Removal - Violation of ~~Previous~~ Remov Settlement (Attendance)

Art. 35 - Par Program

10052 (C1C-4B-D)

C#00694

IN ARBITRATION

UNITED STATES POSTAL SERVICE,	) GERALD COHEN, Arbitrator;
and	) Case No. C1C-4B-D 10052;
AMERICAN POSTAL WORKERS UNION, PAULA SHELTZER, Grievant. (Central Michigan Area Local 488-489)	) Arbitrator's File 83-15-838;
	) Date of Hearing:
	) March 17, 1983,
	) Lansing, Michigan.

APPEARANCES

For the Postal Service:

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For the Union:

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OPINION

Issue

Was Grievant discharged for just cause? If not, what is the remedy?

Facts

On July 15, 1982, Grievant was issued a Notice of Removal. This Notice of Removal stated as follows:

> "You are hereby notified that you will be removed from the Postal Service on August 17, 192. The reason for this removal is:
>
> CHARGE: Failure to abide by terms of Grievance settlement to hold letter of removal issued December 28, 1981 in obeyance (sic) as evidenced by the following:

On December 28, 1981 you were issued a notice of charges for intoxication. A grievance settlement was entered into on January 7, 1982 that stated the removal action would be held in obeyance (sic) for one (1) year provided the following conditions were met; 1-You would enter the PAR program and meet all requirements set forth in the structured program, 2-You would maintain a regular schedule and any violations of these conditions would be just cause for immediate removal.

Since January 7, 1982 you have compiled the following record of unscheduled absences:

01-09-82	Absent 8 hrs. of 8 scheduled hrs.	Emergency Annual
03-20-82	Absent 8 hrs. of 8 scheduled hrs.	LWOP
03-23-82	Absent 8 hrs. of 8 scheduled hrs.	LWOP
03-24-82	Absent 8 hrs. of 8 scheduled hrs.	LWOP
03-25-82	Absent 8 hrs. of 8 scheduled hrs.	LWOP
03-26-82	Absent 8 hrs. of 8 scheduled hrs.	LWOP
03-27-82	Absent 8 hrs. of 8 scheduled hrs.	LWOP
05-05-82	Absent 8 hrs. of 8 scheduled hrs.	Sick/LWOP
05-28-82	Absent 8 hrs. of 8 scheduled hrs.	Sick/LWOP
06-24-82	Absent 8 hrs. of 8 scheduled hrs.	Sick/LWOP
06-25-82	Absent 8 hrs. of 8 scheduled hrs.	Sick/LWOP
06-26-82	Absent 8 hrs. of 8 scheduled hrs.	Sick/LWOP
07-14-82	Absent 8 hrs. of 8 scheduled hrs.	Sick

You have not participated in the structured PAR program since June 10, 1982 and have failed to meet the conditions set forth in the grievance settlement.

The following elements of your past record have been considered in taking this action:

You were issued an 8 day suspension on October 6, 1981 for failure to be regular in attendance.*

The testimony of the Postal Service was that the settlement referred to was the culmination of a Notice of Removal sent to Grievant on December 28, 1981, as a result of her having reported to work intoxicated on December 23, 1981. Grievant filed a grievance protesting that removal, and the settlement referred to above resulted.

The parties introduced in evidence the settlement mentioned in Grievant's Letter of Removal of July 15, 1982. This settlement

state[4] as follows:

> "Pursuant to the terms and obligations as set forth in Article 15 of the 1981 National Agreement, management and the union designees met at Step 2 of the grievance procedure. The results of that meeting on the above reference case are as follows:
>
> The removal action scheduled for 2-1-82 will be held in abeyance for one (1) year provided the following conditions are met:
>
> 1. The grievant will enter the PAR program under the direction of the local PAR counselor. It is incumbent upon the grievant that she meet all requirements set forth in the structured program.
>
> 2. The grievant will maintain regular attendance.
>
> Violations of these conditions will be just cause for immediate removal.
>
> In addition, at the end of a six month period (June 27, 1982) the grievant, steward, Step 2 designee and the PAR counselor will meet and review the progress of the grievant. In the event that the above conditions have been met, the removal action will be disposed of at that time.
>
> It is understood that this resolution is germane to this grievance only and is not intended to serve as a means of immunity from future discipline as the result of a violation of any and all applicable postal rules and regulations.
>
> The above constitutes a full and complete settlement of the subject case and resolves any and all other issues pertaining thereto."

