

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration
between
UNITED STATES POSTAL SERVICE
and
AMERICAN POSTAL WORKERS UNION

C# 11193
Grievant: A Falby
Post Office: 421 Atlantic S.
Case No: N1T-1J-D 37462

Before Arnold M. Zack , Arbitrator

Appearances:

For US Postal Service Thomas E. Guerra

For Union: Michael Ganino

Date of Hearing: December 3, 1985

Place of Hearing: Stamford, CT

Award:

The Separation/Disqualification of A. was not in conformance with the 1981 National Agreement and applicable regulations. He shall be reinstated with full seniority and other rights and reimbursement of earnings lost. The just cause for the removal is not proven before me in this proceeding.

Date of Award: December 22 1985

JAN 8 1986

United States Postal Service
Stamford, Connecticut
and
American Postal Workers Union

- * ARBITRATION OPINION & DECISION
 - * Case No. NIT-IJ-D 37462
 - * A Falby Grievance
 - * Dated: December 27, 1985
-

On December 3, 1985, I held a hearing in Stamford, Connecticut to arbitrate the following issue. Michael Ganino represented the Union. Thomas E. Guerra represented the Postal Service.

THE ISSUE

The parties agreed upon the issue to be decided as follows:

"Was the Separation/Disqualification in conformance with the 1981-84 National Agreement and applicable Regulations? If not, what shall be the remedy?"

The Postal Service challenged the arbitrability of the foregoing issue.

THE FACTS

On August 12, 1983, Allen Falby, the grievant, filled out an application for a position of Career Custodian in Stamford, Connecticut. In that application he stated:

- 1) that he had left Hewitt Associates in September, 1979 "to go into business"
- 2) that he had not been fired from any job within the preceding five years
- 3) that he had never been convicted by special or general court martial while in the military service
- 4) that he had been in the US Navy from 1974-76
- 5) that he had no relatives working for the federal government

According to Pauline Grieco, Supervisor of Employment Services, she had requested the grievant's military records when his name came up for appointment since without the Veteran's preference, Falby would not have gotten the position he was then holding.

Falby testified that he did not have evidence of his military service when he was asked for it because he apparently lost the record while moving and that he wrote the VA for it in August but received no response.

On September 13, 1983 Falby was hired into the position of custodian. He was apparently reminded by Grieco in late September of the need to provide verification of his military service and thereafter went to the Navy recruiting office where an effort was made to find the record. Falby was given an address to send for it. He did so, but it did not arrive. Falby testified that Grieco asked for the form two or three times so that she could credit his military service on his Postal seniority. Falby claims that he then remembered he had applied for a Veteran's bonus while living in Westport and applied for evidence there.

At about this time Grieco came into possession of an employment application which Falby had filled out the previous February 14, 1983 in Westport. In that application he had stated:

- 1) that he had been fired from Hewitt Associates in October, 1979
- 2) that the firing was within the preceding five years and was for drinking on the job
- 3) that he had been convicted of a special or general court martial
- 4) that he had been convicted of a legal offense (an answer was left blank in the Stamford application)
- 5) that he had listed his father as a federal employee working for the Postal Service

Grieco testified that because of the inconsistencies between the two applications and because of his failure to produce the military service record which was essential to support Falby's holding of the position, she determined that Falby had to be separated from the Postal Service. She testified at the hearing, that she had a copy of the grievant's Stamford police record at the time, but that she had not relied on that record in making her decision.

On December 9, 1983, she wrote Falby a Notice of Separation/Disqualification during his probationary period, effective December 13, 1983. The letter, asserting falsification of Application of Employment, focused on the different answers between the two applications and Falby's "failure to provide proof of your military discharge to the employment office which leaves your claim for military Veteran's preference questionable."

Falby testified that he asked the EMF Manager, the Foreman, the Vehicle Operations Analyst, the Maintenance Supervisor and Grieco herself if he had any recourse, and was told by each that there was nothing he could do because he was on probationary status.

