

C#05204

IN THE MATTER OF AN ARBITRATION) Regular Arbitration
Between) Case No. W4N-SD-D89
UNITED STATES POSTAL SERVICE) R. Lovegreen Emergency Suspension
And)
NATIONAL ASSOCIATION OF) AWARD OF THE ARBITRATOR
LETTER CARRIERS) October 1, 1985

This matter came on for hearing in Portland, Oregon, on August 13, 1985, before Arbitrator William E. Rentfro, selected by the parties to hear and render a final decision on the issue in dispute.

The Union was represented by Jim Edgemon, National Business Agent. The Postal Service was represented by Roger Strobel, Employee and Labor Relations.

The hearing was taped by the Arbitrator and oral closing arguments were made by the parties.

THE ISSUES

1. Is the grievance properly before the Arbitrator under the timeliness requirements of the grievance procedure (Article 15, Section 2, Step 2H) of the National Agreement.
2. If so, was the Grievant placed on emergency suspension for just cause? If not, what is the proper remedy?

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JIM EDGEMON, NBA
National Association Letter Carriers

STATEMENT OF THE CASE

Grievant Rick Lovegreen began his employment with the Postal Service in September, 1975, as a casual employee. He was hired by the Gresham, Oregon, Post Office as a part-time flexible clerk/cARRIER on January 15, 1977, and was converted to full-time regular approximately one year later.

By late in 1984, the Gresham Post Office was experiencing an increase in mail volume. Grievant, as steward, was processing many grievances concerning overtime, sick leave, etc. In addition to these pressures, Grievant was also experiencing severe pressure in his personal life. As a result of his requesting time off with compensation due to stress, he was told he would need certification from a psychiatrist that the stress was job-related. He was referred by his doctor to a psychiatrist, Dr. Barry Maletzky.

On November 20, 1984, Grievant visited his psychiatrist. During the course of his appointment, and while discussing the pressures he was experiencing on the job, he made a statement to the psychiatrist to the effect that one option open to him was to kill the Postmaster and a supervisor at the Gresham office. The psychiatrist notified these two management representatives of this statement by way of the following letter:

November 21, 1984
Norman Singleton, Postmaster
Gresham Post Office
Gresham, Oregon 97030

Dear Mr. Singleton:

I am a psychiatrist who has seen Mr. Richard Lovegreen on two occasions. The Physician's Code of Ethics and recent court decisions dictate that I inform you that Mr. Lovegreen has threatened your life. He has indicated to me that if things do not work out well for him on his job, one option available is for him to take your life.

I am not in a position to judge the seriousness of these threats. Therefore, I can only inform you of them and advise you to take whatever action you deem appropriate.

Since I also must inform Mr. Lovegreen that I have given you this information, it may be difficult for me to continue treating him. I will promise that I will either endeavor to continue treating him or refer him to another psychiatrist.

Sincerely,

s/ Barry M. Maletzky, M.D.

An identical letter was sent to William Randall, supervisor at the Gresham Post Office.

This letter was preceded by telephone calls to both Singleton and Randall from Maletzky on the day of the therapy session, on the basis of which Grievant was placed on administrative leave with pay on November 23. When the letter was received on December 7, Grievant was placed on emergency suspension without pay, effective beginning on December 12. The reason given for this action was management's fears that a real threat had been made on the lives of Singleton and

Randall. Grievant immediately filed a grievance protesting the suspension.

The grievance progressed through Steps one and two of the grievance procedure, with the Union receiving the Postal Service's response to Step 2 denying the grievance on January 21, 1985. Under the terms of Article 15.2, Step 2, paragraph (h), the Union had 15 days to appeal the decision to Step 3, a period which ended on February 5, 1985.

According to Union representative Randy Smith, he prepared and mailed the appeal on February 5. However, upon receipt of the appeal, management noted that the letter was postmarked on February 7, and therefore it had not, in management's opinion, been mailed by the February 5 deadline. The appeal was denied both because Grievant had threatened his supervisors and because the appeal was untimely. This request for arbitration followed.

RELEVANT CONTRACT PROVISIONS

Article 16.7 - Emergency Procedures

Article 15.2, Step 2(h) - Appeals to Step 3

Article 15.3(b) - Forfeiture clause

POSITIONS OF THE PARTIES

Postal Service

The Postal Service argues that an emergency suspension is appropriate whenever a supervisor has reasonable grounds for believing that an employee may be injurious to himself or

others. Grievant does not dispute the fact that he made a threat to kill his supervisors to his psychiatrist on November 20. The persons who were threatened felt themselves in serious and justifiable fear for their lives. The Postal Service has no obligation to continue an employee under such circumstances and therefore was justified in immediately suspending Grievant and removing him from the office.