The first witness to testify for the Postal Service was Grievant's supervisor. He stated that he was the one who instituted Grievant's removal. At the time that he took that action, he was aware of the previous removal settlement. He was also aware of the provisions in that settlement for her attendance at PAR.

Before he requested Grievant's removal, he investigated her compliance with the PAR attendance requirement, and also her attendance at work. When he talked to Grievant about her attendance at work, she told him that she was pregnant, and her pregnant condition had caused part of her absence problems. He also found that Grievant was unsatisfactory with regard to the PAR program.

The witness testified that he had talked to the PAR counselor about the program, and was told that Grievant had had an attendance problem insofar as the PAR program was concerned. He was not, however, aware of Grievant's specific attendance record at the PAR program.

The second witness for the Postal Service was the PAR counselor, who stated that it was his job as a PAR counselor to assist alcoholic employees by giving counsel or referring them to other agencies. Grievant had been first referred to the PAR program in October, 1981, because of alcoholism. At that time, she refused help. She was referred again in January, 1982, and at that time, commenced participation in the program. This referral came as a result of Grievant having been found drunk at work, which led to a discharge.

The witness stated that he established a program for Grievant which required her to attend three meetings a week for one year. These meetings were to be a combination of PAR meetings and AA meetings. He did not, however, tell Grievant's Union steward that one year of attendance was required of her. He did feel that more than 90 days of attendance at such meetings were

needed. He did not have any specific time frame of attendance for Grievant at PAR. Many persons have had a 90-day PAR program.

Grievant maintained regular contact with the PAR program through June 10, 1982. After that time, she had no contact with the program, except one time in August, 1982. At the start of the program in late January or early February, 1982, Grievant had been hospitalized for treatment of alcoholism. When Grievant left the hospital, the witness advised Grievant of her need for regular attendance in the PAR program. He told Grievant at that time that her attendance was marginal. The witness felt that Grievant's motivation as of March, 1982, was unsatisfactory.

In May, 1982, he discussed her attendance at work with her, and advised her that a supervisor had told him that her attendance was not good.

The witness testified that he was a recovered alcoholic, and was familiar with the personality traits of alcoholics. He felt that he was able to judge the attitude of participants in self-help programs. It was his feeling that Grievant was attending the program more to keep her job than anything else. He felt that up through June 10, 1982, Grievant had made some progress.

On cross-examination, the witness said that, before Grievant, no one had been in the PAR program for as long as one year. On June 10, Grievant did not come to the PAR program. The witness had tried to contact her, and had been able to do so only one time.

The witness testified that his evaluation of Grievant as

unsatisfactory was based not just on her attendance at the PAR program, but at work also. The supervisor who had advised the witness that Grievant was unsatisfactory in attendance did not give him any details as to what caused the unsatisfactory work attendance.

The witness testified that he had told Grievant at one time that because of the distances that she had to travel to the PAR program, he would accept her attendance at AA meetings in place of PAR.

On cross-examination, the witness stated that he felt that his relationship with Grievant was "all right". He may have told her that he felt that she was a "con artist". (He had the feeling that alcoholics can be con artists.)

He further testified that he did tell Grievant that she needed to be pregnant like she needed "a hole in the head". He told Grievant that he had advised her that she did not need the extra problems of pregnancy. He felt that this was constructive advice.

The witness stated that he judged Grievant's attendance at PAR as poor because she seldom contacted the PAR office.

