

28218

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration )  
Between ) GRIEVANT: Laura Steene  
UNITED STATES POSTAL SERVICE ) POST OFFICE: Malden, Massachusetts  
and )  
NATIONAL ASSOCIATION OF LETTER ) CASE Numbers:  
CARRIERS, AFL-CIO ) USPS: B06N-4B-D 08387028  
                                  ) NALC: 08-148D16  
                                  ) DRT: 14-115641

BEFORE: Sherrie Rose Talmadge, Esq., ARBITRATOR

APPEARANCES:

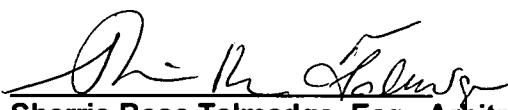
For the U.S. Postal Service: Miles P. Walcott, Labor Relations Specialist  
For the Union: Gerald McCarthy, Arbitration Advocate

Place of Hearing: 26 Dorchester Avenue, Boston, MA  
Date(s) of Hearing: March 9, 2009  
Date of Award: April 30, 2009  
Relevant Contract Provisions: Articles 16  
Date of Contract: 2006 - 2011  
Type of Grievance: Discharge

AWARD SUMMARY

The Service had just cause to discipline the Grievant for altering a date on her medical documentation in violation of the ELM 665.18. The Grievant is to reimburse the Service for 8 hours of compensation benefits, if that has not been done.

However, the discharge was punitive and not corrective in nature in violation of Article 16.1. In light of the due process violation and mitigating circumstances (the Grievant's 12 years of service and unblemished record, her good faith admission and offer to reimburse the Service for the eight hours of compensation she would not have been entitled to), I conclude that the discharge is to be reduced to a fourteen day suspension without pay. The Grievant is to be returned to duty and the Notice of Removal is to be rescinded. The Grievant is to be made whole for the loss of any wages, benefits and seniority. Accordingly, the grievance is sustained in part and denied in part.

  
Sherrie Rose Talmadge, Esq., Arbitrator

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OFFICE  
NALC HEADQUARTERS

### **STIPULATED ISSUES**

1. Was the Notice of Removal dated August 18, 2008, charging violation of the Postal Service's Standards of Conduct, issued to the Grievant for just cause?
2. If not, what is the appropriate remedy?

### **RELEVANT CONTRACT ARTICLES**

#### **Article 16.1 Statement of Principle**

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.

### **FINDINGS OF FACTS<sup>1</sup>**

Letter Carrier Laura Steene, Grievant, had been employed as a Letter Carrier since May 1996. She also held the position of Union steward. She was a good worker who had no prior discipline.

On November 1, 2007, the Grievant filed a CA-2 Notice of Occupational Disease and Claim for Compensation which was accepted by the Office of Workers Compensation Program (OWCP). The Grievant continued to work until her foot surgery on May 9, 2008. Her surgeon, Dr. Numberg told the Grievant that she would be out of work for at least six weeks, and he indicated on her CA-20 that she would be out of work from May 9 through June 30, 2008.

After Dr. Numberg was involved in a car accident, her post-op care was handled by Dr. McBride. During a visit with Dr. McBride on June 5, the Grievant was given a note stating that she would be out of work for two weeks. During that period the Grievant made a subsequent appointment with Dr. McBride because she did not feel she was ready to return to full duty. The Grievant found Dr. McBride not very compassionate. The Grievant testified that she tried to talk to him about the lack of movement of her toes but felt that it fell on deaf ears. She felt it was stressful dealing with McBride. The Grievant's preceding medical documentation indicated that she would be returning to work full-time on June 23.

