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A.B

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration *

between: *

United States Postal Service *

and *

National Association of
Letter Carriers, AFL, CIO *

Grievant: W. Valez (Velez)

Post Office: San Juan, PR

USPS Case No: A01N-4A-C 08099963
A01N-4A-D 08031825

NALC Case No: C984143907
D984149007

BEFORE:

Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service:

Juan DelGado

For the Union:

Frank Mengiello

Place of Hearing:

Postal Facility, San Juan, PR

Date of Hearing:

May 20, 2008

Date of Award:

June 19, 2008

Relevant Contract Provision:

Article 16

Contract Year:

2001

Type of Grievance:

Procedure/Discipline

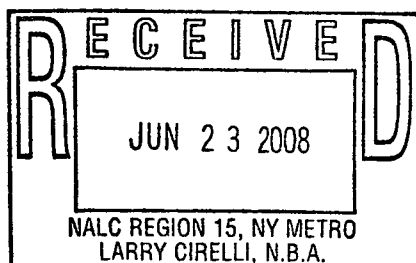
Award Summary:

This decision involves a violation of the Grievant's Weingarten Rights. During a PDI for a removal action, that came about after the Grievant was observed drinking two beers while on duty, the Union Steward and the Grievant were denied the opportunity to concur privately. The Arbitrator found the Grievant's Weingarten Rights were violated and ruled this to be a fatal procedural flaw. The instant grievance is sustained, the removal action is rescinded and the Grievant shall be made whole.

Lawrence Roberts

Lawrence Roberts, Panel Arbitrator

RECEIVED



JUN 25 2008

VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the National Agreement between the National Association of Letter Carriers and the United States Postal Service, the Parties having failed to resolve this matter prior to the arbitral proceedings.

The Step B team considered all the arguments and evidence in the case file and was not able to resolve the Grievance and impasse the decision. The matter is now before the arbitrator for final resolution.

The hearing in this cause was conducted at 10 AM, May 20, 2008 at the postal facility in San Juan PR. Testimony and evidence were presented by both parties. The Arbitrator made a record of the proceedings by use of a tape recorder and personal notes. A transcriber was not used. The Arbitrator, a current member of the New York Metro and Caribbean regular arbitration panel, was assigned to hear and resolve the dispute in accordance with the Wage Agreement.

The hearing began at 10 a.m. and concluded at 4:30 pm with oral closing arguments. Both parties submitted several arbitration cites in support of their position.

OPINION

BACKGROUND AND FACTS:

The Grievant in this case is a Letter Carrier. He is employed at the Roberto Clemente Walker Post Office in Carolina PR. He has been employed by the Postal Service for approximately 13 years.

On or about 6 November 2007, the Grievant received a Proposed Notice of Removal, in pertinent part, stating:

"This is advance written notice that it is proposed to remove you from the US Postal Service no sooner than 30 calendar days from your receipt of this notice. However, as a result of the USPS-NALC Dispute Resolution Process, the decision in this case

will be deferred until after the Step B decision has been rendered or fourteen (14) calendar days after the appeal is received at Step B, whichever comes first.

This action is based on the following reasons:

CHARGE 1: UNACCEPTABLE CONDUCT/USE OF ALCOHOLIC BEVERAGE WHILE ON DUTY your postal record reveals that you were hired effective 09/03/1994. you have been a letter carrier in carolina since 1995.

An Office of Inspector General Investigation revealed that on Friday September 28, 2007 while in the performance of your duties as a letter carrier you requested 2 hours 30 minutes assistance and or overtime via PS Form 3996 to alleviate a supposed workload coverage. You received a 2 hour approval from your immediate Supervisor Reynaldo Zayas to manage the supposed overage in workload for the date in question. On Friday September 28, 2007 at approximately 2:30 PM you were observed to be consuming alcoholic beverage by OIG Agent Varnessa Delgado during the hours of work in full uniform at a hardware store located at WA16 Calle Acuario Extension Los Angeles for approximately one hour. This conduct reflects unfavorably on your professionalism and performance as a regular city letter carrier where you misused one hour of productive time to consume alcoholic beverages. You have been employed as a Letter Carrier in Carolina for thirteen years; you have more than five years working on the current assignment of route 98324. Through your actions you have violated the trust, reliability, trustworthiness, good character and reputation of the US Postal Service.

