

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration)
 Between) GRIEVANT: Michael Lotto
 UNITED STATES POSTAL SERVICE)
) POST OFFICE: New Haven, CT
 And)
) CASE Numbers:
 NATIONAL ASSOCIATION OF LETTER) USPS: B11N4BC 15145172
 CARRIERS, AFL-CIO) NALC: 19-288-15-FH
) DRT: 14-336876
)

BEFORE: Sherrie Rose Talmadge, Esq., ARBITRATOR

APPEARANCES:

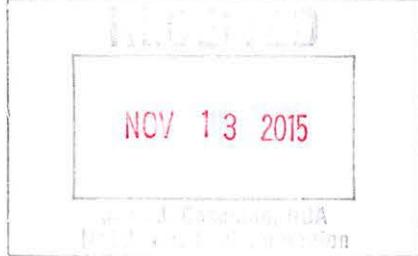
For the U.S. Postal Service: Marylou C. Millett, Labor Relations Specialist
 For the Union: Vincent J. Mase, Esq., President Branch 19

Place of Hearing: 50 Brewery Street, New Haven, CT
 Date(s) of Hearing: August 6, 2015
 Date of Briefs Received: September 22, 2015
 Date of Award: November 7, 2015
 Relevant Contract Provisions: Article 15
 Date of Contract: 2011-2016
 Type of Grievance: Contract (remedy clarification)

AWARD SUMMARY

Management did not violate the National Agreement, Article 15, specifically, Arbitrator Donald J. Barrett's decision (B11N-4B-D 14270554) dated January 7, 2015 when it implemented the award without returning the Grievant to duty. Arbitrator Barrett resolved the merits of the case concerning the Indefinite Suspension issued to Letter Carrier Michael Lotto, and awarded the following: "The grievance is sustained. The subject Notice of Indefinite Suspension shall be rescinded, and the grievant made whole, subject to those applicable provisions related to back pay/wages." Arbitrator Barrett did not specify that the Grievant was to be reinstated.

In compliance with the award, Management rescinded the Indefinite Suspension, made the Grievant whole for any lost back pay, and exercised its discretion, as referenced in a prior DRT decision, to place the Grievant in an administrative leave pay status or 'status quo ante' pending an ongoing investigation into his misconduct. Thus, the grievance is denied.



Sherrie Rose Talmadge, Esq., Arbitrator

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STIPULATED ISSUE

1. Did management violate the National Agreement, Article 15, specifically, Arbitrator Barrett's decision dated January 7, 2015, when it did not implement the award, including restoration of the Grievant?
2. If so, what is the proper remedy?

BACKGROUND

Letter Carrier Michael Lotto, Grievant, is the senior bidder of Route 1314 in the Fair Haven carrier section with over eight years of service. The Grievant had been placed on emergency placement in off duty status in a letter dated April 10, 2014 for having been arrested March 19, 2014 while off-duty. By DRT decision (# B11N-4B-D 14190180) dated July 9, 2014 the suspension was rescinded and stated, in pertinent part:

The grievant shall be placed in a pay status, eight (8) hours a day, forty (40) hours per week beginning April 10, 2014. He will remain in that status OR returned to work at the discretion of management.

On July 22, 2014, Management placed the Grievant on non-pay status pursuant to Article 16.6 Crime Situation by letter dated July 22, 2014 for having been arrested March 19, 2014 while off-duty. The DRT Impassed decision on September 2, 2014, and the matter was heard in arbitration before Regional Arbitrator Donald Barrett on January 6, 2015. Arbitrator Barrett issued his decision on January 7, 2015 awarding as follows:

The grievance is sustained. The subject Notice of Indefinite Suspension shall be rescinded, and the grievant made whole, subject to those applicable provisions related to back pay/wages.

To comply with Arbitrator Barrett's award, Management has made the Grievant whole regarding back pay and wages. Additionally, Management, in compliance with the July 9, 2014 DRT decision in case B11N-4B-D 14190180, placed the Grievant on extended pay status beginning on January 26, 2015. The Office of Inspector General conducted an investigation from February 1 through 23, 2015 and issued a Report of Investigation. Subsequently, the Grievant was issued a removal notice, which is the subject of another grievance.

