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REGULAR ARBITRATION PANEL

In the matter of arbitration)
)
 between) **GRIEVANT: Delton Doran**
)
 UNITED STATES POSTAL SERVICE) **Post Office: Paulsboro, NJ**
)
 and) **CASE No. CO1N-4C-D-07006552**
) **DRT No. 12-063467, Local #021007G**
 NATIONAL ASSOCIATION OF)
 LETTER CARRIERS, AFL-CIO)

BEFORE: Arbitrator Timothy J. Brown, Esquire

Appearances:

For the Postal Service: Theresa Hensel, Labor Relations Specialist

For the Union: Raymond F. McDonald, Jr., NALC Advocate

Place of Hearing: Bellmawr, NJ

Date of Hearing: August 1, 2007

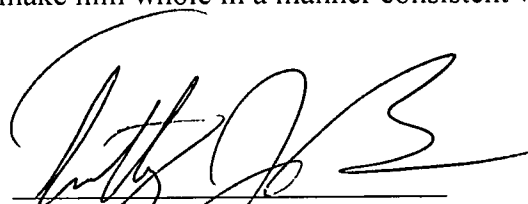
Date of Award: August 27, 2007

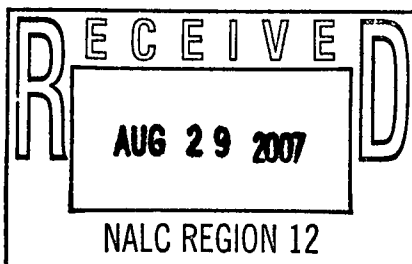
Relevant Contract Provisions: Article 16

Award Summary

The Grievance is granted. The removal of Grievant for the reasons presented in this matter were the same reasons relied upon to support a previously issued notice of removal; a removal resolved by a Step B Dispute Resolution Team. The Employer's attempt to remove Grievant in the instant matter constitutes double jeopardy and is contrary to the principles of due process and just cause. Additionally, management further failed the just cause standard by not conducting a full and fair investigation of the charges it proffered to support the removal of Grievant and deciding to terminate Grievant based upon assumptions rather than facts. Under the circumstances, the Postal Service is ordered to reinstate Grievant and make him whole in a manner consistent with the bargaining agreement and the ELM.

DATE: August 27, 2007


Timothy J. Brown, Esquire
Arbitrator



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VICE PRESIDENT &
OFFICE
NALC HEADQUARTERS

Award

This Decision and Award is made after careful consideration of all admissible evidence and argument submitted by the parties, including the undersigned's observation and evaluation of the credibility of each witness.

Issue

The parties stipulated that there are no procedural issues presented in this matter, that the matter is properly before the arbitrator for determination and that the following is an accurate statement of the issue or issues to be determined by the arbitrator:

Did Management have just cause under Article 16 of the National Agreement to issue the subject removal of Grievant Delton Doran dated February 9, 2007 for lack of candor and lack of suitability for continued employment and, if not, what shall be the remedy?

Facts

Background

Grievant Delton Doran has worked for the Postal Service for approximately two years. Prior to his employment with the Postal Service Grievant was a Senior Officer Specialist for the U. S. Bureau of Prisons for approximately five years. Grievant resigned his position with the Bureau of Prisons on October 27, 2004 immediately after he completed an interview by an OIG Special Agent during which Grievant executed a written statement admitting to having inappropriate sexual contact with an inmate. During his interview with the Special Agent Grievant was informed that he could not apply for a law enforcement job in the future. Although he was not officially informed of

such at the time of hi resignation from the B.O.P. he later became the subject of a related criminal investigation.

The History of Grievant's Criminal Case

A full consideration of this matter requires an analysis of management's efforts to discipline Grievant within the context of (1) the events that transpired relating to Grievant's resignation from the Bureau of Prisons and (2) both Grievant's and management's knowledge of the evolving status of Grievant's criminal case. Toward that end, the following is a history of Grievant's criminal case:

-October 27, 2004 Grievant signed a statement admitting to having inappropriate sexual contact with an inmate.

-July 18, 2006 the US attorney filed an Information against Grievant relating to the subject of his October 27, 2004 admission.

-September 12, 2006 Grievant pled guilty to one count of violating Title 18 U.S. Code Section 2243(b) engaging in sexual act with a ward.

-January 9, 2007 Judgment signed by the Federal Judge with an "imposition" date of December 18, 2006.

-January 9, 2007 Grievant completed a Gloucester County Prosecutor's Office Megan's Law "Acknowledgement of Duties of Address Verification and Re-Registration"

-April 9, 2007 Gloucester County Prosecutor issued a Tier 1 Sex Offender Classification of Grievant stating in part; "...a Tier 1 Classification restricts the

notification to law enforcement agencies upon a finding that the risk of re-offense is low.”

