

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration *

between:

United States Postal Service

and

National Association of
Letter Carriers, AFL,CIO

* Grievant: S. Devoe

* Post Office: Jacksonville, FL

* USPS Case No: G11N-4G-D 13330582

* Branch Case No: JX53-840-13D

09-286169

BEFORE:

Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: LaSandra D. Crawford

For the Union: John Mitchell

Place of Hearing: Jacksonville, FL

Date of Hearing: January 10, 2014

Date of Award: February 4, 2014

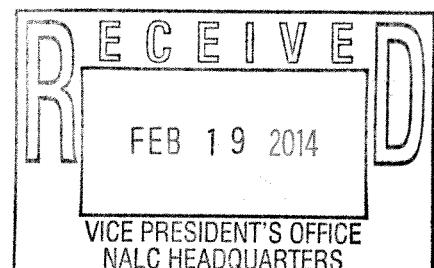
Relevant Contract Provision: Article 16

Contract Year: 2011

Type of Grievance: Discipline

Award Summary:

The Grievant in this case was issued a Notice of Removal alleging Conduct Unbecoming a Postal Employee. While the evidence shows the Grievant was guilty, I was not convinced the conduct of the Grievant in this instance was egregious and deserving of removal action. Therefore, the Notice of Removal is reduced to a seven (7) workday suspension.



Judith R. Willoughby, NALC
National Business Agent

FEB 10 2014



Lawrence Roberts, Panel Arbitrator

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 10 January 2014 at the postal facility located in Jacksonville, FL beginning at 9 AM. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a digital recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION**BACKGROUND AND FACTS:**

The Grievant in this matter is employed as a City Carrier Assistant Employee at a Jacksonville, FL Postal facility, the Murray Hill Delivery Unit. She has been employed by the Postal Service since May 2013.

On or about 19 August 2013, the Grievant received the following Notice of Removal Letter, signed by a supervisor. That document, in pertinent part, reads:

"You are hereby notified that you will be removed from the Postal Service effective at the end of your tour on September 20, 2013.

Charge No. 1: Conduct Unbecoming a Postal Employee

You are fully trained city carrier assistant (CCA) with an enter on duty date as a CCA appointment you were a rural carrier associate (RCA) since May 12, 2007, and prior to your RCA appointment you were a rural Temporary Relief Carrier since October 30, 2006. You are well aware of your duties and

responsibilities as carrier. You are also well aware of the importance of the requirement of maintaining the sanctity and the security of the mail. You are required to protect all mail entrusted to your care and to keep the mail in your possession.

You failed to properly perform the duties of your position. You failed to maintain the sanctity and the security of the mail, and you failed to protect all mail entrusted to your care. You were assigned as the collector on collection route 504 from April 18, 2013 through July 25, 2013. One of your collection points is Sundrez, which is located at the Jacksonville Landing. The Jacksonville Landing is a busy place of business with numerous stores and people coming and going constantly. On July 25, 2013, management received an email from the owner of the Frugal Diva Boutiques, Thomas Hand. The Frugal Diva Boutiques is a store located in the Jacksonville Landing. Mr. Hand informed management that you have shopped in his store numerous times while picking up mail from Sundrez. Mr. Hand informed management that when you come to his store to shop you leave the mail you collected at Sundrez at the entrance of his store, sometimes just outside the store, and sometimes just inside the store. Mr. Hand always looks to see where you leave the mail as it is potentially an accidental trip liability for his store. A video was also forwarded to management from the staff at Frugal Diva Boutique of you shopping in the store with the collection mail you picked up at Sundrez sitting unattended and unsecured at the entrance of the store. It is clearly evident in the video that the collection mail is out of your view as you had your back turned to the mail as you were facing the counter, speaking with the employee at the counter, and checking out merchandise. It is also clearly evident in the video that the collection mail is sitting at the entrance of the store unsecured and unattended with you no where in the close vicinity. You failed to properly perform the duties of your position. You failed to maintain the sanctity and the security of the mail, and you failed to protect all mail entrusted to your care.

