

C#08977

REGULAR ARBITRATION PANEL

<i>In the Matter of the Arbitration</i>	(GRIEVANT:	William L. Patrick
<i>between</i>	(POST OFFICE:	Bessemer AL
UNITED STATES POSTAL SERVICE	(USPS CASE NO:	S7N-3D-D 17876
<i>and</i>	(NALC CASE NO:	003219
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	(

BEFORE: Raymond L. Britton, *Arbitrator*

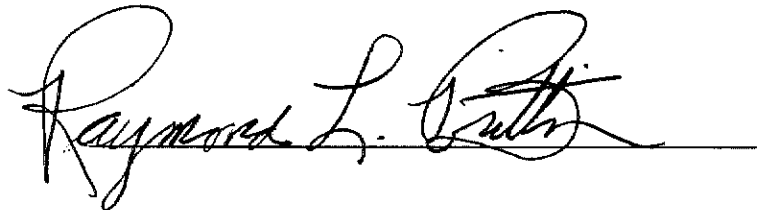
APPEARANCES:

<i>For the U.S. Postal Service:</i>	John A. Shalhoop
<i>For the Union:</i>	G.E. Cruise
<i>Place of Hearing:</i>	U.S. Post Office
<i>Date of Hearing:</i>	March 10, 1989

AWARD:

For the reasons given, the grievance is sustained and the Employer directed to reinstate the Grievant, make him whole for any loss that he has suffered, and expunge from the record any and all references to the disciplinary action.

Date of Award: June 16, 1989



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ISSUE

Whether the Postal Service had just cause for the removal of the Grievant?

HISTORY OF THE PROCEEDINGS

The parties failed to reach agreement on this matter, and it was submitted to arbitration for resolution. Pursuant to the contractual procedures of the parties, the undersigned was appointed as Arbitrator to hear and decide the matter in dispute.

At the commencement of the Hearing, it was stipulated by the parties that this matter was properly before the Arbitrator for decision and that all steps of the arbitration procedure had been followed and that the Arbitrator had the authority to render the decision in this matter. After the Hearing, it was agreed that the parties would submit Post-Hearing Cross-Briefs to the Arbitrator by placing such Briefs in the mails not later than March 27, 1989. The Post-Hearing Cross-Brief filed by the United States Postal Service (hereinafter referred to as "Employer") was received by the Arbitrator on March 25, 1989. The Post-Hearing Cross-Brief filed by the National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "Union") was received by the Arbitrator on March 31, 1989.

SUMMARY STATEMENT OF THE CASE

William L. Patrick (hereinafter sometimes referred to as "Grievant") is a letter carrier at the Post Office in Bessemer, Alabama. On September 8, 1988, the Grievant filed a grievance protesting his removal and a Step 1 meeting occurred on that date, after which the grievance was denied. Pursuant to Article 15 of the National Agreement, the grievance was appealed on September 13, 1988 to Step 2 of the grievance procedure alleging a violation of, but not limited to, Articles 15, 16, 19 and 31 of the National Agreement, and stating in relevant part as follows (Joint Exhibit No. 2):

Grievant was issued a letter of removal for falsification of PS Forms 2485 and 4583. On 9/8/88 Union requested any and all information used as a basis for letter of removal. None given to date.

Union Contentions: Grievant removed without just cause. Management in violation of above-stated articles & laws. Grievant has been denied due process of his rights under agreement and applicable laws. Grievant would have been hired if information had been known. J. Washington 10 pt. veteran with bad knees hired prior to Grievant. Grievant's doctor filled out medical examination.

Corrective Action Requested: Grievant shall be made whole. Letter of removal should be withdrawn.

On September 22, 1988, a Step 2 meeting was held, and on September 30, 1988, in a letter to Union President E.O. Harper, Superintendent of Postal Operations Jimmy R. Moore denied the grievance, stating in relevant part as follows (Joint Exhibit No. 2):

* * *

Management has the right to require from each candidate for employment the truthfulness and accuracy of all forms that are filled out by a candidate in the interviewing and processing for Postal employment. The failure of anyone being considered for employment or being processed for employment to do otherwise will result in being terminated from employment with the Postal Service. Mr. Patrick falsified medical questions on PS Form 2485 and PS Form 4583 during his processing for Postal employment.

Decision: After reviewing the charges, I find that the Postal Service had just cause to issue a letter of removal to grievant for falsification of PS Form 2485 and PS Form 4583. Therefore, the grievance is denied.