Grievant's History of Employment with the Postal Service

Grievant completed his application for a carrier position with the Postal Service on December 8, 2004. On his application Grievant answered “No” to the following three questions:

4. Have you ever been fired from any job for any reason?

5. Have you ever quit a job after being notified that you would be fired?

7a. Have you ever been convicted of a crime or are you now under charges for any offenses against the law? You may omit: (1) any charges that were dismissed or resulted in acquittal; (2) an conviction that has been set aside, vacated, annulled, expunged or sealed; (3) any offense that was finally adjudicated in a juvenile court or juvenile delinquency proceeding; and (4) any charges that resulted only in a conviction of a non criminal offense. All felony and misdemeanor convictions and all convictions in state and federal courts are criminal convictions and must be disclosed. Disclosure of such convictions is required even if you did not spend any time in jail and/or were not required to pay a fine.

Grievant was thereafter interviewed, hired and began working for the Postal Service on January 22, 2005. Although there was some dispute over whether Grievant's attendance was a problem, the record reflects that his performance as a carrier was good, and there was no evidence of any discipline issued against Grievant until an October 11, 2006 Notice of Removal for “falsification of Employment application.” Specifically, the 2006 Notice of Removal charged that Grievant had falsely answered “no” to question 7a

on his application, reading in part: "Have you ever been convicted of a crime or are you now under charges for any offense against the law?"

Greivant's October 11, 2006 removal was grieved by the Union and processed through the parties' grievance procedure. The Union asserted in its related grievance that Grievant had not been notified of his MSPB rights and that management did not have just cause to issue a notice of removal for falsification of employment application. On December 7, 2006 the Step B Dispute Resolution Team resolved the grievance with the following "Decision":

The Dispute Resolution Team has RESOLVED this issue. Management did violate Article 16 of the National Agreement and did not have just cause under Article 16 of the National Agreement to issue the "Notice of Removal." The removal will be expunged from all of Carrier Doran's records and Carrier Doran will be returned to work immediately and paid for all lost time due to removal.

In the "Explanation" portion of its decision the Team, in part, wrote:

We further agree that the Union's contention that he [Grievant] did not falsify #7a on his application is correct. On the application that he filled out on December 8, 2004 clearly asks if he has ever been convicted of a crime or if he is now under charges for any offense against the Law. Carrier Doran was not charged with a crime until July 17, 2006, over 19 months after he filled out his application.

In the meanwhile, by letter dated December 1, 2006 and sent via regular and certified mail, local management wrote to Grievant the following:

You are hereby notified that Notice of Removal dated October 5, 2006 for Falsification of Employment Application is rescinded. You will remain in a pay status on administrative leave until further notice.

Much testimony was presented during the hearing in this matter in an effort by both parties to establish when the December 1, 2006 notice of rescission was received by

Grievant. Management witnesses asserted that the regular mail mailing to Grievant should have been received by him within a day or two of its mailing. The earliest certified receipt presented by management reflects a delivery to Grievant on December 11, 2006.

However, notwithstanding the effort to show when Grievant may have received the notice of rescission, no evidence whatsoever was presented as to when, if ever, management notified either its, or the Union's, representative on the Step B Dispute Resolution Team that the October 5 Notice of Removal had been rescinded.

Events Leading to the Instant Grievance

On February 6, 2007 Grievant was notified that he would be having a Day-in-Court hearing at 9:00 A.M. February 8, 2007 for a "pre disciplinary discussion." The Notice did not provide further detail of the reasons for management's consideration of discipline. Nor is there record evidence of any particular event that moved management to issue its second notice of removal.

Grievant attended the February 8 meeting and was interviewed by Supervisor, Distribution Operations, Terri Hood. Hood Asked Grievant a series of questions relating to his resignation from the B.O.P., the history of his criminal case, his understanding of that case at the time he completed his employment application with the Postal Service, the reasons for his answers on his Postal Service application, and the status of his criminal case and his probation and reporting status at the time of the February 8, 2007 interview. In reply to Hood's question; "Are you on probation?" Grievant answered "yes" and further stated that he had no restrictions because of the probation. In response to the

question; "Do you have to list as a sexual offender?" Grievant's response as recorded by Hood was; "Has not been determined yet." When asked what reasons he gave for his resignation from the B.O. P. Grievant answered; "personal reasons."

On February 9, 2007 Grievant was issued a second Notice of Proposed Removal; the Notice of Removal at issue in the instant matter. In this second Notice management proffered two "Charges" in support of the action: (1) a "lack of candor in completing the employment application" and (2) a "lack of suitability for continued employment." In regard to Charge 1, the Notice provides, in part:

In the block requesting "Reasons for Leaving" you wrote "personal reasons". You also certified that the information provided in your application was "true, complete, and correct" to the best of your knowledge and belief and that your statements "are in good faith."