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<sup>1</sup> At the hearing the parties had the opportunity to question the sworn witnesses under direct and cross-examination and to submit all relevant and material documentary evidence. At the

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The Grievant made an appointment on June 17 to see Dr. McBride because she did not feel that she was physically ready to return to work full-time on June 23. On her visit to McBride on June 17, the Grievant asked her husband, Michael, to accompany her. She felt "stressed" because she did not think that McBride would listen to her. Michael testified that Dr. McBride examined the Grievant's foot and said that it looked good and she should have no problem going back to work. The Grievant and her husband testified that in response to the Grievant's explanation that she was still in pain and did not feel that she could return to work at this time McBride responded "you can't or you won't". The Grievant felt that, as a result of her husband's intervention, they had reached a compromise that she would return on a limited duty basis 4 hours per day for the first week beginning on June 23 and return to work full duty on June 30. The Grievant testified that Dr. McBride repeated that she should have been out of work for six weeks. Dr. McBride did not testify.

As they were leaving the appointment, Dr. McBride gave the Grievant a note written on prescription paper dated June 17, 2008 returning the Grievant to work for two weeks of limited duty, 4 hours per day, then to full-duty on June 30, 2008.

As soon as the Grievant left the office she looked at the note and believed that it incorrectly stated that she was to return to work on June 18, rather than June 23. She said to her husband that the note does not say to return on June 23. The Grievant was not scheduled not to work June 19, 20 and 21. The Grievant wanted to go back into the doctor's office, but she was shaken by the visit and her husband said to "get in the car". The Grievant testified that she was intimidated by McBride, and therefore did not want to return to his office the next day.

The Grievant, who believed that the note did not reflect what was discussed at the appointment, changed the date on the note from June 17 to June 22. The Grievant testified that did not inform her husband that she had changed the date until July 23, 2008.

The year before the surgery the Grievant had worked a full year in severe pain before filling out the CA-2. The Grievant did not want to jeopardize her job, and she had wanted to be available for the route inspection. Then she had to wait a long time for the surgery.

At the time of the incident the Grievant testified that she was under a lot pressure because, in addition to the pain she continued to suffer during her recovery, her husband

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conclusion of the hearing the parties presented closing arguments.

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worked long hours out of state from June 17 through July 3, and she concerned about her 22 year old child who had been arrested on or about May 9, 2008.

On June 23 the Grievant returned to work on four hours limited duty and full duty on June 30. That week she worked four hours a day, Monday through Saturday, and was paid the remaining four hours a day by workers' compensation. The Postal Service paid the Grievant for 24 hours of work that week. However, at the time of the hearing she had not been paid the 24 hours due from Workers' Compensation.

Subsequently, upon review of McBride's medical note, the Office of Workers' Compensation suspected that the June 22<sup>nd</sup> date on medical note had been altered and the OIG was contacted to investigate. The OIG sent Dr. McBride a letter dated July 22, 2008 stating that it was a health oversight agency as defined by HIPPA and was entitled to protected health information without the patient's consent. The letter also asked Dr. McBride to refrain from disclosure for one year asserting that HIPPA required the doctor to withhold notification. According to the OIG agent, Dr. McBride acknowledged that he had dated the medical note June 17 and had not changed the date to June 22.

On July 23 the OIG agent held an interview with the Grievant who admitted to changing the date on the note from June 17 to 22. The Grievant also offered to reimburse the Service for any workers' compensation benefits she received in error due to altering the date on the form.

Manager Customer Service (A) Janine A. Falzone-Curtis held a pre-disciplinary interview (PDI) on August 7, 2008 with the Grievant, and her Union representative. At the PDI, the Grievant apologized to her Manager for changing the date and expressed remorse. The Grievant mentioned that her original return date had always been six weeks from the date of the May 9 surgery, which would have been June 20. Moreover, the May 12, 2008 CA-20 from her surgeon indicated that she would be disabled until June 30. She also offered to repay the Service for any unauthorized comp time. She told the Manager that fear of working with her foot not completely healed, stress and the smug behavior of Dr. McBride were contributing factors for her lack of judgment. She explained that her route had been abolished on May 8, 2008, her son had been arrested on May 9 and she was still in constant pain. She added that Dr. McBride's unwillingness to acknowledge the physical nature of her job as a letter carrier led her to this one impulsive act.

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By letter dated July 24, 2008, Manager Customer Service (A) Janine A. Falzone-Curtis put the Grievant out on Emergency Placement with pay pending the investigation into whether she misrepresented information provided on OWCP documents.