On December 17, 1983, Falby was given the documentation of his, honorable discharge by the Town of Westport, but did not show it to the Postal officials because of their having told him he had no recourse.

On April 25, 1984, according to Union President Ganino, he was asked by a Postal Supervisor how the Falby case was going. Ganino, who knew nothing of Falby, requested his file, examined it and discovered that the Notice of Separation was effective 92 days after Falby's hiring; that he was no longer then a probationary employee; and that as a veteran he was entitled to thirty day Notice of Removal.

On May 18, 1984, he filed a grievance for Falby which was subsequently appealed to arbitration. The Union asserts that it did not discuss the just cause standard during the appeal meeting. The Postal Service answered at the second and third steps do refer to the substantive issue. At the hearing, the Postal Service submitted a police record for Falby dated November 7, 1985 which listed four arrests: Disorderly Conduct 1974, Larceny (\$50 fine) 1977, Interfering (\$50 fine) 1977 and Burglary (1 year probation) 1979.

Falby testified that he had been fired from Hewitt and left to go into business; that he had been told by Personnel Assistant Dimisio to answer no the court martial question in Stamford because his had been a summary court martial and therefore neither a special nor general court martial; and that he answered no to the Stamford question about being fired within five years because he had thought Hewitt occurred more than five years ago. He made no reference to having failed to list his father as a federal employee in the Stamford application.

CONTENTIONS OF THE POSTAL SERVICE

The Postal Service contends that this grievance is not arbitrable. Even though it concedes that the Notice of Separation was issued tardily, and that the grievant did have the right to file a grievance on his separation, it argues that the grievance should have been filed within

fourteen days of the December 9th letter or the December 13th effective date of the Employer's action. It asserts that a delay until May, 1984 has no contractual or factual justification; that it is clearly evidence of laches and that the grievance must be held to be tardy and therefore not arbitrable.

On the merits, the Postal Service contends that there was just cause for Falby's removal; that he had failed to provide the requisite proof of military service after three months of prodding; that his access to the job required the Veterans preference to which he was not able to show entitlement; that he had been guilty of falsification of either his Westport or Stamford application for employment; and that those inconsistencies constituted a false and dishonest answer and were thus grounds for termination.

CONTENTIONS OF THE UNION

The Union contends that the grievance is arbitrable; that the Notice of Separation as a probationary employee was tardy; that Falby had worked more than 90 days and was entitled to a removal letter advising him of his rights and with thirty day notice becoming to a veteran; that provision of such notice and letter would have led to his advising the Postal Service of the receipt of evidence of his Veteran's status; and that such information would have come within the thirty day notice period and voided the removal action.

It argues further that Falby did not grieve in December because he had been told by all supervisors, when asked about his rights, that he had none, that the Union was unaware of the case until a supervisor brought it to the Union President's attention; that the timing error was then discovered; and that a timely grievance was then filed within fourteen days of the Union's becoming aware of the grievance. It urges the grievant be reinstated with full seniority and all back pay because its actions constituted a violation of the above quoted submission agreement.

On the merits the Union contends that Falby did have proof of his military service honorable discharge; that the Postal Service's improper separation notice deprived him of the opportunity to produce it, and that he answered the questions on the Stamford employment application as accurately as he could. It notes that he had neither a special nor general

court martial and was told by supervision that his summary court martial did not justify a 'Yes' answer to Question 18; that he had been fired by Hewitt at the time he was leaving to start his own business; that he had answered 'No' to Question 15 about being fired within five years because he thought the Hewitt employment predated that deadline; that he thought his arrest record had been washed out; and that the Postal Service supervisor responsible for the removal testified that it was the contradictions, rather than any claim of falsification, that caused the removal. It urges, if the grievance is considered on its merits, that Falby be reinstated with full seniority and full back pay.