The Postal Service also argues that the grievance is not arbitrable because the appeal to Step 3 was untimely. The Service has traditionally relied on the postmark as the indication of when the appeal was filed, and the postmark on this appeal, February 7, is clearly two days beyond the 15-day deadline specified in the grievance procedure. The language of the contract is unequivocal; the appeal must be filed within 15 days of receipt of the Service's response to the Step 2 appeal. Since the Union failed to appeal on time, the grievance must be denied.

The Union

The Union addresses the timeliness issue first, arguing that appeals are timely if mailed before the deadline irrespective of the date indicated on the postmark. The undisputed testimony of Randy Smith indicates that he mailed the appeal to Step 3 on February 5, and thus the appeal was filed within the prescribed time limits. The fact that the

postmark indicates February 7, the Union argues, is irrelevant. It is the date of mailing, not the date of the postmark, that is important. Therefore, the grievance is arbitrable.

As to the threatening statement, the Union argues that the specific statement made was merely the ventilation of severe frustration and depression which Grievant had built up during an extended period of disputing with management over the working conditions at Gresham. The statement was made under Grievant's mistaken impression that anything he said to his psychiatrist would be held in the strictest confidence. Further, the specific statement made, "I am so sick of them and everything they have done to me that I could kill them," cannot properly be interpreted as a viable threat.

That the psychiatrist himself did not at the time consider this statement to be a realistic threat is evidenced by the psychiatrist's failure to seek clarification, to inquire whether the statement was intended to be serious, or to notify the police. The Union argues that management's response to the psychiatrist's letter can only be classified as an over-reaction to an incidental comment made in confidence by a patient to his psychiatrist. Therefore, the Union concludes the Postal Service was without just cause in suspending Grievant because of this supposed threat.

CONCLUSIONS

The testimony presented at the hearing was taped by the Arbitrator and this recording, together with the documentary

evidence introduced by the parties, has been carefully reviewed in preparing this award. Since the procedural issue presented in this grievance would be dispositive of the entire grievance, if found for management, the Arbitrator will address it first.

Timeliness

Article 15.3(b) of the parties' collective bargaining agreement is unequivocal in providing that any grievance not timely appealed is waived. Management raised the timeliness issue at Step 3, thereby preserving the issue for arbitration.

Article 15.2, Step 2(h) provides that "Any such appeal must be made within 15 days after receipt of the Employer's [step two] decision." The Union contends that its past practice indicates that an appeal is "made" when it is deposited in a mailbox. Management's contention is that it has customarily relied on the postmark to determine when an appeal is made. The distinction has proven largely irrelevant in the past since no case, as of the time of this grievance, had ever arisen where the date of mailing and the date of the postmark differed. In the present case, however, the evidence indicates that the appeal was mailed on February 5 and postmarked on February 7.

The great weight of arbitral authority indicates that an appeal is made when it is mailed. See, e.g., Jefferson

Chemical Co. Inc., 72 LA 892 (Goodstein, 1979); Intermediate Unit 1 Board of Directors, 73 LA 80 (Duff, 1979); American Petrofina Co. of Texas, 76 LA 239 (Hamilton, 1981); Redner Plastics, Inc., 709 LA 351 (Eagle, 1982).

The only evidence offered by management to refute the Union's assertion that the letter was mailed on February 5 is the fact that the letter was not postmarked until February 7. The Arbitrator is persuaded that management's reliance on the postmark under the facts of this case is misplaced.

Several cases have arisen in the courts where an assertion was made that the postmark evidences the date a letter was mailed. In most of these cases, it was held that the postmark is not controlling as to the date of mailing. For example, in New Haven v. Mitchell, 15 Conn. 206, 224 (1842), it was first stated:

... The postmark ... is evidence that the letter was mailed and sent, rather than that it was merely put into the post office on that day; the object of the postmark being to indicate the former [that the letter was mailed] and not the latter [that the letter was put into the post office on that day].
(as quoted in Collins, The Validity of Postmarks, 47 A.B.A.J. 371 (April, 1961))

In National City Bank of New York v. Morris Horowitz, 149 Misc. 531, 267 N.Y. Supp. 527 (1933), the City Court of New York stated:

There appears to be no legal presumption that because a letter is stamped as having been received at the post office or a substation on a particular date, that therefore, it was deposited in the mailbox on that date.

See, also, Harada v. Ellis, 591 P.2d 1060 (Haw, 1974).

As a general proposition, any doubts as to the timeliness of a grievance should be resolved against forfeiture of the grievance. Elkouri and Elkouri, How Arbitration Works, at 149.

It is obvious that a letter postmarked on a given date was mailed on or before that date. It is not so obvious that the date of mailing and the date of the postmark are always identical. The practice of management of deeming appeals timely if postmarked on time is thus ambiguous in that the Arbitrator cannot determine whether the reliance has been on the postmark or on the sure knowledge that the letter was mailed on or before the postmark date.