On July 29, 2008, Agent Lopez of the Office of the Inspector General issued his investigatory report noting that the Grievant admitted altering the medical document that she submitted to the Service in support of her workers' compensation claim at her July 23 interview with OIG agents. Subsequently, by letter dated August 18, 2008, Manager Falzone-Curtis issued the Grievant the Notice of Removal, which states in pertinent part:

You are hereby notified that you will be removed from the rolls of the United States Postal Service on September 20, 2008. This removal will be deferred until a decision is made on the grievance, if one is filed, at the Step B level of the NALC-USPS Joint Dispute Resolution Process, or 14 calendar days after the appeal is received at Step B, whichever comes first.

The reasons for this action are:

#### **CHARGE: VIOLATION OF POSTAL SERVICE STANDARDS OF CONDUCT**

Specifically, on 6/17/08, you were evaluated by your physician for injuries related to your job as a City Letter Carrier for a previously approved claim filed with the U.S. Department of Labor on a CA-2 Notice of Occupational Disease and Claim for Compensation with a date of injury of 8/10/07. The Doctor explained to you that he found no functional limitations and you then requested that he provide documentation returning you to work in a limited duty capacity. You then subsequently filed a Form CA-7 Claim for Compensation for the time frame from 6/7/08 through 6/20/08. A review of the medical documentation you provided to support the time frame claimed on the CA-7 revealed that these dates appeared to have been altered. An investigation was then initiated to determine if you had in fact altered medical documentation relative to your OWCP claim number 012043884.

The investigation revealed that the medical documentation provided by your treating physician had designated a return to work date of 6/18/08 and that you subsequently changed the date on the doctor's note to 6/22/08, thereby affording you an extended period of time out of work, with concurrent request to be compensated by the OWCP via the aforementioned CA-7 for this time. During an interview conducted with you by the Agents of the Office of the Inspector General on 7/23/08, you admitted to changing the date on one piece of documentation submitted to the Postal Service. Based on the Doctor's original prognosis dated 6/17/08, you could have returned to work on 6/18/08. Based on the altered date you received 12 hours of paid benefits that you were not entitled to. You returned to work on 6/23/08 in a limited duty capacity working 4 hours per day.

At the pre-disciplinary interview held with you on 8/7/08, you gave no acceptable reason for your actions.

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Your actions, wherein you altered medical documentation to reflect disability from work for a period of time when you were not in fact disabled and subsequently accepting monetary compensation for disability for that time period, are serious in nature and cannot be tolerated or condoned. Further, your actions have impacted the trust and confidence relative to the employee/employer relationship and are in violation of the following sections of the Employee and Labor Relations Manual (ELM):

#### **665.16 Behavior and Personal Habits**

Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of good character and reputation. The Federal Standards of Ethical Conduct referenced in 662.1 also contain regulations governing the off-duty behavior of postal employees. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct prejudicial to the Postal Service.

Moreover, the seriousness of your actions outlined above warrants the level of corrective action specified herein, even in the absence of prior elements or record or the presence of similar related prior discipline. . . .

At the hearing the parties agreed that as a result of returning to work on June 23 instead of June 18, the Grievant received 8 hours of benefits, rather than the 12 hours listed on the NOR, because she was not scheduled to work on June 19, 20 or 21.

The Union steward testified that when he tried to interview Dr. McBride during October 2008, the doctor did not respond to his calls or letters, and the Union was subsequently notified that the doctor had moved out of state.

### **POSITIONS OF THE PARTIES**

#### **POSTAL SERVICE POSITION**

The Service argued that there was just cause to issue the Notice of Removal. The Grievant forged a medical document concerning the amount of time she should be out before returning to work. This reflected two extra days, eight hours of pay, given to the Grievant that was not deserved. The Grievant admitted to forging the document. Although the Grievant testified that she was intimidated by the doctor, she could have changed doctors, if necessary. Furthermore, she had three days to get the medical document corrected by the physician, if she believed it to be incorrect, but she did not do so.