On October 3, 1988, the Union appealed the grievance to Step 3 of the grievance procedure for the following reasons (Joint Exhibit No. 2):

No decision rendered at step one or step two. Grievant was issued letter of removal without just cause. . . .

Corrective Action Requested: The grievant should be made whole including interest compensation for any lost income due to the removal (personal or otherwise), compensation for mental anguish and personal suffering should be included/granted (i.e., such as medical bills & sick leave).

On November 23, 1988, in a letter to National Business Agent G.E. Cruise, the grievance was denied by Labor Relations Manager George Whitten, who stated in relevant part as follows (Joint Exhibit No. 2):

* * *

The grievant in this case has been charged with falsification of PS Form 2485, Medical Examination and Assessment Form, and falsification of PS Form 4583. This is a serious offense that cannot be taken lightly. Postal regulations require all Postal personnel to be honest and trustworthy. It is evident that the grievant was not being honest, when he failed to notify the Postal Service about his prior medical conditions. There is a possibility that the grievant would not have been hired if he had not falsified PS Form 2485 and PS Form 4583.

Based on these facts, the grievance is denied.

Subsequently, the grievance was appealed to arbitration.

Provisions of the National Agreement effective July 21, 1984, to remain in full force and effect to and including 12 midnight July 20, 1987, (hereinafter referred to as "National Agreement") (Joint Exhibit No. 1) considered pertinent to this dispute by the parties are as follows:

ARTICLE 12

PRINCIPLES OF SENIORITY, POSTING AND REASSIGNMENTS

Section 1. Probationary Period

A. The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto. . . .

B. The parties recognize that the failure of the Employer to discover a falsification by an employee in the employment application prior to the expiration of the probationary period shall not bar the use of such falsification as a reason for discharge.

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ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

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Section 2. Grievance Procedure--Steps

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Step 2:

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(d) At the meeting the Union representative shall make a full and detailed statement of facts relied upon, contractual provisions involved, and remedy sought. The Union representative may also furnish written statements from witnesses or other individuals. The Employer representative shall also make a full and detailed statement of facts and contractual provisions relied upon. The parties' representatives shall cooperate fully in the exchange of copies of all relevant papers or documents in accordance with Article 31. The parties' representatives may mutually agree to jointly interview witnesses where desirable

to assure full development of all facts and contentions. In addition, in cases involving discharge either party shall have the right to present no more than two witnesses. Such right shall not preclude the parties from jointly agreeing to interview additional witnesses as provided above.

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ARTICLE 16

DISCIPLINE PROCEDURE

Section 1. Principles

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.

ARTICLE 19

HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals, and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least sixty (60) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Unions upon issuance.

ARTICLE 31

UNION-MANAGEMENT COOPERATION

* * *

Section 2. Information

The Employer will make available for inspection by the Unions all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any costs reasonably incurred in obtaining the information.

Requests for information relating to purely local matters should be submitted by the local Union representative to the installation head or his designee. All other requests for information should be directed by the National President of the Union to the Senior Assistant Postmaster General for Employee and Labor Relations.

* * *

Provisions of Management and Delivery Services (M-39) considered pertinent to this dispute are as follows:

115 Discipline

115.1 Basic Principle

In the administration of discipline, a basic principle must be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause. The delivery manager must make every effort to correct a situation before resorting to disciplinary measures.

115.2 Using People Effectively

Managers can accomplish their mission only through the effective use of people. How successful a manager is in working with people will, to a great measure, determine whether or not the goals of the Postal Service are attained. Getting the job done through people is not an easy task, and certain basic things are required, such as:

- a. Let the employee know what is expected of him or her.*
- b. Know fully if the employee is attaining expectations; don't guess--make certain with documented evidence.*

c. Let the employee explain his or her problem--listen! If given a chance, the employee will tell you the problem. Draw it out from the employee if needed, but get the whole story.

115.3 Obligation to Employees

When problems arise, managers must recognize that they have an obligation to their employees and to the Postal Service to look to themselves, as well as to the employee, to:

- a. Find out who, what, when, where, and why.*
- b. Make absolutely sure you have all the facts.*
- c. The manager has the responsibility to resolve as many problems as possible before they become grievances.*
- d. If the employee's stand has merit, admit it and correct the situation. You are the manager; you must make decisions; don't pass this responsibility on to someone else.*

115.4 Maintain Mutual Respect Atmosphere

The National Agreement sets out the basic rules and rights governing management and employees in their dealings with each other, but it is the front-line manager who controls management's attempts to maintain an atmosphere between employer and employee which assures mutual respect of each other's rights and responsibilities.

