record that were taken into consideration in coming to a decision to terminate Fernando. Three of the prior disciplines involved unsafe acts. Grievant had never been involved in a motor vehicle accident during his employment with the Postal Service.

The Union filed a grievance alleging the Postal Service violated Article 16 when it issued Fernando a Notice of Removal. The grievance alleged the Notice of Removal was issued without just cause and sought Grievant's reinstatement and that he be made whole for all wages and benefits lost as a result of the removal. A Step B meeting was conducted on April 15, 2005. The Dispute Resolution Team deadlocked. The Step B decision date was May 9, 2005. Jt. Ex. 1(a) through 1(g).

The Union moved the case to arbitration. A hearing was held at which time both parties were accorded the full and complete opportunity to present evidence and argument in support of their respective positions. Verbal closing arguments were presented in lieu of written post-hearing briefs. The parties waived the 30-day period an arbitrator would normally have to issue an award under the National Agreement. The grievance is now properly before the Arbitrator for a final and binding decision.

V. POSITIONS OF THE PARTIES

A. United States Postal Service

The Postal Service takes the position there was just cause to remove Grievant from the Postal Service based on the February 17, 2005 accident and Grievant's overall disciplinary record. Grievant's prior record shows four suspensions and four letters of warning.

The Postal Service characterized Fernando as an accident repeater whose record shows he cannot operate a vehicle safely and the Postal Service should no longer be required to tolerate Grievant's disregard for safety. Despite repeated warnings and progressive discipline, the Grievant simply cannot or will not act safely.

The evidence shows that Grievant's Postal Service vehicle struck the private vehicle. The police report concluded the Postal Service vehicle collided with the private vehicle while traveling southbound on Hawthorne Boulevard in the number three lane. The police report identified the cause of the collision as Grievant's failure to yield to an approaching vehicle.

The photographs taken by supervisor Aguilar clearly show Grievant struck the right front fender of the private vehicle with his Postal Service vehicle. The photograph of the Postal Service vehicle identifies damage on the left front of the vehicle, which would indicate Grievant 's vehicle struck the private vehicle.

Turning to the second charge of deviating from his route, the Postal Service argues Grievant had no authority to take an unscheduled break to purchase a milkshake. According to the Postal Service, breaks and lunch periods are not scheduled during collection periods. The Postal Service submits that if Grievant had not taken the unauthorized deviation from his route, the accident would not have occurred.

Turning to the Union's claim that local management was overruled by Labor Relations in making the decision to terminate, the Postal Service maintains this argument is without merit. The e-mails from manager Wilkins to the Postmaster and to Labor Relations clearly show the local office was looking for guidance from Labor Relations with regard to what level of discipline would be appropriate in the instant case.

There is no evidence that Labor Relations made an attempt to overrule any decision made by local management. Labor Relations Manager Sanders simply provided guidance to the local office. According to the Postal Service, local management attempted to seek advice as to the proper level of discipline to impose on Grievant. The Postal Services submits there is absolutely nothing wrong with seeking guidance in an effort to administer the appropriate level of discipline.

Based on the February 17, 2005 at-fault accident, and Grievant's overall poor record, the Arbitrator should deny the grievance and sustain Fernando's removal from Postal Service employment.

The Postal Service offered the following Awards in support of its position: Case No. E01N-4E-D04030329; Case No. F94N-4F-D-97061631; Case No. E01N-4E-D 03212511; Case No. G98N-4G-D 00061193; and Case No. C94N-4C-D 99019206.

B. National Association of Letter Carriers

The Union argues the Postal Service bears the burden of proof to establish the allegations set forth in the Notice of Removal. According to the Union, the only person who knew what happened was Grievant Fernando. He was the only one present at the time the accident occurred on February 17, 2005. Neither the Postal Service managers nor the police officers were present when the accident took place. Grievant testified that the private citizen drove her car into the Postal Service vehicle. At the investigatory interview, Grievant stated, "She hit me."

Regarding the police report, the Union contends that because the driver of the private vehicle failed to remain at the scene of the accident, it would be impossible for the police to determine who was at fault. The Union submits the police assumed

Grievant was at fault based on the California Vehicle Code. However, it is incumbent on the Postal Service to conduct an investigation outside of the police investigation. The Arbitrator should conclude the February 17, 2005 accident was not the fault of Grievant Fernando.

Turning to charge two, the Union contends there was no deviation by Grievant from his route when he stopped for a milkshake. The Postal Service failed to support its contention that Grievant was not allowed to take a break during the collection periods. Grievant testified that he has received no instructions regarding taking lunch or breaks during collections.

Moreover, the Union argues that the collection run Grievant was performing was not a regular collection run, and not even on Grievant's schedule. As a limited duty employee, Fernando is not required to maintain his normal schedule for lunch and break times. The Arbitrator should hold that the Postal Service failed to prove there was a specific rule that Grievant violated when he took a break to order a milkshake.

It is also the Union's position the disciplinary action is flawed in that local management originally requested discipline in the form of a 14-day suspension, not a removal. Although the Union concedes that local management may seek guidance regarding discipline from Labor Relations, the authority and responsibility to determine discipline rests with the front line supervisor. The Union submits that higher management overruled local management's request for a 14-day suspension and instead forced the issuance of a Notice of Removal. Copies of the e-mails contained in the record from Labor Relations Specialist Sanders clearly established that the decision

to issue the Notice of Removal was made by Sanders, not by supervisor Aguilar. The Union submits supervisor Aguilar never initiated, nor did she propose removal of Fernando. In the present case the suspension was authorized by manager Wilkins and upgraded by Sanders to a removal. The only thing the immediate supervisor did was sign the Notice of Removal.