However, records from the BOP show that on the day that you resigned from employment with BOP, you completed an affidavit of investigation confessing that you had sexual relations with a female inmate that was under your custody and control. Your misconduct while an employee at BOP later resulted in criminal charges being brought against you for which you pled guilty and were subsequently convicted of a felony. Accordingly, your response on the Postal Service's application form that you resigned from your position at BOP for "personal reasons" was clearly lacking in candor and was obviously meant to conceal the fact that you were under investigation by the Office of Inspector General of the Department of Justice for very serious acts of misconduct at BOP.

In regard to Charge 2, the Notice provides, in part:

On or about September 12, 2006, while employed as a letter carrier at the Paulsboro, NJ Post Office, you pled guilty to one count of felony violation of Title 18 United States Code, Section 2243(b), engaging in a sexual act with a ward. As a result of your conviction, you were placed on three years probation and fined. It also appears that as a result of your conviction, you are required to register as a sex offender. ...at the

time you were hired by the Postal Service it was believed that you possessed the necessary personal qualifications to be suitable for employment as a letter carrier, and that your conduct both on and off the job would reflect favorably on the agency. Your felony conviction and requirement to register as a sex offender makes you unsuitable for continued federal employment...

The Union filed a timely grievance over the February 9, 2007 Notice of Removal, a grievance leading to the instant arbitration.

Discussion

It is well recognized that in arbitrations of discipline for just cause it is the employer's burden to show that its decision to terminate a grievant satisfies the requirements of the "just cause" standard. Having carefully considered all of the evidence and argument presented by the parties and contained in the joint file in this matter, I find that the Postal Service has, for two reasons, failed to establish just cause for the removal of Grievant. First, management is attempting here to remove Grievant for fundamentally the same reasons it proffered for its October 5, 2006 Notice of Removal of Grievant, a removal fully settled by the parties. Second, management failed to adequately investigate its charge that Grievant lacked suitability for employment with the Postal Service and made its decision in this regard based upon assumptions rather than facts. The Postal Service thereby denied Grievant the due process due him under the bargaining agreement and the just cause standard.

Double Jeopardy

Management asserts that the February 9, 2007 Notice of Removal did not subject Grievant to "double Jeopardy" because it rescinded its October 2006 Notice of Removal

prior to the resolution of the grievance relating to that removal by the Step B Dispute Resolution Team. As a result, management argues, there is presented here no "second prosecution for the same offense after acquittal" that is required for a finding of double jeopardy.

The record does not support management's argument. Even under circumstances where management could establish that it notified Grievant of the rescission of its Notice of Removal before the Dispute Resolution Team decision, such does not establish that the Notice was fully rescinded. Although Grievant may have been the "subject" of the grievance over the October 2006 Notice of removal, it was not "his" grievance. Rather, it was the Union's

It is well recognized that the processing of Grievances by parties to a collective bargaining agreement is an extension of the collective bargaining process. Collective bargaining must be performed in "good faith;" a duty enforced by Section 8 (a) (5) of the National Labor Relations Act. Here, the parties have by agreement determined that such good faith collective bargaining will be conducted by their respective representatives. Grievant was not the Union's representative on the Dispute Resolution Team not otherwise an agent of the Union and management presented no evidence that it attempted to end the grievance process by notifying either its own grievance representative or the Union's representative that the grievance was no longer in dispute. Considerations of equity and due process recommend that management, having not attempted to stop the grievance process prior to the issuance of a resolution by the Step B Team, may not now claim that the mutual agreement to resolve the grievance reached by the Team does not now exist. As a result, fundamental considerations of fairness and the overriding interests

of protecting the efficacy of the parties' collective bargaining relationship require a finding that management's effort here to remove Grievant for essentially the same reasons¹ as those contained in the resolved October 2006 Notice of Removal constitutes impermissible double jeopardy. As such the Notice of Remove at issue here is not supported by just cause.

Grievant's Suitability for Employment with the Postal Service

Important elements of the just cause standard include that the employer conducted a full and fair investigation of the matter at issue and that the employer was reasonable in concluding that the employee engaged in the alleged misconduct or other violation of the employer's rules at issue. In the instant matter management performed an inadequate investigation of Grievant's circumstance and, as a consequence, was without adequate factual basis for concluding that Grievant was in violation of any rule or standard.