DISCUSSION

On the issues of timeliness, the evidence shows that Falby was issued a Separation/Disqualification during Probationary Period letter; that pursuant to that status he was not advised of any grievance or appeal rights that might have flowed from a normal removal letter; that he was told by numerous supervisors that he had no recourse following the separation; and that he had neither a copy of the parties' collective bargaining agreement nor independent knowledge of his right to grieve. It was not until late April that the Union first gained any knowledge of the separation or awareness of the actual number of days that Falby had worked.

Article 15 Section 2 Step 1 a provides that

"The Union also may initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the fact giving rise to the grievance."

Since the grievant, at the time of his separation, was told he had no recourse, and since that Union was not advised of the separation when it occurred and had no reason to be aware of it at the time, I find that its initial awareness was not until April and that it acted within the requisite time limits in instituting the grievance thereafter. The case is arbitrable.

This brings me to a consideration of the case on its merits. The Postal Service admits that the Notice of Separation was tardy, that the

grievant had in fact been employed by the Postal Service for more than 90 days; that he should have been issued a Notice of Removal; and that he was entitled to grieve that removal.

The Union argues that the improper separation notice can only be rectified by reinstating the grievant with full back pay and permitting the Postal Service to thereafter take whatever recourse it desires in conformity with the agreement for the alleged improprieties in the grievant's application and proof of Veteran status. It cites as precedential the January 2, 1985 Arbitration Award of Nicholas Zumas in Case No. NIC-IE-D 27209 where the grievant was reinstated with full back pay with removal action to follow.

The Postal Service argues that despite the shortfall in counting days the grievant, and later the Union, knew the reasons for the removal; that they discussed the merits of the case; and that there was, in fact, just cause for the removal.

At the outset of the hearing, I suggested to the parties the standard issue of whether the termination of Falby was for just cause. The Union spokesman rejected that formulation, offering instead the previously written submission set forth above to which the Employer's representative agreed. The issue before me, therefore, is not whether there was just cause for the removal, but rather whether the Separation/Disqualification was in conformance with the agreement. That term Separation/Disqualification is clearly related to the probationary period and it is equally clear that it was not issued in conformity with the agreement, but in fact several days after the probationary period for Falby had come to an end.

Although the Employer set forth in the Separation/Disqualification letter the reasons for its action, it was not required at that point to meet the requirements of just cause, or to anticipate that any grievance or burden of proof would emanate therefrom. Nor is there persuasive evidence that the problem was discussed during the grievance appeals. The Employer's answer set forth reasons, but the Union insists there was no discussion on the merits during the appeal sessions.

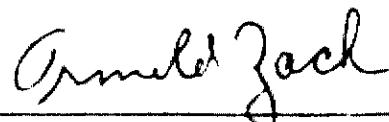
As testified to by Supervisor Grieco, she didn't rely on the grievant's police record, acting only on limited evidence when she issued the Notice. In a proper probationary separation she need not have. It would be unreasonable to preclude the Employer from reliance on that record or

from expanding its investigation to the fuller record when it is required to adhere to a just cause standard. The Employer acted in good faith reliance upon its unfettered right to separate an employee without recourse to the grievance procedure and without need to rely on just cause or burdens of proof. It should not be restricted from its opportunity to meet its burden of proving just cause by an arbitrator converting a Separation/Disqualification into a removal for just cause and thereafter restricting evidence to the statement set forth by the Employer for that separation. Therefore, the issue of just cause for removal is a separate matter and can not be addressed within the scope of this arbitration.

The grievant is entitled to reimbursement with full seniority and other rights and reimbursement of earnings lost. The issue of the propriety of removal of Falby as a Nonprobationary employee is a matter for a different proceeding.

DECISION

The Separation/Disqualification of A. Falby was not in conformance with the 1981-84 National Agreement and applicable regulations. He shall be reinstated with full seniority and other rights and reimbursement of earnings lost. The issue of just cause for the removal is not properly before me in this proceeding



Arnold M. Zack
Arnold M. Zack, Arbitrator