The Service has met its burden of proving just cause for the removal. The rule not to falsify documents for the employer is a reasonable rule. The rule is consistently

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enforced. Whenever an employee forges a document the same penalty, removal, is meted out, even if the employee had an unblemished record. There was a thorough investigation by the OIG and the Manager. The severity of the action merited the severity of the discipline. The discipline was issued in a timely manner. The Manager took into consideration the Grievant's 12 year history and lack of prior discipline. Nonetheless, the severity of altering a medical document for financial gain warrants discharge. The Grievant's integrity was at issue. In this case there was just cause for the removal notice. The Service urged the Arbitrator not to substitute her judgment for that of the Service, there was no evidence that the discipline was arbitrary and capricious or that the discipline was unreasonable. Accordingly, the Service urged a denial of the grievance.

### **UNION'S POSITION**

The Service did not have just cause to issue the Notice of Removal to the Grievant. The Grievant was involved with one incident, resulting in no monetary gain. The Grievant altered the date on the medical document because she was not healed enough to return to work, and she believed that it reflected the return date discussed at her June 17 appointment with Dr. McBride. The Grievant was very upset by her treatment from Dr. McBride on June 17 and neither she nor her husband noticed the incorrect return to duty date until they left the office. They noticed the error when they got into the car, and her husband was still upset and would not allow the Grievant to go back and get the note corrected by Dr. McBride. The Service alleges that the Grievant should have returned to work on June 18, although she was not scheduled to work on June 19, 22 and 23). She did return to work on June 23 on a 4 hour light duty and 4 hour OWCP schedule until June 30 when she returned to full duty. The same date her surgeon, Dr. Numberg had specified on the CA-20, noting that she would be out of work for six weeks, and she was. The Grievant was not paid for 24 hours she worked her first week on duty and thus, she did not gain any additional monies. Moreover, she had offered to repay the Service any monies owed.

The Service's investigation was shoddy at best. The type of investigation conducted by the OIG involving medical documentation is awaiting adjudication in federal court. Dr. McBride was not available to be interviewed by the Union, and he no longer practices medicine in Massachusetts.

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The penalty was punitive rather than corrective in nature in violation of Article 16.1. There are several mitigating factors to be considered. The Grievant had an unblemished record for 12 years. Moreover, the Grievant was under a great deal of stress at the time that this was simply a lapse of judgment. She was still in pain and was intimidated by Dr. McBride; her husband was commuting from out of state; and her son had recently been arrested. The Grievant believed Dr. McBride had been in error when he dated the letter June 17, and that she was changing the date to the agreed upon start date. The Grievant was truthful when asked about the date by the OIG, admitting that she had changed the date on the document. The penalty should be modified and the Grievant should be returned to duty and made whole for all lost wages and benefits.

### DISCUSSION

At issue is whether the Service had just cause to issue the notice of removal to the Grievant for violation of the Postal Service standards of conduct because she changed the date on a medical note. I find that the Service had just cause to discipline the Grievant, but that discharge was punitive and not corrective in this case.

The just cause standard requires the Postal Service to prove that the disciplinary action was issued after an objective pre-disciplinary investigation resulting in proof of an employee's infraction of a clearly communicated, consistently applied work rule. The Postal Service must communicate the disciplinary consequences of the employee's infraction. The administered discipline must be consistent with the charged offense and the employee's past record. Furthermore, the Postal Service must establish that its discipline was imposed in accordance with the procedural requirements of the parties' National Agreement.

The Grievant knew or should have known that pursuant to ELM Section 665.16, "Employees are expected to conduct themselves during and outside of working hours in manner, which reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal personnel be honest, reliable trustworthy, courteous, and of good character and reputation."

The Service met its burden of proving that there was just cause to discipline the Grievant for alteration of the medical note written by Dr. McBride by changing the date on the note from June 17 to June 22 which resulted in the Grievant returning to work on June 23 instead of June 18, 2008. The Grievant, who had been recuperating from foot

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surgery, received the medical note from her post care physician, Dr. McBride on June 17, 2008. At that medical appointment Dr. McBride had agreed to return the Grievant to work initially on a limited duty basis because she was not fully recovered. The Grievant acknowledged to the OIG agent and to the Manager at the Pre-disciplinary interview that she changed the date. Although Dr. McBride did not testify, the OIG agent included a statement from Dr. McBride in which he asserted that he did not change the June 17 date to June 22. As a result of that alteration the Grievant received eight hours of compensation that she would not have been otherwise entitled.