During the arbitration hearing in this matter, Supervisor Hood testified that she made the decision to terminate Grievant. Hood asserted that she did not believe Grievant when he told her in his February 8, 2007 day-in-court interview that it was "undecided" whether or not he would have to register as a sex offender. In this regard, Hood testified that based upon her conversations with legal counsel at the time she was under the impression that Grievant, having been convicted of a sex-related crime, would be required to register as a sex offender and, she assumed, such would result in restrictions on Grievant's conduct that could negatively impact his ability to perform his job. Hood further explained that as an inevitable consequence of his responsibilities as a letter

¹ There is no significant difference between the falsification of an application charged in the first notice and the lack of candor in completing the application charged in the second. As for the addition of a charge of "lack of suitability" for continued employment contained in the second Notice, the evidence established that the claimed 'lack of suitability' resulted from the same conduct about which Grievant "lacked candor" and, as such was essentially a different way of stating the same charge.

carrier Grievant is unsupervised for the large majority of his shift and she made the decision to terminate Grievant because she is responsible for the safety of her customers and employees and she no longer trusted Grievant. As further explanation of her rationale, Hood observed that there are "schools and libraries" on Grievant's route.

I credit Grievant that when he attended his February 8, 2007 day-in-court he did not know what if any requirement he would have in regard to registering as a sex offender. Particularly persuasive in this regard is the Judgment against Grievant executed by the United States District Court. The Judgment provides a list of pre-printed terms of probation to be checked off as appropriate for the case, and although the Court checked off the space prohibiting Grievant from owning a fire arm, the Court did not check the space requiring Grievant to register with the state sex-offender registration agency. Moreover, as it eventually turned out, Grievant was found to have a "low" risk of re-offense and, as a consequence, his requirements in regard to registration are minimal and carry no restrictions on his conduct.

Due process offers no quarter to decisions by management to terminate an employee based upon speculation or conjecture. At the time management made the decision to issue Grievant the February 9, 2007 Notice of Removal it was its second effort to formulate a case against him, yet management: (1) Did not know whether or not Grievant would be required to register as a sex offender with local law enforcement authorities; (2) Did not know that if Grievant was required to register as a sex offender what consequences, if any, such registration would have upon Grievant's ability to perform his job or, for that matter, upon the reputation of the Postal Service; (3) Inexplicably assumed Grievant was a danger to those who frequent schools and libraries

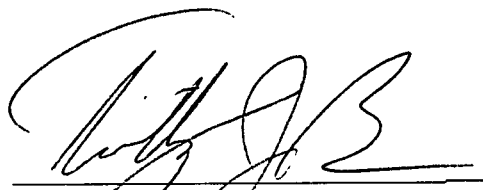
(i.e.; children) notwithstanding that there was no hint of such in his written admission to the OIG, his Plea or the Court's Judgment; and (4) Incorrectly assumed that Grievant had been convicted of a "felony" (generally a more serious offense) when, in fact, his conviction was for a "misdemeanor."

Here, Management chose to assume the worst and condemned Grievant to "industrial capital punishment" rather than attempt to determine the facts and assess whether such violated the rules or policies of the Postal Service. Such is not consistent with the principals of fairness and due process that underlay the just cause standard.

Conclusion

The Removal of Grievant is not supported by just cause. I will order that Grievant be promptly reinstated and made whole for his losses in a manner consistent with the parties bargaining agreement and that all references to the February 9, 2007 Notice of Removal be expunged from Grievant's records

Dated: August 27, 2007


Timothy J. Brown, Esquire
Arbitrator

REGULAR ARBITRATION PANEL

<u>In the matter of arbitration</u>)
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between) GRIEVANT: Delton Doran
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UNITED STATES POSTAL SERVICE) Post Office: Paulsboro, NJ
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and) CASE No. CO1N-4C-D-07006552
) Local #01007G
NATIONAL ASSOCIATION OF)
LETTER CARRIERS, AFL-CIO)

ORDER

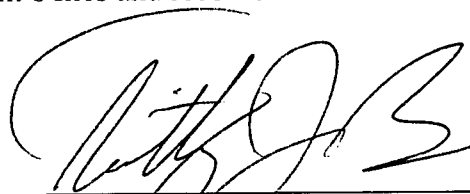
The subject grievance is GRANTED.

The Notice of Removal issued to Grievant on February 9, 2007 was issued without just cause.

The Removal of Grievant is hereby rescinded and Grievant is to be promptly offered reinstatement to his former or an equivalent position and made whole for any loss of wages or benefits he may have experienced as a result of the Notice of removal in a manner consistent with the provisions of the parties' bargaining agreement and ELM.

All references to the February 9, 2007 Notice of Removal and/or removal of Grievant are to be expunged from Grievant's files and records.

DATED: August 27, 2007



Timothy J. Brown, Esquire
Arbitrator