Grievant testified that she had been with the Postal Service for nine years, and had worked as a distribution clerk. She was aware of the settlement of her previous grievance. She understood that she was to be regular in attendance and enrolled in the PAR program for 90 days. She stated that the PAR counselor had told her several times that her enrollment in the PAR program

was to be for 90 days.

Grievant stated that, at the start of her program, she had spent 30 days in an alcoholic-treatment center. The treatment consisted of various programs, including group and individual counseling sessions. She also attended three meetings a week at Alcoholics Anonymous.

Grievant said she had been told by both the PAR counselor and a supervisor that her enrollment in the PAR program was to be for 90 days.

Grievant stated that her termination letter said that her attendance was not satisfactory. However, she had had some of her absences approved in advance. Other of her absences were due to either an auto accident, which she sustained after an AA meeting, or as a result of the fact that she was pregnant.

Grievant felt that her attendance had improved after her last discipline.

Grievant testified that she also attended meetings sponsored by an organized called "Women for Sobriety". This attendance consisted of one meeting a week for three or four months. She had advised her PAR counselor of her attendance at this organization, and he had approved of it.

Grievant said that, after her auto accident, she still was able to attend AA meetings, although she was not able to work. She wanted to change her life, and "things were coming down". Grievant stated that the PAR counselor had told her that her participation in the PAR program was marginal, but he never

explained why he considered her participation to be marginal.

Grievant testified that, while she was aware of the settlement of her previous removal, she was never told that it was a last-chance settlement by either the PAR counselor or by her Union representation.

The next witness for Grievant was a counselor at the hospital which she had entered in early 1982. This counselor stated that he had talked to the PAR program counselor, and it was his understanding that Grievant was enrolled in the PAR program for 90 days. He was not sure that the month that she spent in the hospital counted in this program.

The witness testified that he left the hospital in April, 1982, and he believed at that time that Grievant was making progress. He felt that Grievant had been honest and open with him. She admitted that she had had a drinking problem for most of her life.

The last witness for the Union was a Union steward, who testified that the six-month evaluation meeting mentioned in the last-chance settlement was never held.

Discussion and Award

The Postal Service argues that Grievant's removal was proper due to her failure to abide by the settlement to which she had freely agreed. She was to stay for one year in a structured PAR program, and was to abide by its terms and conditions. Additionally, she was to maintain regular attendance at work. She did neither.

The evidence was clear, states the Postal Service, that Grievant ceased attending PAR meetings some time in April, 1982. She did not live up to that portion of the agreement.

In addition, between January and July, 1982, Grievant took eight hours of emergency annual leave, 72 hours of leave without pay, 48 hours of sick leave, and was late twice.

The Postal Service also points out that Grievant had numerous instances of prior discipline, all for irregular attendance. She admitted to a couple of letters of warning and a couple of suspensions. The evidence indicated that she had had two letters of warning and five suspensions. As a result of this, the Postal Service maintains that Grievant had ample warning and opportunity to improve her attendance.

The Postal Service further argues that it has justification for concern with regular attendance. Poor attendance causes the Postal Service a great deal of difficulty. If the absent employees are not replaced, either the remaining employees must pick up the work load of the absent employees, or the mail is not processed. Either choice is unsatisfactory. The third choice is for the Postal Service to use increased overtime, and this also is not a satisfactory solution to the problem.

Insofar as Grievant's claim of pregnancy is concerned, the Postal Service cites Case No. C8M-4A-D 35120 (Seidman, Arbitrator), in which a discharge for poor attendance was sustained. The arbitrator stated in that case that pregnancy in and of self is not a disabling condition, nor an illness or disease. It

is a natural condition which in most cases does not affect the woman's ability to perform her normal job duties during most of its course.

It is the Union's position that Grievant was not discharged for just cause, because she has abided by the terms of the previous grievance settlement.

The evidence, according to the Union, was that her removal action was to be held in abeyance for one year. No where is there any evidence that it was mandatory that she be in the PAR program for one year. As a matter of fact, contends the Union, no one up to that time had ever been required to be in a PAR program for as long as one year.

