

NORTHEAST AREA REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

Before:

Jonathan I. Klein,
Arbitrator

Appearances:

For the Postal Service:

Vernon N. Tyler, Jr.
Labor Relations Specialist

For the Union:

Charles Carroll NALC Advocate

Place of Hearing:

New Milford, Connecticut

Date of Hearing:

January 6, 2015

Date of Award

Relevant Contract Provisions:

Article 16

RECEIVED

Contract Year:

2011- 2016

Type of Grievance:

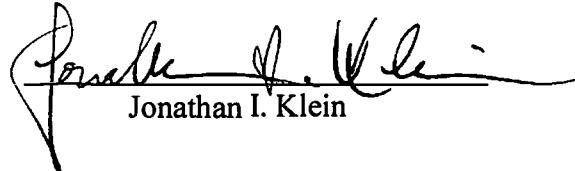
Discipline

FEB 24 2015

**VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS**

AWARD SUMMARY

The Postal Service did not prove it had just cause to place the grievant in an emergency off-duty status on September 8, 2014, pursuant to Article 16.7 of the National Agreement. The grievance is sustained.



Jonathan I. Klein

STATEMENT OF FACTS

The grievant, James Best, has been employed by the Postal Service as a letter carrier at the New Milford, Connecticut post office for approximately 26 years. On September 5, 2014, letter carrier Michael Kravec allegedly overheard the grievant make several threatening statements concerning postmaster Robert Gabianelli. On the morning of September 8, 2014, postmaster Gabianelli received a written statement from letter carrier Kravec detailing the alleged incident. (Joint Ex. 2, at 15). Postmaster Gabianelli subsequently met with letter carrier Kravec who confirmed that the grievant did, in fact, engage in such conduct. Following a discussion with labor relations, postmaster Gabianelli informed the grievant that he was placed in an off-duty status without pay pending an investigation.

The Postal Service issued the grievant the following notice, dated September 8, 2015, placing him in an emergency off-duty status:

In accordance with Emergency Procedures set forth in Article 16, Section 7 of the National Agreement, you are hereby notified that you were placed in an off-duty (without pay) status effective September 8, 2014 at approximately 9:30 am.

**USPS Case No. B11N-4B-D 14298661
NALC Case No. 150514**

The reasons for this action are due to the allegations of inappropriate conduct. Specifically on September 8, 2014, it came to my attention that you allegedly made threatening comments to Carrier Michael Kravec on September 5, 2014. Allegedly those comments were directed toward me and included the following "I will punch him in the head . . . I'll kill him . . . I don't care if I get fired, I'll do it anyway". It is believed that your retention on duty may result in your being injurious to self or others.

A further decision will be made as to whether or not discipline should be issued to you for the alleged misconduct. That decision shall be forthcoming in the near future.

* * *

(Joint Ex. 2, at 10).

On September 12, 2014, the Union filed a grievance to protest the placement of the grievant in an emergency off-duty status. (Joint Ex. 2, at 9). The Union requested that the Postal Service immediately return the grievant to work with full back pay and benefits. A Formal Step A meeting was held on September 17, 2014, and the grievance was progressed to Step B on September 19, 2014. On September 19, 2014, the Step B Dispute Resolution Team reached an impasse. (Joint Ex. 2, at 1-8). The parties subsequently proceeded to arbitration and a hearing was conducted on January 6, 2015, at which time the parties were afforded full opportunity to present documentary evidence, direct and cross-examine witnesses, offer rebuttal testimony and present argument. Each party presented an oral closing statement in support of their respective positions.

STATEMENT OF ISSUE

The stipulated issue in this case is set forth by the Step B Dispute Resolution Team:

Did Management violate Article 16.7 of the National Agreement on 9/8/2014 when putting James Best on emergency placement no pay status for alleged threats to the Postmaster and if so, what is the proper remedy?

(Joint Ex. 2, at 1).

RELEVANT CONTRACT PROVISIONS

Article 16 of the National Agreement entitled “Discipline Procedure,” provides, in pertinent part, as follows:

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.

* * *

Section 7. Emergency Procedure

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage,

or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance.

* * *

CONTENTIONS OF THE PARTIES

Management's Contentions

The Postal Service contends that the grievant was placed in an emergency off duty status based upon the threats which he made towards the postmaster, and his history of “temper tantrums.” According to the Postal Service, the grievant does not like doing pivots and he has thrown multiple “temper tantrums” when assigned such work. The Postal Service asserts that the emergency placement of the grievant was appropriate under the facts and circumstances of this case.