The Manager preformed an investigation which included the pre-disciplinary interview at which time the Grievant, represented by a Union official, acknowledged having altered the date on the medical note, explained that she believed the doctor had erred based on their discussion that she would be out of work for a total of six weeks and her continued pain, and discussed the pressure that she was undergoing during that period. The Grievant was remorseful and offered to repay the 8 hours of compensation benefits she would not have received had she returned to work on June 18. In addition, the Manager relied upon the OIG report, which included a statement from Dr. McBride.

The Service met its burden of proving that the Grievant's action, altering a date on a medical note, violated an established regulation ELM 665.18 requiring employees to be honest and trustworthy, and thus, warranted discipline.

Nonetheless, the Union raised a significant due process issue. The Manager relied heavily on the OIG report's findings of which Dr. McBride's statement that he did not change the June 17 date to June 22 and his assertion that the Grievant was functionally ready to return to work, was critical. Along with his explanation of why he believed that the Grievant was ready to return to work on June 18 despite the Grievant's assertion that she was not full recovered. I find that the Union's inability to question Dr. McBride created a significant hurdle for the preparation of their case. Because Dr. McBride did not testify, it is not known whether he simply choose not to participate in the Union's inquiry or was influenced by the July 22, 2008 letter sent by the OIG instructing the doctor to refrain from disclosure for one year about the matters discussed concerning the Grievant. Consequently, the Union was not able to question Dr. McBride about what transpired on June 17, 2008, including when he intended the Grievant to return to work.

The Union also presented compelling reasons to mitigate the discipline. The Grievant had 12 years of employment with an unblemished record. Although she

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inappropriately altered the medical document, the Grievant, who was still in recovery from her surgery, believed in good faith that she was changing the date on the medical note to reflect the return date that had been discussed and agreed to with Dr. McBride (and had been initially projected as her return date by her surgeon). The Grievant was under a stressful period in her family life at the time. When confronted about the date change, the Grievant immediately admitted to having made change to both the OIG and her Manager, and she was remorseful and offered to reimburse the 8 hours of compensation that she would not have received had she returned to work on June 18, 2008. Consequently, I find that the discipline was excessive and not corrective pursuant to Article 16.1 and should be reduced to a fourteen day suspension. The Grievant is to be returned to work and made whole for lost wages and benefits.

Thus, I conclude that although the Service had just cause to discipline the Grievant for altering her medical documentation, I find that in light of the due process violation, and the mitigating circumstances, including the Grievant's 12 years of employment, unblemished record, her good faith admission and remorse, and offer to reimburse the Service, the discharge was excessive and not corrective in violation of Article 16.1, and should be reduced to a fourteen day suspension without pay. The Grievant is to be returned to work and made whole for any back pay, and all other benefits lost for the period after the fourteen day suspension until she is returned to duty.

#### AWARD

The Service had just cause to discipline the Grievant for altering a date on her medical documentation in violation of the ELM 665.18. The Grievant is to reimburse the Service for 8 hours of compensation benefits, if that has not been done. However, the discharge was punitive and not corrective in nature in violation of Article 16.1. In light of the due process violation and mitigating circumstances (the Grievant's 12 years of service and unblemished record, her good faith admission and offer to reimburse the Service for the eight hours of compensation she would not have been entitled to), I conclude that the discharge is to be reduced to a fourteen day suspension without pay. The Grievant is to be returned to duty and the Notice of Removal is to be rescinded. The Grievant is to be made whole for the loss of any wages, benefits and seniority. Accordingly, the grievance is sustained in part and denied in part.

Respectfully submitted by:



Sherrie Rose Talmadge

Sherrie Rose Talmadge, Arbitrator