The Union concludes the Arbitrator should find management failed to establish just cause for the removal of Grievant Fernando from his position as a letter carrier and order him reinstated with full back pay and benefits.

The Union offered the following Award in support of its position: Case No. W1N-5H-D 27023.

VI. DISCUSSION AND FINDINGS

The Arbitrator finds the Postal Service did not have just cause to remove Fernando from his employment as a letter carrier. The Postal Service did have just cause to impose on Grievant a 30-day suspension. Accordingly, the grievance will be sustained in part, and denied in part. The following is the reasoning of the Arbitrator.

The evidence clearly shows Grievant was involved in an at-fault accident. Grievant's assertion that the driver of the private vehicle "hit" him is contrary to the physical evidence. The photographs of the two vehicles show Grievant's Postal Service van struck the private vehicle. The damage to the Postal Service vehicle as depicted in the photographs was on the left front of the Postal Service vehicle adjacent to the headlight. The damage to the private vehicle is shown to be on the right side of the

vehicle just forward of the wheel well. Thus, the conclusion is inescapable that Grievant struck the private vehicle with his Postal Service van.

Moreover, the police report attributed the cause of the collision to be:

Failing to yield to an approaching vehicle when entering a roadway from private property, violation of 21804(a)cvc.

The police officer's conclusion is consistent with Grievant's testimony that he entered Hawthorne Boulevard from a private drive and attempted to make a right turn when the collision occurred. While Grievant was not cited, it does not change the fact the evidence shows Grievant caused the accident when he failed to yield to an approaching vehicle.

The issue now turns to whether removal is the appropriate level of discipline to be imposed for the February 17, 2005 accident. The evidence is undisputed the accident resulted in no personal injuries to either Grievant or the passenger of the other vehicle. The physical damages to the Postal Service van and private vehicle were minor. The amount of the damages argues against dismissal. Grievant was employed by the Postal Service since 1990 and prior to this incident he had never been involved in a vehicle accident.

The Union also averred the Postal Service violated the National Agreement because the decision to remove Fernando was not made by supervisor Aguilar as required by Article 15.3.A. According to the Union, the decision to terminate Fernando was made by higher authority. While I agree the front line supervisor may consult and seek guidance from Labor Relations, the evidence in the instant case shows supervisor Aguilar received more than guidance from Labor Relations and other managers.

Supervisor Aguilar initiated a draft of the letter of discipline to be sent to Labor Relations for review, which sought to impose a 14-day suspension on Fernando. Jt. Ex. 1, p. 22. Manager Wilkins, who typed the letter, testified she used the 14-day suspension form letter because it was "easier to type." In the context of this case, I reject the excuse that Aguilar really wanted a removal but used a 14-day suspension form because it was easier to type. Wilkins sent the 14-day suspension letter to Sanders in Labor Relations for a review with a question Wilkins added to the form as to whether this should be "a removal." Jt. Ex. 1, p. 24. Sanders responded to the Postmaster in Lawndale by e-mail that the discipline "definitely should be a removal." Jt. Ex. 1, p. 24.

On May 15, 2005, Sanders responded to an e-mail by stating:

As previously requested on 3/14 and 3/11, please fill in the blanks of the attached notice of removal. If you are not clear on what I am asking, please call me. Although I received the copy of the police report and past discipline, you have better knowledge of the facts than I do and I want to be sure I do not misinterpret the records. And, I want your participation in case you need to testify later that you participated in writing the letter and made the decision for removal. 2). Also, to that end, please fax a copy of a signed Personnel Recommendation form requesting a removal action for Fernando. This is necessary because the decision to give discipline comes from the immediate supervisor . . . not Labor. Our role is only to advise and assist.

Once you have completed the above, RETURN THE DRAFT LETTER TO ME . . . NOT TO LOS ANGELES!! I will review it and submit it for final approval and return it to you to issue. Thank you. WB Sanders

Jt. Ex. 1, p. 26; emphases in original.

The evidence in this case is undisputed that supervisor Aguilar's request for discipline went to Labor Relations as a 14-day suspension and came back from

Labor Relations as a Notice of Removal. The testimony and the chain of e-mails establish the decision making process on the level of discipline to be imposed on Grievant Fernando was tainted by Labor Relations and manager Wilkins. I find that Labor Relations in this case went beyond the role to advise and assist local managers by placing supervisor Aguilar in a position that she had no choice but to discipline Grievant in the form of a removal.

The record evidence in this arbitration includes numerous documents dating back to 1995, 1996 and 1997 concerning Grievant's work record, including driving observations and other disciplines. These documents are stale and have no relevance to an incident that happened 10 years later in 2005. The prior elements of past record cited in the Notice of Removal involve two safety issues. Grievant was suspended in 2003 for not having a seatbelt on/parked illegally and changing lanes without using his turn signal.

Four of the elements of past record cited in the Notice of Removal were for "causing a hardship on the Postal Service." In the words of Labor Relations Specialist Sanders, "What the heck is 'Harmful to the Interests of the Post Office'?" While Grievant's past record is not that of a model employee, I hold his past record fails to support the Postal Service's summary removal of Grievant from his job as a letter carrier, which was triggered by the February 17, 2005 accident.

Based on the totality of the record, I conclude the Postal Service failed to prove there was just cause to remove Grievant Fernando from the Postal Service. I further hold Grievant's actions on February 17, 2005, and his deviation from his route justifies the imposition of a 30-day suspension.

AWARD

The Postal Service did not have just cause to remove Grievant Fernando from his position as a letter carrier. The Postal Service did have just cause to suspend Grievant for 30 calendar days. The Postal Service is ordered to reinstate Rohan Fernando to his former position and to make him whole for all wages and benefits lost, minus the 30-day suspension.

Respectfully submitted,



Gary L. Axon
Arbitrator
Dated: October 4, 2005