The Postal Service further asserts that under Article 16.7 of the National Agreement, “all that is needed [for an emergency placement] is an allegation.” In the instant case, postmaster Gabianelli received a statement from a letter carrier which indicated that the grievant threatened “to kill the postmaster.” According to the Postal Service, the relevant information is “what is in front of the postmaster that day.” The Postal Service urges the arbitrator to “put himself in the spot of the postmaster on September 8th” and consider “what he was faced with.” It points out

that postmaster Gabianelli was aware of the grievant's history, and had dealt with him on prior occasions in connection with his "temper tantrums." Under the circumstances, postmaster Gabianelli was "justified to put the grievant off the clock, let the dust settle, and do an investigation."

Clearly, an allegation that the grievant threatened serious harm upon the postmaster justified placing him in an emergency off-duty status pursuant to Article 16.7 of the National Agreement. The Postal Service points out that "[t]he contract is clear when it states that an employee may be immediately placed in an off duty status where the allegation involves situations where . . . the employee may be injurious to self or others." (Postal Service Opening Statement, 2). Therefore, management did not violate Article 16.7 in this case. Accordingly, the grievance should be denied in its entirety.

Union's Contentions

The Union asserts that the Postal Service did not have just cause to place the grievant off duty on September 8, 2014. The facts of this case reveal that the grievant was placed off duty pursuant to Article 16.7 based upon a statement and information provided by a third party that he allegedly threatened the postmaster. The Union notes that "[t]wo days later the grievant was asked for his version of the events and he denied making these statements." (Union Closing Statement, 1). The grievant remained off duty for 56 days under Article 16.7 despite the fact that management had all of the facts within two days of the alleged incident.

Aside from a written statement from another letter carrier, there is no evidence that the alleged incident even occurred. The Union maintains that the postmaster acted in an arbitrary manner when he placed the grievant off duty without pay. The Postal Service simply failed to present any evidence that the grievant acted as charged. According to the Union, this is a case of “accusation without corroborating evidence or context.” (Union Closing Statement, 1). It points out that the postmaster acknowledged that he did not observe the grievant’s alleged behavior, which others had described. The Union asserts that “[t]here is no basis for the written fears and appear only to beef up the Postmaster’s actions.” (Union Closing Statement, 2). Additionally, the Union claims that it never had a chance to interview the individual who accused the grievant of misconduct.

In sum, the grievant was placed off duty under Article 16.7 based upon unsubstantiated allegations. Therefore, the Postal Service has failed to establish that management had just cause for its actions in this case. The Union requests the following remedy for management’s violation of Article 16.7 of the National Agreement: “. . . expunge the suspension and make the grievant whole for all lost wages and benefits and overtime for the time period from September until his return to duty.” (Union Closing Statement, 3).

OPINION AND ANALYSIS

The dispute before the arbitrator in this case is relatively straightforward. The evidence of record reveals an allegation was made that the grievant uttered several threatening statements

regarding postmaster Gabianelli on September 5, 2014. Specifically, letter carrier Kravec submitted a written statement to management indicating that he overheard the grievant “talking negatively about the Postmaster” and that he would punch him, kill him, and did not care if he would be fired for such acts. (Joint Ex. 2, at 15). The statement provided by letter carrier Kravec stands at the heart of this case, and constitutes the primary evidence relied upon by management in support of its decision to place the grievant in an off-duty status without pay pursuant to the emergency procedure set forth in Article 16.7 of the National Agreement. For the following reasons, the arbitrator finds that the Postal Service presented insufficient evidence that management had just cause to place the grievant in an emergency off-duty status under the facts and circumstances developed at hearing.

As stated on page 16-8 of the Joint Contract Administration Manual (JCAM), “[t]he purpose of Article 16.7 is to allow the Postal Service to act ‘immediately’ to place an employee in an off-duty status in the specified ‘emergency’ situations.” Moreover, management is not required to provide advance written notice to the employee prior to taking such an emergency action. In the instant case, the grievant was placed in an off-duty status because management claimed that his “. . . retention on duty may result in [his] being injurious to self or others.” (Joint Ex. 2, at 10). Management’s belief that the grievant may be injurious to himself or others is based upon the allegation put forth by another employee that the grievant purportedly stated that he wanted to punch and kill postmaster Gabianelli. The arbitrator finds that under Article 16.7, management may act by immediately placing an employee, such as the grievant, in an off-duty

status where there is an allegation involving one or more of the specified "emergency" situations. However, management must justify its action pursuant to the applicable test.