The Union Informal A representative, William Houde, testified that when he met with 204B supervisor McCain at the Informal A for this grievance, McCain said that he would have to ask his supervisor about the grievance, and upon returning to the meeting stated that he was informed not to settle the grievance. Houde also testified that, in his many years of experience, when an arbitrator makes a grievant whole this means to return the

Arbitration decision continued.

employee to work. The Union Formal A representative, Frederick Kelley, testified that when he met with Area Manager Customer Services Bourgoin on February 18, 2015 they discussed the Union's request to immediately return the Grievant to work but Management noted that the investigation by the OIG was ongoing. Kelley testified that he believed that when the Indefinite Suspension was rescinded, the Grievant should have been brought back to work. During the Formal A meeting, the parties signed a Formal Step A settlement, dated February 18, 2015, providing an additional \$225 lump sum to the Grievant for not implementing the award.

POSITIONS OF THE PARTIES

UNION POSITION

The Union argued that it has met its burden of proof that Management violated the National Agreement, Article 15, specifically, and Arbitrator Barrett's decision dated January 7, 2015, when it did not implement the award, including restoration of the Grievant. In his award Arbitrator Barrett held, "The grievance is sustained. The subject Notice of Indefinite Suspension shall be rescinded, and the grievance made whole, subject to applicable provisions related to back wages." The Union interprets this "make whole" remedy as restoring the Grievant back to work.

The Union asserted that Management violated the Grievant's due process rights. The Union contended that the right to due process is a basic and fundamental right that is inherent and implied in the decisions of arbitrators and cannot be ignored even if it is brought up for the first time at the day of arbitration hearing. The Grievant was denied his due process rights when upper management decided not to return the Grievant to his former position as a letter after Arbitrator Barrett sustained a grievance to make him whole for violating the National Agreement. As a result of upper Management's decision not to return the Grievant to duty, the Grievant's immediate supervisor, 204B McCain, was not capable of settling this grievance at the lowest possible level pursuant to Article 15. As Barrett concluded in his decision, the supervisor did not know the Grievant, had not met him, did not prepare the notice of suspension, and was instructed to sign it, and most damaging to the position of the Service, she did not conduct any form of investigation prior to issuing the subject notice, nor was she aware of one being conducted or having been conducted." In the present case, the 204B nor the manager conducted any investigation but only relied on the OIG to conduct one sometime in the future after Barrett issued his

Arbitration decision continued.

ruling. Therefore, the violation of the Grievant's due process rights is a fatal flaw by Management.

Arbitrator Barrett's award states "the grievance is sustained", which means the Union proved that management did not have just cause. The award also states, "...and the grievant made whole..." The Union's position is that the make whole remedy also means returning the Grievant back to his route, especially if that phrase is preceded by "the Notice of Indefinite Suspension shall be rescinded". Both witnesses for the Union testified credibly about this phrase and management did not provide any witnesses to refute the testimony of Houde and Kelley on this matter. A make whole remedy incorporates into the remedy to put the Grievant back into the status quo position he would have been in prior to management's adverse action. The Grievant should have been brought back into work and returned to his bid route.

The Union met its burden of proof and the grievance should be sustained. As a remedy, the Union requested that the Grievant be immediately returned back to work on his bid route in the Fair Haven Section of the GPO, and be made whole for all lost overtime for splits and non-scheduled days from March 18, 2014 until such time as the Grievant is returned to work on his bid route assignment, and pay the Grievant \$300.00 lump sum payment for management's failure to follow Arbitrator Barrett's decision.

POSTAL SERVICE POSITION

The Union did not meet its burden of proving that a violation of the National Agreement exists. The Service has satisfied and been in compliance with the prior DRT decisions, as well as Arbitrator Barrett's award dated January 7, 2015. Management rescinded the Indefinite Suspension. The Grievant was placed in an administrative leave pay status or "status quo ante" in lieu of being returned to duty, pending an ongoing investigation into his misconduct. There was no language in Barrett's award returning the Grievant to a work or duty status. It stated the Grievant made whole, "subject to" or related to those applicable provisions related to back pay and wages only. The return of the Grievant to duty status was Management's discretion as previously rendered in DRT (B11N-4B-D 14190180) which stated in pertinent part, "The grievant shall be placed in a pay status, eight (8) hours a day, forty (40) hours per week beginning April 10, 2014. He will remain in that status OR returned to work at the discretion of management". This DRT decision is precedent setting in the installation. Placing the Grievant in a pay status

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pending the outcome of an ongoing investigation was Management's right under specific circumstances outlined in Article 16.5 and 16.7 of the contract and the JCAM.