I conducted a fact finding with you on July 29, 2013 and your NALC representative, Paul McGowan, was present. You stated you have worked for the Postal

Service for 7 years and were previously a rural carrier. I asked you were you assigned as the primary collector on collection route 504 from April 18, 2013, through July 25, 2013, and you replied, "I don't remember." You stated you were unaware of missing mail pieces from companies on collection route 504. You acknowledged you are aware of the importance of maintaining the sanctity and the security of mail, and that you were made aware of securing the mail as a rural carrier. You stated you have not left mail unsecured while collecting mail on collection route 504 and that you have not left mail unsecured while in the Frugal Diva Boutique. You stated you were not aware of a video showing you shopping at the Frugal Diva Boutiques, nor were you aware this video showed that you left the mail you picked up from Sundrez at the front of the store in the Landing unsecured and out of your view. I asked you if you had anything you wished to add and you replied, "No."

On March 14, 2007, you signed your appointment affidavit in which you declared that you understood that you must protest the United States mail.

Your actions have destroyed the trust necessary to retain you as a postal employee. You are well aware that you are required to maintain the sanctity and the security of the mail, and that you are required to protect all mail entrusted to your care. Your actions were contrary to your duties and responsibilities as a postal employee, as well as parts 665.11, 665.13 and 665.16 of the Employee and Labor relations Manual and sections 112.1, 112.31, and 131.11 of the Handbook M-41.

Please turn in all government property issued to you on your last day of service. Notification of Personnel Action, PS Form 50 will be forwarded to you later.

If this action is overturned on appeal, back pay will be allowed, unless otherwise specified in the appropriate award or decision. Only if you have made reasonable efforts to obtain other employment during the relevant non-work period. The extent of documentation necessary to support your back pay claim is explained on the attached Notification of Employee's Obligation to Mitigate Damages Letter.

You have a right to file a grievance under the Grievance and Arbitration procedures set forth in Article 15 of the National Agreement within fourteen (14) days of your receipt of this notice.

The Grievant, as well as the Union, refute the charges.

The instant grievance was filed in protest. The Union asks the Grievant be returned to work and made whole in every respect. In rebuttal, the Agency argues the evidence supports their removal action and requests their initial decision be upheld.

Obviously, the Parties were unable to resolve this dispute during the prior steps of the Parties Grievance-Arbitration Procedure of Article 15. An impasse was declared by the Step B Team on 10 October 2013.

It was found the matter was properly processed through the prior steps of the grievance procedure. Therefore, the dispute is now before the undersigned for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. The record was closed following the receipt of oral closing arguments from the respective Advocates.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.

2. Grievance Package

COMPANY'S POSITION:

It is the contention of the Employer the evidence in this case is not in substantial dispute and there is no doubt that the mails were left unsecure in full view of the public that had been entrusted to the Grievant while the Grievant was preoccupied herself in a retail establishment. And for that reason, the Service believes just cause exists to support their removal action.

The Service insists the Grievant left the mail in the front of the store, unguarded. And the Employer points out that video evidence, as well as credible testimony will support their claims in that regard.

According to the Agency, the Grievant had no official business reason to be in the retail location leaving the mail unattended and unsecure. Management points out the Grievant had collected mail from Sundrez, a retail shop that has a Central Postal Unit inside of it. The Service mentions that Sundrez is the only collection point in the Landing for collection run #504 the Grievant was performing.

It is the view of the Employer that the proper protocol is for the mail to be collected, returned to the vehicle: secured and to proceed to the next collection point and not for the Grievant to deviate away from her duties of collecting and securing the mails to engage in personal ideation while leaving the mail unattended and vulnerable.

As explained by the Agency, when questioned, the Grievant acknowledged she was aware of the importance of maintaining the sanctity and security of the mail. However, it is Management's position that the Grievant denied every leaving mail unsecure while working on the collection route in question. The Employer's belief is that such action is highly improper and warrants removal action.

The evidence, according to Management, supports their claims in this case. The Employer believes the essential job function of a Letter Carrier is the security and sanctity of the mail. It is the Employer's position that this was an egregious act committed by the Grievant which violates Postal policy and public confidence.