The test which management must satisfy in an emergency placement action is set forth at page 16-8 of the JCAM:

Usually employees are placed on emergency non-duty status for alleged misconduct. However, the provisions of this section are broad enough to allow management to invoke the emergency procedures in situations that do not involve misconduct - for example, if an employee does not recognize that he or she is having an adverse reaction to medication. The test management must satisfy to justify actions taken under this Article 16.7 depends upon the nature of the 'emergency.' In H4N-3U-C 58637, August 3, 1990 (C-10146), National Arbitrator Mittenthal wrote as follows:

My response to this disagreement depends, in large part, upon how the Section 7 'emergency' action is characterized. If the action is discipline for alleged misconduct, then Management is subject to a 'just cause' test. To quote from Section 1, 'No employee may be disciplined . . . except for just cause.' If, on the other hand, that action is not prompted by misconduct and hence is not discipline, the 'just cause' standard is not applicable. Management then need only show 'reasonable cause' (or 'reasonable belief') a test which is easier to satisfy.

* * *

The grievant was clearly placed in an emergency off-duty status for alleged misconduct. Therefore, management is subject to a just cause test in order to justify its action under Article 16.7 of the National Agreement. While the grievant acknowledged that he "hated pivoting," he adamantly denied making any statements that he would punch or kill postmaster Gabianelli.

Letter carrier Kravec, the individual who made the key allegation that he overheard the grievant threaten postmaster Gabianelli with physical violence, did not testify at the hearing.

The arbitrator notes that management could have compelled the testimony of this key witness. However, it chose not to do so. Postmaster Gabianelli testified that letter carrier Kravec did not testify because he was “very uncomfortable and did not want to get involved.” There was no evidence that the grievant threatened letter Kravec or otherwise coerced him to prevent his testimony at the hearing.

Management took what it considered prudent action to remove the grievant from the workplace based upon a serious allegation of potential violence made by a co-worker against the grievant. Because such action is subject to arbitral review based upon the just cause standard – a standard of review required by the National Agreement and JCAM – it is incumbent on management to meet that test.

In this case, the right of the Postal Service to immediately place an employee in an off-duty status without pay based upon an allegation remains subject to an evidentiary hearing, including the rigors of direct and cross-examination. Aside from his denial of wrongdoing, the grievant and his Union representative were left with no recourse to probe the truth and veracity of his accuser’s hearsay statement.

The fact that letter carrier Kravec’s statement was admitted at hearing is an entirely different issue from the weight or probative value to be afforded to it. For example, the statement could tend to show the adequacy of management’s investigation, which is an element

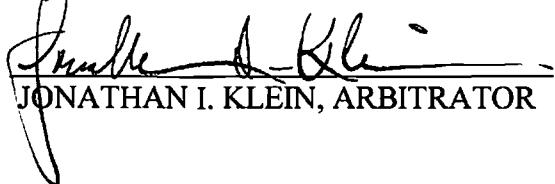
of just cause. However, the only witness to the grievant's alleged statement was Kravec to whom management gave a pass on appearing and offering testimony at hearing. Such witness testimony concerning the facts that gave rise to the grievant's emergency placement are critically important.

Under these facts and circumstances, the arbitrator finds that the hearsay statement of letter carrier Kravec, in the absence of his testimony at hearing, is insufficient to establish that management had just cause to place the grievant in an emergency placement, off-duty status pursuant to Article 16.7 of the National Agreement. The grievant has been employed by the Postal Service for approximately 26 years, and although an allegation was made that he has an issue with his temper in the office, the joint case file contains no prior disciplinary action. Postmaster Gabianelli himself acknowledged that he never observed the grievant acting violently or throwing a "temper tantrum" in the office.

For each of the foregoing reasons, the Postal Service failed to satisfy its burden of proof in this case. The grievance is sustained as set forth in the Award.

AWARD

The grievance is sustained. The grievant shall receive back pay and be made whole for the period of September 8, 2014, until the date that management returned him to duty.



JONATHAN I. KLEIN, ARBITRATOR

Date of Issuance: February 7, 2015.