

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)
Between)
UNITED STATES POSTAL SERVICE)
and)
NATIONAL ASSOCIATION OF LETTER)
CARRIERS, AFL-CIO)

C#09929

OPINION AND AWARD

Nicholas H. Zumas, Arbitrator

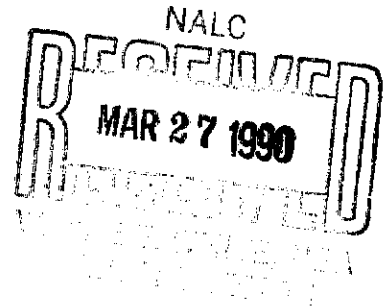
Grievant: Wendell Brooks

Case No.: E7-2H-D 22196

Appearances:

For the Postal Service: John M. McCrarey

For the Union: Judson Vaughn



Place of Hearing: Columbia, South Carolina


Date of Hearing: January 22, 1990

Post-Hearing Briefs Filed: February 15, 1990 (USPS)

February 27, 1990 (NALC)

Award: Grievance denied.

Date of Award: March 21, 1990


Nicholas H. Zumas, Arbitrator

STATEMENT OF THE CASE

This is an arbitration pursuant to the provisions of Article 15 of the National Agreement between United States Postal Service (hereinafter "Service") and National Association of Letter Carriers, AFL-CIO (hereinafter "Union"). At the hearing, sworn testimony was taken, exhibits were offered and made part of the record and oral argument was heard. Post-hearing briefs were filed with this Arbitrator on February 15 and February 27, 1990.

Grievant, a Part-Time Flexible Carrier, was terminated as a result of his alleged repeated AWOL, operation of a postal vehicle without a valid state driver's permit and failure to report the lack of a valid permit to his supervisor.

The parties, having failed to resolve the matter during the various Steps of the grievance procedure, referred the dispute to this Arbitrator for resolution.

ISSUE

The parties have stipulated that the questions to be resolved are (1) whether this matter is arbitrable, and (2) whether Grievant was terminated for just cause under the Agreement; and if not, what should the remedy be.

STATEMENT OF FACTS

Grievant was hired on March 28, 1987. On November 15, 1988, Grievant was issued a Letter of Warning for AWOL. On December 29, 1988, Grievant was issued a seven day suspension for AWOL. On February 1, 1988, Grievant was issued a 14 day suspension for AWOL.

On March 9, 10, 13, 14, 15, 17, 18 and 20, 1989, Grievant did not report for duty as scheduled. Grievant did not contact his supervisor on those dates to explain his absence or request excuse on approved leave.

George Sturkie, Grievant's supervisor, testified that Grievant had a tendency not to come to work and that he referred Grievant to the EAP on three separate occasions. Sturkie testified further that he was not aware that Grievant was an alcoholic until just before Grievant was terminated. Sturkie repeatedly tried to contact Grievant during March 1989, but could not reach him. When he finally confronted Grievant, Grievant explained that his mother had been in the hospital.

Sturkie testified that he was unaware of Grievant's permit suspension until other carriers informed him that Grievant probably did not have one. Sturkie then ordered Grievant's driving record. That record, dated March 31, 1989, indicated that Grievant's permit had been suspended for a period of six months (November 16, 1987 to May 16, 1988) following Grievant's arrest October 2, 1987 on charges of driving under the influence. Joanne Catoe, a Records Custodian for the South Carolina Highway Department,

testified that Grievant did not have a valid driver's permit from November 16, 1987 until July 7, 1989. Catoe testified further that Grievant enrolled in the ADSAP Program on December 30, 1988, and that ADSAP is only for those whose permits had been suspended. On July 7, 1989, Grievant filed a Form SR-22 (a certificate of financial responsibility) and was issued a provisional permit. Sturkie testified that driving without a permit is a serious offense. Finally, Sturkie testified that Grievant did not tell him that he (Grievant) did not have a valid driver's permit. Sturkie stated that he relied on an employee's honesty to tell him whether he had a valid driver's permit.

Grievant testified that he knew his permit was suspended, but hoped the police would not find out or that a computer error would not reveal it. Grievant also acknowledged that he was aware of the great risk at which he placed the Service by driving while his permit was suspended.

Clarence Hart, the EAP coordinator for the Columbia Division, testified that Grievant had not participated the way he should in the EAP; that is, that Grievant was not regular in attendance. Grievant testified that he had agreed to attend the EAP in 1988, but he did not abide by that agreement. Hart noted that 10 1/2 months of sobriety is not sufficient to complete the 12 step Alcoholics Anonymous program.