The Union attempted to address the merits of the Indefinite Suspension in the instant case. Although the Union acknowledged that the Indefinite Suspension had been rescinded, the Union advocate claimed the Grievant was denied due process when placed in an Indefinite Suspension as a result of an off-duty drug related arrest and misconduct. The Union inappropriately requested that the arbitrator retain jurisdiction over the removal action, which had not yet been scheduled.

The Union's witnesses, William Houde, the Informal A union representative, and Fred Kelley, the Formal A union representative, testified as to their opinion as to what Barrett's award meant. There was no evidence or proof of any contractual language in the National Agreement requiring the Service to return an employee to a work or duty status under the circumstances. Thus, the Service requested that the grievance be denied.

DISCUSSION

At issue is whether Management violated the National Agreement, Article 15, specifically, Arbitrator Barrett's decision dated January 7, 2015, when it did not implement the award, including restoration of the Grievant. I find that the Union did not meet its burden of proving that Management failed to properly implement Arbitrator Barrett's Award.

Arbitrator Barrett held that:

The grievance is sustained. The subject Notice of Indefinite Suspension shall be rescinded, and the grievant made whole, subject to those applicable provisions related to back pay/wages.

There is no dispute that upon receipt of Barrett's Award, Management rescinded the Notice of Indefinite Suspension, made the Grievant for all lost back pay, and paid the \$225.00 lump sum payment to the Grievant that the parties had agreed upon as a Formal A Settlement, dated February 18, 2015, for not having implementing the award.

The crux of the matter is whether Barrett's award, in which he states "and the grievant made whole, subject to those applicable provisions related to back pay/wages" also intended to reinstate the Grievant to his position as a letter carrier.

The language of Article 16.6.B provides:

The just cause of an indefinite suspension is grievable. The arbitrator shall have the authority to reinstate and make the employee whole for the entire period of the indefinite suspension. [Emphasis added.]

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Thus, the language of Section 6.B gives the deciding arbitrator authority both to reinstate **and** to make the employee whole for the entire period of the indefinite suspension. Arbitrator Barrett, who expressly stated that the Notice of Indefinite Suspension shall be rescinded and the grievant made whole, subject to those applicable provisions related to back pay/wages, and did not specify that the Grievant was to be reinstated. Because the language of Section 6.B unambiguously enumerates two types of remedies – reinstatement and a make whole order, it would appear that Arbitrator Barrett may have either intentionally left out or overlooked the reinstatement portion of the remedy. Without that specific language of reinstatement in the award, Management looked to the July 9, 2014 DRT decision in which the Step B Team had rescinded an earlier Notice of Indefinite Suspension issued to the Grievant for the same arrest incident and determined that:

The grievant shall be placed in a pay status, eight (8) hours a day, forty (40) hours per week beginning April 10, 2014. He will remain in that status OR returned to work at the discretion of management.

In this instance in which the Grievant had been the subject of an ongoing investigation for an off-duty crime situation when Barrett's award was issued, and Barrett did not specify that the Grievant was to be reinstated, it was reasonable for Management to consider the July 9, 2014 DRT award which directed that the Grievant be placed in a pay status, and remain in that status or returned to work at the discretion of management. Thus, I find that it was reasonable for Management to exercise its discretion and maintain the Grievant on a pay status rather than return him to work.

I am not persuaded by the Union's assertion that the make whole order, subject to those applicable provisions related to back pay/wages, was intended to include missed overtime opportunities, which are too speculative in this case. Further, I do not find that the Grievant was harmed by the fact that the Informal A management representative may not have authority to settle the grievance when there was another opportunity at the Formal A for settlement by a management representative who did have the requisite authority. Although Article 15, Section 2, Informal Step A (b) provides that "In any discussion the supervisor shall have authority to resolve the grievance", and (c) "if no resolution is reached...the Union shall be entitled to file a written appeal to Formal A...", the Informal A supervisor's alleged lack of authority to settle the grievance did not rise to the level of a substantial due process violation.

Arbitration decision continued.

AWARD

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Respectfully submitted by:



Sherrie Rose Talmadge, Arbitrator