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POSITION OF THE PARTIES

The Position of the Employer

It is the position of the Employer that the Grievant falsified information on medical questionnaires that were completed prior to his employment. The Employer contends that after learning of the falsification, management properly removed the Grievant from his position with the Postal Service. The Employer additionally maintains that there were no procedural irregularities with the processing of the grievance, and it should, therefore, be denied.

The Position of the Union

The Union takes the position that the removal of the Grievant was without just cause and was punitive rather than corrective in nature. The Union contends that the

Postal Service failed to meet its burden of proving by clear and convincing evidence that the Grievant intentionally falsified his application for employment. The Union further maintains that management failed to make available to the Union certain documents used by management in making the decision to remove the Grievant.

OPINION

Resolution of this matter requires the Arbitrator to determine whether management has presented sufficient probative evidence to demonstrate that the Grievant wilfully falsified his medical information in order to secure employment with the Postal Service.

Initially, it is noted by the Arbitrator that the Union has lodged a complaint that management failed at Step One of the grievance procedure to supply the Union with medical documents concerning the charges against the Grievant. At the Hearing on this matter, Supervisor Mack Flynn testified that he supplied Union President E.O. Harper with all relevant documents. Supervisor Flynn's testimony was corroborated by SPO Jimmy Moore. Union President Harper did not testify. Inasmuch as the testimony of Supervisors Flynn and Moore is un rebutted, and since the Union did not address the question of procedural irregularities in its Post-Hearing Cross-Brief, it is the determination of the Arbitrator that the Union's assertion with respect to the procedural propriety of this grievance is lacking in persuasive force.

With respect to the merits of the grievance, the record reveals that the Grievant signed PS Form 2485 on December 28, 1987, after being examined by Dr. Thomas Bryant. Dr. Bryant stated on the form that there was no medical reason to limit the Grievant's activities, and the Grievant was subsequently hired by the Postal Service on January 16, 1988. On May 7, 1988, the Grievant injured his ankle while carrying his route and was examined by Dr. Bryant, who referred him to orthopedic specialist Dr. Keith W. Weaver. In his notes transcribed after examining the Grievant, Dr. Weaver stated that the Grievant "... has had several injuries to this ankle since 1974 [and] has been advised by two different surgeons in the past to undergo lateral ankle ligament reconstruction." After performing surgery on the Grievant's ankle, Dr. Weaver stated in his Report of Operation that the Grievant "... had longstanding instability of right ankle with recent reinjury." Upon receipt of this information, the Employer reviewed the Grievant's PS Form 2485 and learned that the Grievant had not indicated thereon that he had suffered from a painful or swollen joint, nor did he specify that he had ever had an x-ray. Management further determined that when he completed PS Form 4583, he failed to respond in the affirmative to questions concerning 1) whether he had arthritis, rheumatism, swollen or painful joints; 2) whether he had a deformity of a hand, arm, foot or leg; and 3) whether he had other serious defects or diseases. On the basis of these determinations by management, the Grievant was removed for falsification of the two forms.

In support of its position that the removal of the Grievant was proper, the Employer references the testimony of Supervisor Flynn, who stated that he first learned of the allegedly erroneous information on the Grievant's medical forms from the Injury Compensation Supervisor. After comparing the Grievant's answers with the medical information received from Dr. Weaver, Supervisor Flynn made the decision to deny the grievance at Step One. Reference is also made by the Employer to the testimony of Supervisor Moore, who stated that he recalled interviewing the Grievant when the latter applied for the position of letter carrier. According to Supervisor Moore, had he been given the full and complete information concerning the Grievant's ankle injuries, he would not have hired the Grievant. Similarly, Dr. Charles C. Morgan, who reviewed the pre-employment medical examination and assessment forms for the Grievant, stated that, based on the information provided on the PS Forms 2485 and 4583, he saw no reason to disqualify the Grievant. However, he is also shown to have stated that he would not have found the Grievant medically fit for the position of letter carrier had he been made aware of the medical findings of Dr. Weaver, the Grievant's prior ankle injuries, and the need for surgery prior to employment.

In justification of its decision to remove the Grievant, the Employer argues that since letter carriers are in a fiduciary position, applicants for employment are expected to answer the questions on the medical forms fully and truthfully. According to the Employer, arbitrators have long upheld the language found in Article 12, Section 1 of the National Agreement, which states that "... the failure of the Employer to discover a falsification by an employee in the employment application prior to the expiration of the probationary period shall not bar the use of such falsification as a reason for discharge." Citing several prior arbitration awards, the Employer notes that such awards have validated the position of the Employer herein that falsification of an employment application constitutes just cause for termination.