Grievant testified that he had serious drinking problems and that he sometimes came to work drunk. He testified further that he had been enrolled in the EAP, but dropped out, stating that he had an "attitude"

about attending, preferring to go to a bar. Grievant testified further that he did not recall showing up at work on March 18, 1989 with alcohol on his breath or stating that he was not going to lose his job because he planned to go to de-tox, but conceded he probably had done so. In a newspaper article dated July 30, 1989, Grievant stated, "I wanted to prove I could get away with [drinking and driving]....I knew they couldn't catch me. I was smarter than they were...."

On June 2, 1989, Labor Relations Representative John McCrarey denied this grievance at Step 2. Steward/Local President Darrel Addison prepared a letter of additions and appealed to Step 3 on June 9, 1989. Addison mailed the appeal to USPS at the Columbia Division level, where Human Resources received it June 12, 1989. Human Resources returned the appeal to Addison, who received it following his vacation at the end of June and beginning of July. The Step 3 appeal was received by Eastern Region Labor Relations on July 13, 1989.

Article 15 of the Agreement provides that appeals from Step 2 to Step 3 "must be made within fifteen (15) days after receipt of the employer's decision" and that an appeal from Step 2 "shall be in writing to the Regional Director for Human Resources." Failure to meet the time limits "shall be considered as a waiver of the grievance."

The Employee and Labor Relations Manual is incorporated into the Agreement in Article 19.

Part 666.1 provides:

Discharge of Duties

Employees are expected to discharge their assigned duties conscientiously and effectively.

Parts 666.81 and 666.82 provide:

666.8 Attendance

666.81 Requirement for Attendance. Employees are required to be regular in attendance.

666.82 Absence without Permission. Employees failing to report for duty on scheduled days, including Saturdays, Sundays, and holidays, will be considered absent without leave except in actual emergencies which prevent obtaining permission in advance. In emergencies, the supervisor or proper official will be notified as soon as the inability to report for duty becomes apparent. Satisfactory evidence of the emergency must be furnished later. An employee who is absent without permission or fails to provide satisfactory evidence that an emergency existed will be placed in a nonpay status for the period of such absence. The absence will be reported to the appropriate authority.

Part 811.1 provides:

Responsibility of Carrier

.11 Be sure you are qualified to drive the vehicle assigned to you; maintain a valid State driver's license and SF 46, U.S. Government Motor Vehicle Operator's Identification Card.

.12 Advise your immediate manager of suspension or revocation of your state license.

Part 871.31 provides:

Participation in EAP is voluntary and will not jeopardize the employee's job security or promotional opportunities. Although voluntary participation in EAP will be given favorable consideration in disciplinary action, participation in EAP does not prohibit disciplinary action for failure to meet acceptable standards of work performance, attendance, and/or conduct problems. Further, participation in EAP does not shield an employee from discipline or prosecution for criminal activities.

Part 873.1 provides:

873.11 Where alcoholism or dependency on drugs was a primary contributing factor to events which led to an employee's removal or resignation from the Postal Service, one should not assume that the individual lacks the potential to become a productive postal employee in the future. Those who recover from the disease of alcoholism or from dependency on drugs may be fully employable. Therefore, their requests for reinstatement should be given serious consideration, recognizing that the experience gained in former postal employment is a potentially valuable asset.

873.12 In reviewing such reinstatement requests, local management will consider the former employee's postal work history and the nature of the charges which led to removal or resignation, as well as the eligibility factors set forth below and those contained in Handbook EL-311, Personnel Operations.

Article 29 provides that "an employee must inform the supervisor immediately of the revocation or suspension of such employee's state driver's licence."

POSITION OF THE SERVICE

The Service contends that the grievance is not arbitrable and that Grievant was terminated for just cause under the Agreement.

With respect to arbitrability, the Service contends that since the appeal to Step 3 was not filed within 15 days, the grievance is waived and cannot be handled further. It contends that the steward's lack of experience is the Union's responsibility.

On the merits, the Service maintains that Grievant was repeatedly in violation of the Agreement as to his attendance, being AWOL on numerous occasions. Likewise, the Service contends that Grievant violated the Agreement by driving without a valid state permit and by failing to advise his supervisor of that fact. The Service maintains that it is entitled to expect its employees to report for work as scheduled and to follow the rules. It also points out that Grievant's actions regarding his driver's permit subjected it to great potential liability.