The Employer went on in that Letter to cite various portions of Postal Regulation that was allegedly violated. The Employee was informed of his contractual rights to grieve the above Letter.

A timely grievance was filed in protest, however, the Parties were unable to settle the matter. Instead, the Parties reached an impasse upon the conclusion of the Step B process.

The matter is now before the undersigned for final resolution.

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 timely 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 (Procedural)
3. Grievance Package (Removal)

COMPANY'S POSITION:

According to the Service, both the Notice of Proposed Removal and the Letter of Decision, issued to the Grievant, were with just cause. Management argues the Grievant was observed by an OIG Agent drinking beer while on duty.

More specifically, the Grievant was observed by a Postal Official drinking two (2) beers, for approximately one (1) hour while on duty and during the delivery of his route.

The Employer argues the Grievant voluntarily admitted to the OIG Agent that he had in fact drank two beers while waiting for the rain to cease.

Furthermore, at a Pre Disciplinary Interview, the Agency insists the Grievant was afforded union representation. And the Service argues the Union Steward actively participated in the process on that day.

It is the argument of the Employer that, there is no violation of the Weingarten Rights as alleged by the Union. And again, at that Pre-Disciplinary Interview, it is Management's contention the Grievant, once again, admitted that he drank two beers on the day in question.

It is Management's contention this evidence caused the issuance of both the Notice of Proposed Removal and subsequent Letter of Decision for violation of Postal Regulation.

The Service submits the evidence in this case will establish the Grievant drank alcoholic beverages while on duty. It is the Agency's contention that maintaining the Grievant as a Letter Carrier, can put not only him, but also third parties as well as Postal properties in great risk.

The Employer cites several arbitrators that support a similar position in this matter. The Service insists the

consumption of any alcohol while on duty is certainly a capital offense.

And with that reasoning in mind, the Employer asks the instant grievance be denied in it's entirety.

UNION'S POSITION:

The Union will prove, via evidence and testimony, that the Grievant's Weingarten Rights were violated during an investigatory interview on 2 November 2007. According to the Union, the case file shows undisputed facts that are stipulated on the 8190 Joint Step A Grievance Form.

According to the Union, the evidence is clear and unambiguous. It is the Union's contention this is enough evidence to sustain the matter. The Union insists that Management had the opportunity and obligation to challenge this item on the Joint Grievance Form and failed to do so.

In the Union's view, Management's belief that just because a Shop Steward is present with the Grievant during a Pre Disciplinary Interview, that they have fulfilled their obligation under the Weingarten rights clause. This, according to the Union, was verified by Management via their Step B decision which, in pertinent part, states, the Grievant was afforded Union

Representation during the Pre-Disciplinary Interview.

It is the Union's argument the mere presence of a Shop Steward is not a fulfillment of a Grievant's Weingarten Rights.

Regarding the merits, it is the Union's contention that, on the day in question, it was raining very hard. The Union insists the Grievant stopped at the hardware store to protect the mail. And, according to the Union, this is not an uncommon practice among Postal Letter Carriers.

Both the Union and the Grievant admit that, while waiting out the rain, two (2) beers were consumed. Again, both agree with the Postal Service, in that, the decision to consume alcohol while on duty was certainly bad judgement. However, the Union insists that due to the Grievant's unblemished work record, the discipline should not rise to the level of removal.

And according to the Union, Management was clearly in violation of Article 17. And, based on all the above, the Union asks the discipline be rescinded and the Grievant be made whole for any lost wages and benefits.

THE ISSUE:

Whether or not the removal was proper? If not, what is the proper remedy?

PERTINENT CONTRACT PROVISIONS:

**ARTICLE 16
DISCIPLINE PROCEDURE**

SECTION 1. Principles

DISCUSSION AND FINDINGS:

The Removal in this case came about after the Grievant was observed drinking beer while on his mail delivery route.

The Employer insisted this was a serious violation warranting removal.