The difficulty with the foregoing position of the Employer as it relates to the matter at hand is that, in the considered judgment of the Arbitrator, no probative evidence has been presented by management to demonstrate that the Grievant supplied false answers to the specified questions on the medical forms. In this regard, it is observed by the Arbitrator that management highlighted the following questions from the medical forms (PS Form 2485 and PS Form 4583; Management Exhibit No. 1) in order to demonstrate the answers that the Employer believed to be erroneous:

Do you have any medical disorder or physical impairment which could interfere in any way with the full performance of duties of the position for which you are applying?

Have you ever received compensation or a cash settlement from an employer insurance company, governmental or other organization for injury or disease?

Have you ever had an x-ray or other special examination (e.g., electrocardiogram, CAT scan)?

Do you now or have you ever had any of the following conditions:

Painful or swollen joint?

Have you ever or have you now

Arthritis, rheumatism, swollen or painful joints?

Deformity of hand, arm, foot or leg?

Other serious defects or diseases?

The Grievant responded "no" to all of the foregoing questions. However, for the reasons hereinafter given, the Arbitrator cannot rightfully view the responses of the Grievant to be falacious based upon the evidence presented.

There is no evidence in the record presented to reveal that the Grievant believed he had any medical disorder or physical impairment which could interfere in the performance of the duties of a letter carrier. Nor is there any information contained in the record submitted to indicate that the Grievant ever received compensation or a cash settlement for injury or disease. Similarly, with respect to the question regarding x-rays or other special examinations, management has presented no evidence that would tend to show that the Grievant falsified his response, nor has management demonstrated that the condition of the Grievant's ankle ought to be categorized as either a "deformity" or a "serious defect or disease."

The two remaining questions inquire as to the past or present existence of arthritis, rheumatism, and swollen or painful joints. With respect to whether the Grievant has or has had arthritis or rheumatism, nothing in the evidence submitted supports such a finding. As to whether he has or has had any swollen or painful joints, the record reveals only that he injured his ankle in approximately 1974 while he was in the military service, but according to the undisputed testimony of the Grievant, he did not even see a doctor on that occasion, and he did not state that the ankle was either swollen or painful.

In view of the foregoing, it appears to the Arbitrator that the sole basis for management making the determination that the Grievant must have falsified his medical forms were the statements made by Dr. Keith W. Weaver. The first statement, made by the doctor during his initial consultation with the Grievant was that the Grievant "... has had several injuries to this ankle since 1974 [and] has been advised by two different surgeons in the past to undergo lateral ankle ligament reconstruction." Assuming that the doctor accurately transcribed the Grievant's words, the most that can be said is that the Grievant had previously injured his ankle. However, even accepting that statement by the Grievant as true, such does not conflict with any of the questions which the Grievant allegedly falsified. None of the referenced questions ask about ankle injuries, nor do any of the cited questions appear to encompass an ankle injury. The second statement made by Dr. Weaver, after performing surgery on the Grievant's ankle, was that the Grievant "... had longstanding instability of right ankle with

recent reinjury." It seems to the Arbitrator that management is attempting to conclude, on the basis of this postoperative statement, that the Grievant must have known that he had a longstanding instability of the right ankle. Again, however, even though management's conclusion is erroneous, were it found to be correct that the Grievant knew he had such a "longstanding instability," the questions that the Grievant is alleged to have falsified do not address themselves to such a condition. Moreover, it does not appear to the Arbitrator that the Grievant considered the condition of his ankle to be anything other than normal until the time of the injury that he sustained in May 1988.

After fully considering the charges against the Grievant in light of the record presented, the Arbitrator is required to conclude that management has not proven through the presentation of probative evidence that there was any intent on the part of the Grievant to falsify his answers to the questions specified. As a result, just cause did not exist for his removal.

In reaching this conclusion, the Arbitrator has fully reviewed the awards in Case Nos. C1T-4B-D-705, S8C-3P-D-14994, and N1C-1M-D-4040, submitted by the Employer as supportive of its position herein. It does not appear to the Arbitrator, however, that these cited cases can properly be considered as controlling inasmuch as, unlike the case at hand, the responses made by the respective applicants were found to be clearly false, thereby establishing just cause for their removal.