It was reasoned by the Service that when you stop and think about this you will see that the decision to remove the

Grievant, a short term non-career employee, was proper and warranted.

The Service also argues that the concept of progressive discipline does not apply to City Carrier Assistants per item 3.E of the Das Award. Furthermore, the Service argues this Employee cannot be rehabilitated as she was not truthful during the investigative interview demonstrating she was no longer worthy of the trust which is the foundation of employment relationships, particularly in this type of employment that requires the employee to work the majority of the time without an immediate supervisor.

Furthermore, the Employer argues that any modification of this penalty would only send a signal to other Employees that such conduct is acceptable.

The Service therefore respectfully asks that the Arbitrator make the Grievant accept responsibility for her actions by denying this grievance in its entirety and upholding her removal.

UNION'S POSITION:

According to the Union, just cause is not present in the instant case to support removal action.

The Union also mentions that under the current Agreement, City Carrier Assistants, while not career employees of the Service are now given rights per Article 15 to have their grievances heard through the procedure. Furthermore, the Union points out that discipline for City Carrier Assistants shall be corrective in nature.

The Union also argues there to be a procedural defect in this matter, in that, while the Grievant is being charged with one offense, the investigation performed by the issuing supervisor is for something almost totally different. The Union also claims that requested documentation was not provided.

The Union insists that had the reviewing official performed an independent review, the procedural defects would have been noticed.

It is proffered by the Union there is no proof offered to show the Grievant was aware of or broke a rule, or that management performed a thorough and objective investigation before they rushed to this punitive discipline.

The Union concludes that Management may claim many things, however, when you begin to peel away the layers of speculation and assumptions then and only then do we arrive at the facts.

It is the Union's claim the evidence will show that the Agency did not give the Grievant her "day in court," and they did not have just cause to issue a Notice of Removal.

As a remedy, the Union asks the Notice of Removal be rescinded and the Grievant be made whole for all wage loss and benefits including the average overtime made by CCA's in the Jacksonville installation during her non-pay/non-duty status.

THE ISSUE:

Did Management have just cause when they issued the grievant, a CCA carrier, a Notice of Removal dated 8/19/13? If so, what is the remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 16
DISCIPLINE PROCEDURE

DISCUSSION AND FINDINGS:

This matter involves an issue of removal wherein the burden of proof falls on Management to establish just cause for their actions.

While Article 3, Management Rights, provides the Employer with the power to "suspend, demote, discharge, or take other disciplinary action...", the Employer is limited in any decisions as restricted by other Articles or Sections of the Agreement.

According to the Agreement, no Employee may be disciplined or discharged except for just cause. In my view the "just cause" provision is ambiguous; however, its concept is well established in the field of labor arbitration. The Employer cannot arbitrarily discipline or discharge any Employee. The burden of proof is squarely on the Employer to show the discipline imposed was supported with sound reasoning.

In addition, the just cause standard cannot be gauged in the same manner in all cases since each discipline case is unique to its own set of facts and circumstances.

The chief negotiators of Article 16 suggest progressive discipline. In many cases, that guideline prevails and progressive discipline works to serve both the Employer and Employee. As an example, absenteeism is oftentimes corrected with progressive discipline.

Then, there are those infractions, whereby progressive discipline, is simply improper. Theft would certainly be a good example of one of these instances. In this business, such an act would be intolerable and removal following the first occurrence would only be appropriate. I'm sure the chief negotiators would agree with this reasoning.

However, each matter of discipline rests solely on its own merits. What is found to be applicable in this case cannot be applied evenly to other similar issues. In fact, this case is totally unique when compared to other matters of discipline that I've decided throughout my arbitral career.

The one constant is the burden of proof rests with the Postal Service. It's their obligation to establish just cause or, at the very least, via their case in chief, demonstrate the presence of clear and convincing evidence.

It is not up to the Union to prove innocence, instead, for the moving party to establish guilt. In order to prevail however, Management need not prove their case beyond a reasonable doubt.

Instead, in arbitral matters, the preponderance of evidence rule applies. Clear and convincing evidence is proof via the preponderance. Regardless of the specific term employed, this Agreement, like most others, requires a showing, via evidence, that, more likely than not, the Grievant is guilty as charged.