In opposition, the Union presented a procedural argument in this case. During a 2 November 2007 Pre-Disciplinary Interview concerning the removal, the Union argued the Grievant was denied his Weingarten Rights. On that basis, the Union believes the removal action taken by the Agency should be dismissed.

To that end, I concur with the Union's argument. And for that reasoning, even though it would appear there is just cause for discipline, neither the seriousness of the alleged offense or the merits of the removal action will be specifically discussed.

In their construction of the Union's argument, both the Steward and the Grievant testified that the Supervisor was told

the Grievant's Weingarten Rights were being violated. They also testified that the Steward kicked the Grievant under the table after realizing the unexpected Pre Disciplinary Interview would proceed without them being allowed to meet privately.

The Service did not challenge the Union's description of events of the 2 November 2007 Pre-Disciplinary Interview. This was paramount.

Instead, the Employer insisted the Grievant was provided Union representation and his Weingarten Rights were not violated.

The Employer Advocate made an excellent attempt in defending Management's position. Most impressive was the Advocate's adamant insistence that the Union's Weingarten argument was inconsequential. I respectfully disagree, based on the following.

An Employee's Weingarten Rights are quite clear. In pertinent part, from the Employer's own USPS Weingarten Card, subtitled, "USPS Supervisor Responsibilities Under Weingarten When Interviewing An Employee Where Discipline Might Result", it states, in pertinent part:

"Then, if either the steward or the employee request, adequate time must be given to them to talk privately before (or during) the interview."

This is also reiterated on Page 17-7 of the NALC-USPS Joint

Contract Administration Manual:

"Employees also have the right under Weingarten to a pre-interview consultation with a steward. Federal Courts have extended this right to pre-meeting consultations to cover Inspection Service interrogations. (U.S. Postal Service v. NLRB, D.C. Dir. 1992, M-01092).

And that above referenced Court Decision provides:

"In Weingarten, the Supreme Court approved as consistent with NLRA Section 7 the Board's recognition of a right to a union representative's attendance at investigatory interviews. The NLRB has since determined that the right recognized in Weingarten and the statutory purposes underlying that decision are best effectuated by allowing employees to consult with their union representatives prior to the occurrence of an interview; and the Board has extended that protection to Postal Service employees whose conduct is subject to investigation by the Postal Inspection Service."

The Employer Advocate also suggested the Union and the Grievant had plenty of time to meet privately to discuss the matter. This is true. However, the record shows that neither the Grievant or the Union's Representative were aware of the Agency's position at that time. And this is a key element in my determination.

The evidence in this case shows that, prior to the Pre-Disciplinary Interview, the Agency was clearly aware, albeit already pre-determined, of the outcome of that Interview. Conversely, the Union was not mindful of exactly what was going to take place, or, the consequence to such a meeting. In my view, it seems as though the Service had already formulated the

end result, prior to the Interview's beginning. And quite frankly, I was convinced the Union didn't have a clue regarding what was about to take place.

The intent of a Pre-Disciplinary Interview allows the Employer to provide their allegations to the Union and then listen and consider the Union's version of what happened, prior to deciding on the meted discipline, if any.

Instead, in this case, the Employer Advocate insisted there was nothing to discuss, since the Grievant had already confessed to drinking two beers, while on duty. This does not negate the fact the Grievant and the Steward maintained the inherent right to meet privately before or during the PDI.

When the Grievant and the Steward were denied the right to meet, by the Supervisor, the Grievant's Weingarten Rights were clearly violated. For the reason those two wished to meet, are only speculative, at best. But fatal to the Employer's case is the fact the Supervisor denied that meeting.

Management also insisted the only thing the Union wanted to discuss, in private, was a possible deal. There was no evidence to support their argument in that regard. But again, regardless of what may or could have been discussed, has absolutely no bearing on my decision in this matter. What is controlling is

the fact the Supervisor prevented that meeting from taking place.

The Employer also emphasized that the Grievant was afforded Union representation at the meeting. This is true. However, that is not the only guarantee provided by the Weingarten decision.