The Union states that the evidence was clear that Grievant complied with the requirement to be in the PAR program for 90 days.

The Union argues that the PAR program was set out in a document given to Grievant on January 29, 1982, and signed by her and the PAR counselor. This required her to attend one PAR meeting per week, contact the PAR unit by phone an unspecified number of times weekly, attend two meetings of AA group therapy, etc., meet with the PAR counselor one time weekly, be hospitalized at a treatment center, and provide documentation for the meetings attended. Grievant did all of these things for at least 90 days. No specific length of time appeared in any document, and it was therefore uncertain as to how long Grievant should be in the program. The only complaint anyone has concerning her PAR partici-

nation is how long she was to be in the program. The lack of clarity in that regard, says the Union, should not be used against Grievant.

Insofar as regularity of attendance is concerned, the Union contends that the only absences which Grievant had were for very specific and easily understood reasons. One was an automobile accident, and the other was for illness due to pregnancy. Grievant was never absent for other reasons.

A review of the evidence and testimony leads me to the conclusion that Grievant is entitled to reinstatement. I believe that she has a justifiable complaint that the length of time that she was to participate in the PAR program was so indefinite that she should not be penalized when a difference of opinion arises as to the length of her participation. Almost everything else in the situation is clear but that factor, and that, the Postal Service admits, is a key point in the charges of misconduct. When a key position of an agreement is uncertain, the person against whom it is being applied should not suffer as a result of the lack of clarity.

The case cited by the Postal Service of Arbitrator Seidman concerning pregnancy contains some language which deserves repeating. He stated (P.5):

> 'In certain circumstances its [pregnancy] symptomology may be disabling for a day or two or more. But this is not a necessary effect of the condition. When it occurs then the employee must be given time off without penalty because disabling.
>
> However, whether it is disabling is dependent upon the condition of the individual employee and does not

necessarily flow from the fact that at the time of the disability claim the employee is pregnant."

What the arbitrator sets out in that opinion is that it is possible that pregnancy may justify absence from work.

Grievant's testimony indicated to me that she was justifiably absent on occasion as a result of her pregnant condition.

Likewise, the automobile accident constituted justifiable grounds for absence. Grievant is not claiming absence for vague illnesses such as backache, head cold, sore muscles, etc., which are frequently suspected as mere excuses for absence without any real substance.

Grievant's absences were for substantial reasons which were not vague and which are not of a repetitive nature.

Article 35 (Alcohol and Drug Recovery Program) of the National Agreement has a bearing on this situation, and must be considered. It is stated therein:

"An employee's voluntary participation in such programs will be considered favorably in disciplinary action proceedings."

Here, Grievant participated in not only one, but in three, programs of self-help. These were the PAR program, Women for Sobriety, and Alcoholic Anonymous.

I believe that voluntary participation in such programs should entitle Grievant to extra consideration. This is not to say that a recovering alcoholic is to be given complete freedom of action because of participation in self-help programs. Grievant's participation, however, should tip the balance in her favor, especially if there is a show of improvement.

I should also like to point out that, while the Postal Service mentions that Grievant was absent from work a considerable number of hours, when her record is checked it is apparent that a good deal of her absence was of a continuous nature. Continuous absences are less troubling to an employer than frequent but short absences. It is easier to make provision for fewer, but longer, absences than for more frequent, but shorter, absences.

Grievant's absences, when counting consecutive days as one absence in the period of time considered, amount to only six occurrences. While that does not constitute a good record, it must be recognized that Grievant was a recovering alcoholic. It is too much to expect that recovery could take place overnight. It is generally accepted that recovering from alcoholism is neither easy nor quick, and it cannot be expected that it would be accomplished almost on demand. The evidence did indicate that Grievant appeared to have improved while attending PAR and other programs.

The grievance is sustained. Grievant is ordered reinstated with back pay. The Arbitrator will retain jurisdiction to compute Grievant's entitlement should the need arise.

The costs are assessed equally.

Dated this 22nd day of June, 1983.

Gerald Cohen

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