This is based on the probability of the evidence, it's probable truth and accuracy, not necessarily the quantity. In

any case, the meaning is somewhat subjective and this forum lacks a steadfast rule that can be applied to all cases. Instead, only a guideline delineates the evaluation of the evidence and accordingly, is considered on a case by case basis.

This particular Article 16 case involves one of failure to properly perform duties. There are certain acts that are certainly dischargeable offenses, even on the first occurrence. While progressive discipline is certainly recommended by the negotiators, that particular theory of discipline is based on the infraction and is to be determined on a case by case basis.

In their opening statement, the Union raised a matter claiming several procedural issues including, the Grievant not being provided her day in court.

However, the evidence shows the Union's procedural issues were without merit. I was not convinced the due process rights of the Grievant were compromised in any way. The Grievant was well aware of the charges against her and there was no evidence to indicate the process was mis-handled by Management in any way. Therefore the Union's procedural arguments are hereby denied. And contrary to the Union's argument, I am of the considered opinion the Grievant was guilty, however, not to the level or degree in which Management argues.

While I do agree the charge against the Grievant is a serious matter, I do not believe the facts of this case are deserving of Removal action on the first offense.

The Employer argued that guilt is the only thing that need to be established in this case and the penalty cannot be mitigated by the Arbitrator in this case. In fact Management even cited a July 2012 arbitration award to make that very point. However, that particular removal action was that of a Transitional Employee issued on 13 January 2012, falling under control of the language of the preceding agreement.

That 2006 Agreement provided that "**Where the employee is found guilty, the arbitrator shall not have the authority to modify the discharge.**" That same language is notably absent from either the 2011 NALC Agreement or the 10 January 2013 Das Award relied upon by the Employer in their opening statement.

And with that as a backdrop, I do find the Grievant guilty, however, not to that egregious level as purported by the Employer. That is not to say that the sanctity and security of the mail is insignificant. To the contrary, all mail should be secure and protected at all times, period.

In this matter, the evidence suggested the Grievant's cart was only unattended for a few minutes and testimony indicated she kept turning around to visually check the cart. There was no evidence to the contrary. However, there was evidence suggesting the shop owner had advised the Grievant to leave the cart outside the door.

That, in and of itself, is not an excuse on the part of the Grievant. However, it does convince me the Grievant did not totally abandon her basic duty of maintaining the security of the cart's contents. I do believe the Grievant was guilty, however, not to the degree relied upon by the Employer. In this particular case, I do not believe the act committed by the Grievant was of such an egregious nature as to warrant removal action.

There was a lot of testimony regarding the sanctity and security of the mail. And to that end, I certainly agree with the Employer that this must be an utmost priority of all employees. However, there was nothing in this record to support Management's claim of this instance being of such an egregious nature as to immediately warrant removal action.

The fact remains the Grievant has been employed by the Postal Service, in various capacities, for some seven years.

And there were no previous mention of any other discipline being issued the Grievant. And this is significant.

I have no reason to believe this to be nothing other than an isolated occurrence on the part of the Grievant. The absence of any prior discipline indicates the Grievant to be trustworthy, as well as an otherwise good Employee.

For all the reasoning mentioned previously, it is my opinion that a removal action is too severe a penalty given all the facts and circumstances of this case. To a certain degree, I do agree with the Union, in that, had this matter been more carefully reviewed, there is a good chance the initial penalty would and could have been reduced prior to this matter reaching the Grievance-Arbitration Procedure of Article 15.

The initial penalty will be reduced to a seven (7) workday suspension. From that point forward, the Grievant shall be made whole to the degree requested via the Union's Position statement above.

This decision is not to be construed in any way as an approval allowing mail to be unattended and/or not secured. The sanctity of the mail is of the utmost importance and should be protected at all times. I was simply unconvinced that is

exactly what had happened in this case nor to the degree as initially alleged by the Employer.

AWARD

The removal action is reduced to a seven (7) day suspension in accord with the above.

Dated: February 4, 2014
Fayette County PA