The Union pointed out that the Employer kept insisting that the Grievant was afforded Union representation throughout the grievance procedure. And the record certainly shows this, did in fact, happen. The Supervisor did allow the Union Representative to be present at the Pre-Disciplinary Interview. However, I was convinced the Steward and the Grievant, after learning the purpose of the meeting was that of a Pre-Disciplinary Interview, were denied the opportunity to meet privately. The mere fact a Union Representative attended the meeting does not satisfy the Court's intent in the Weingarten Decision.

A Union witness testified credibly about meeting with the Postmaster and being denied the opportunity to convene privately with the Grievant, after realizing the purpose of the meeting was a Pre-Disciplinary Interview.

Specifically, the Union representative testified that he specifically asked to speak with the Grievant in private and was told by the Postmaster "I don't think so".

Those four words are controlling in this case.

The witness also testified that he immediately informed the Postmaster the denial of such a meeting was a violation of the Grievant's Weingarten Rights. This seemed to have absolutely no effect on the Supervisor's decision in that regard.

This testimony was corroborated by the record. Furthermore, the Postmaster was not called to testify. Therefore, the testimony by the Union witnesses was not contradicted or undisputed in any way by Management. Yet more so, the testimony of the Union witnesses was quite convincing.

Being undisputed, the Union's procedural argument then requires an interpretation as to whether or not this is a fatal error on the part of Management.

If it is fatal, as suggested by the Union, there is no need to go into the merits of the case.

The Union introduced three arbitration decisions and a US Court of Appeals decision to support their position.

Of significance is the Court Decision that discusses Weingarten Rights, as cited above.

The Employer Advocate insisted the Union and the Grievant had plenty of time to meet privately. The Court case addresses this argument.

In fact, the Court references a possible situation where the Union and Grievant have ample time to meet privately after all the facts are known. This implies there would be nothing left to discuss. Management suggests that same scenario should be applied here.

However, in the instant case, testimony by several witnesses convinced me, neither the Grievant or the Union, were aware of any adverse actions that may be taken by the Employer. And that is significant here.

In my considered opinion, at any point prior to the Union realizing that a Pre-Disciplinary Interview was about to take place, the Employer had failed to make any statement or position to the Union. And to assume the Union was already aware of the Employer's position at that time would have been nothing more than pure conjecture.

There is no doubt the Grievant's Weingarten Rights were violated. And this was a fatal flaw, albeit procedurally, for the Service.

In my view, the Weingarten Rights, as explained by the Court, are merely an extension of the due process rights of a Employee in any alleged matter concerning discipline. Any Employee, via due process, retains the inherent right, via due process, to discuss the charges presented by the Employer, privately, with a Union Representative.

For regardless of the charge, or any facts that appear to be seemingly non-argumentative, that Employee, via due process, is entitled to formulate a response or defense, via the intent and purpose of that Pre-Disciplinary Interview, with their Union Representative. And that certainly did not happen in this matter.

In my considered opinion, the whole intent of that Pre-Disciplinary Interview requirement, is, by it's very term, self defined.

The Interview occurs before any discipline determination is made by the Employer. It's purpose is to provide a discussion by and between the Parties involved, to openly assess the facts of the case. And then it is up to that supposedly, unbiased authority, following evaluation, to determined whether or not discipline, or what degree, may be warranted to that particular case.

Separate from the Court's Weingarten Decision, arbitral due process includes an Employee's ability to discuss, consult and seek advise from their Union Representative, after becoming aware of any Employer charge. Previously, the undersigned has set aside many disciplinary charges based solely on a violation of the Grievant's due process rights being violated. In many past instances, the PDI either didn't happen, or, was conducted inappropriately.

And in this case, the Grievant, once it was realized that a Pre-Disciplinary Interview was about to take place, was simply not allowed by the Supervisor to consult with his Representative. Whether or not such a private conversation would have changed anything in this case is insignificant. The fact remains the Grievant was clearly denied the right, by the Postmaster, to consult with his Representative. And that makes all the difference in this case.

Based on the fact the Grievant's right were violated, the removal action must be reversed and the Grievant made whole. That is my order.

AWARD

Grievance Sustained. The Notice of Removal is hereby rescinded and the Grievant shall be made whole.

Dated: June 19, 2008
Fayette County PA