The Arbitrator is persuaded that on the facts of this case, the date of mailing should be controlling, irrespective of the date of the postmark. If either party believes that this result is generally undesirable, it is free to negotiate more precise contract language than is currently available, or seek an agreement providing for certified mail in such case to avoid future problems.

The Arbitrator finds that the appeal to Step 3 was mailed on February 5 and therefore was timely made. Therefore, this grievance is arbitrable on its merits.

The Suspension

It is axiomatic that management personnel have the right to protect themselves from the fear of bodily harm stemming from bona fide threats of employees. However, before emergency suspension without pay or some other discipline is appropriate, there must be some evidence that the statement, as made, actually constituted a viable threat. There must also be consideration of any mitigating factors which may be involved.

After a thorough examination of the evidence presented in this case, the Arbitrator is persuaded that Grievant's emergency suspension for allegedly making a threatening statement was without just cause. This conclusion is reached for three reasons, including the nature of the alleged threat, the sufficiency of the evidence in support of the allegation and the failure of management to afford Grievant due process.

The Nature of the Alleged Threat

The specific statement made by Grievant was, as quoted above, "I am so sick of them and everything they have done to me that I could kill them." The statement was made to a psychiatrist during a counseling session which Grievant believed to be confidential. Grievant did not make the statement directly to a supervisor or in the presence of

other employees. Apparently, he has not repeated the statement to anyone else.

Grievant has no known history of violence and in the opinion of this Arbitrator, he is not a violent man. He was, however, at that time, under severe pressure in both his personal and occupational life. There is evidence that the situation in the Gresham Post Office at the time was very tense and difficult, largely because of the excessive volume of mail to be processed. There was no indication in the evidence that Grievant had either the present intent or ability to carry out his threat.

The context in which the statement was made, a psychiatric counseling session, was one where Grievant was being encouraged to ventilate his pent-up emotions, to express things which might otherwise never rise to the level of awareness.

Other arbitrators, faced with similar facts, have reduced the action taken by management against employees making threatening statements. In Postal Service case No. W8N-5F-D-5435, Arbitrator Eaton rescinded an emergency suspension followed by discharge on the basis of the tense atmosphere in which the threatening statement was made, coupled with the fact that the supervisor was not present at the time. In Postal Service Case No. C1N-4F-D-5368, Arbitrator Seidman reduced the discipline imposed on an employee on the basis of the "severe emotional trauma" which he was under at the time. Similar

conclusions were reached by Arbitrator Gentile in Case No. W8N-5H-D-9828 and by this Arbitrator in Case No. W8N-5F-D-8240.

Based on an analysis of all of the factors involved, this Arbitrator is persuaded that the statement made by Grievant to his psychiatrist was not a bona fide threat of bodily harm to either of the persons about whom it was made. It has not been shown that Grievant ever had any present intention to actually carry out his supposed threat under any circumstances. He was at no time questioned by anyone in management or given any opportunity to explain.

Therefore, the statement did not provide management with just cause to support an emergency suspension.

The Sufficiency of the Evidence

Management argues that it had ample justification for suspending Grievant solely on the strength of the phone calls and letters received from Grievant's psychiatrist. The psychiatrist provided no additional information concerning the seriousness of the statement or the probability of its actually being carried out. No evidence was offered to indicate that Grievant had either the propensity or the ability to carry out such a threat. No investigation was conducted to determine if any other evidence of threatening intent was available. By management's own admission, the only reason Grievant was suspended was the allegation made in the psychiatrist's letter.

Grievant acknowledges that he made the statement to his psychiatrist, but states it was not seriously intended and was merely venting emotions. To justify summary emergency suspension there must be some credible evidence that the threat was real, was serious, and carried with it some probability of actually being carried out. Such was not the case under the evidence presented herein.

Due Process

When management received the letter concerning Grievant's statement, it made no effort to inquire as to what Grievant intended by it, if anything. In fact, management gave Grievant no opportunity to explain his side of the case at all. He was precluded from having a hearing at any step of the procedure. No investigation to ascertain the facts surrounding the alleged threat was ever made. On similar facts in Postal Service case No. W8N-5F-D-9759, Arbitrator Gentile overturned an emergency suspension and discharge solely on the failure of management to provide due process to the employee. In this case, due process was ignored by management when it over-reacted and took emergency suspension action without first at least asking Grievant about the threat and giving him an opportunity to explain.

AWARD

For all of the foregoing reasons, the Arbitrator finds that the emergency suspension of Grievant, beginning December 12, 1984, was without just cause. The Grievant is to be made whole for all lost time and any sick leave or vacation time used by Grievant to offset the effects of the suspension for its duration.



William E. Rentfro
Arbitrator