The Service rejects the Union's argument as to the mitigating effect of Grievant's alcohol and drug problem. The Service points out that Grievant never took seriously any rehabilitative efforts until his termination was imminent. Further, the Service maintains, participation in the EAP does not prohibit disciplinary action; and, under Article 35, a point can be reached where an employee who is unable to work may be terminated. Finally, the Service contends that Grievant's post-termination recovery efforts are irrelevant to the merits of this case.

POSITION OF THE UNION

The Union contends that Grievant was terminated without just cause, asserting substantive deficiencies and mitigation.

As to the question of arbitrability, the Union rejects the Service's contention that this matter is not arbitrable because the appeal to Step 3 was filed out of time. While acknowledging that the appeal to Step 3 was mailed to the wrong place (Human Resources Columbia Division), the Union maintains, in essence, that it was Management's fault for not returning the appeal in a prompt fashion which prevented its filing in the proper place before the expiration of the appeal time. Further, the Union notes that the steward filing the appeal never had any experience in filing appeals to Step 3.

On the merits, the Union contends that Grievant's particular circumstances mitigate his alleged wrongdoing in this case. Specifically, the Union points out that Grievant is an acknowledged alcoholic and drug addict. It maintains that these twin addictions produced Grievant's actions which form the basis of his termination. The Union argues that Grievant has made, and continues to make, a considerable effort to rehabilitate himself and cites Article 35 of the Agreement to show that the Service's policy is to support efforts by employees to rehabilitate themselves. Further, the Union contends that the penalty of termination is not warranted in cases such as this, where the employee's underlying problem is alcoholism and the employee is making a bona fide effort to address that problem.

FINDINGS AND CONCLUSIONS

After review of the record, and after having had an opportunity to weigh the testimony and evaluate the credibility of the witnesses, it is this Arbitrator's finding that (1) this case is arbitrable, and that (2) the termination was for just cause, and the grievance must be denied.

Turning first to the issue of arbitrability, the Service correctly points out that the grievance processing requirements are of great importance to the grievance procedure and must be followed. The Union appealed from Step 2 in a timely fashion, but misdirected the appeal to Step 3. However, the responsibility for the further misdirection rests squarely with the Service. The facts of this case dictate that the combination of responsibility did not bar arbitration and, therefore, this grievance is arbitrable.

As to the merits, there is no question on this record that Grievant had a history of attendance deficiencies. There is overwhelming evidence that in March 1989, he was repeatedly AWOL. The convincing evidence in the record is that this absence was tied directly to Grievant's alcohol use. The record is also clear that Grievant's driver's permit was suspended in October 1987 and that he drove regularly in the course of his employment in spite of this suspension.

All the above-described actions are serious violations of the Agreement and subject Grievant to termination. The AWOL is serious because the

purpose of the employment relationship is that work be performed. Grievant was clearly not performing his work and equally clearly was not excused properly from duty. The Service is not required to maintain in its employ an individual who cannot or will not work. Through no fault of the Service, Grievant is just such an employee.

Driving with a suspended permit and failure to advise a supervisor of that are likewise very serious. The risk of liability to the Service is extremely high if Grievant were to cause harm while driving suspended. The Service is quite correctly concerned about this issue. Driving suspended is a direct violation of the Employee and Labor Relations Manual (Article 19) and Article 29 of the Agreement and as such makes the violator liable to termination. Grievant clearly drove while suspended. For much the same reasons, an employee must tell a supervisor of suspension of his driver's permit. Driving is so integral to a carrier's work that management must know of an employee's driving capacity. Grievant did not advise his supervisor of his suspension and thereby rendered himself liable to termination.

The Union's principal argument is one of mitigation, stating in essence that Grievant was afflicted by alcoholism and sought help and should not be terminated. While Grievant's alcoholism is heartrending and everyone hopes that for his own sake Grievant addresses the problem, it is not the Service's making. The Service is entitled to have its employees at work. The Service provided repeated opportunities for Grievant to participate in the EAP, but Grievant did not avail himself of them until he stood in the grim

shadow of termination. Article 35 is not a perpetual shield from termination. Where, as here, the Service has attempted to involve the employee in EAP and tried to work with him, it has the right to terminate an employee if he continues to not perform his work and not address his problem.

In the past, this Arbitrator has not hesitated to reinstate an employee afflicted with drug or alcohol addiction, even where the rehabilitation came after termination. This situation, however, is different. Here, Grievant not only violated the law, he consciously flaunted the law. This is wilful and reckless asocial behavior that militates against any consideration by way of mitigation.