

28691

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)

between)

United States Postal Service)

and)

National Association of
Letter Carriers, AFL-CIO)

Grievant: Paul Weeks

Post Office: Manchester, NH

Case No: B06N4BD09377375

Union No: 5650HJC

DET 14-145316

Before: EILEEN A. CENCI

Appearances:

For United States Postal Service: David Papa

For National Association of Letter Carriers: William Bothwell

Place of Hearing: Manchester, NH

Date of Hearing: February 8, 2010

AWARD SUMMARY: The grievance is sustained in part. Management had just cause to discipline the grievant for "Failure to Satisfactorily Perform Your Duties /Safety". However, the Union has proven that procedural violations that may have influenced the level of discipline. Just cause for removal is therefore lacking. The grievant is to be reinstated to his former position with no loss of seniority but without back pay. He may be required to present proof of a valid driver's license and to undergo remedial safety instruction as a condition of his reinstatement.

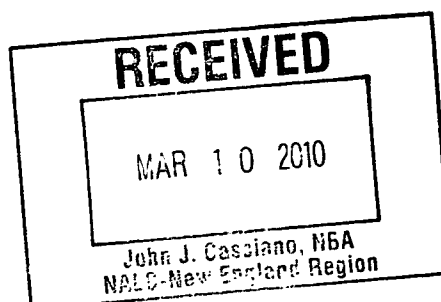
Date of Award: March 5, 2010

Regular Regional Arbitration Panel

RECEIVED

MAR 15 2010

VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS



Eileen ACenci

Eileen A. Cenci

OPINION

STATEMENT OF PROCEEDINGS:

This matter was arbitrated pursuant to the grievance and arbitration provisions of a collective bargaining agreement (National Agreement) between the United States Postal Service (Service) and the National Association of Letter Carriers (NALC or Union). A hearing was held before me on February 8, 2020 in Manchester, New Hampshire. The parties appeared and were given a full and fair opportunity to be heard, to present evidence and argument, and to examine and cross-examine witnesses.

ISSUE:

The parties agreed that the arbitrator should frame the issue. The issue, adopted from the Step B decision is as follows:

Did management violate Article 16 of the National Agreement when on July 28, 2009 the grievant was issued a Notice of Removal for "Failure to Satisfactorily Perform Your Duties/Safety"?

Did management lack just cause to issue the Notice of Removal?

If so, what shall the remedy be?

FACTS:

The grievant, a letter carrier in Bristol, New Hampshire with fifteen years of service as a rural and later a city carrier, was involved in a rollaway accident on July 13, 2009. The grievant stopped his vehicle in to deliver mail to three apartments at 80 Prospect Street in Bristol. Prior to exiting his vehicle he reconfigured mail in the tray. He then got out of the vehicle to make the deliveries without putting the vehicle in park, turning off the engine or engaging the emergency brake. The LLV traveled approximately 50 feet up an incline and to the right, then struck a customer's vehicle, shearing off the grill, headlights and bumper. The LLV came to a stop at the point of impact. There were people outside near the scene of the accident, including a husband cooking at a barbecue, children playing and a wife sunning herself. The owner of the vehicle that had

been struck telephoned the police and the grievant telephoned Bruce Covert, who was the OIC at the Bristol Post Office at the time.

Prior to being assigned as OIC in Bristol Mr. Covert had been the Postmaster at a one-person office in Pike, New Hampshire and had no prior experience with motor vehicle accidents. Mr. Covert and the police came to the scene of the accident. The grievant spoke to OIC Covert at the accident scene and also provided a written statement on the day of the accident. He stated that although he had thought he complied with safety procedures for securing the vehicle, he apparently had not done so. He admitted that the vehicle had been left in gear with the engine running. After he had delivered mail to the addresses on Prospect Street the grievant said he turned around and saw that the LLV had struck another vehicle. The grievant also completed an accident report in which he admitted that he left the vehicle in drive with the engine running. The grievant was placed on emergency off-duty status on the day of the accident.

The following day OIC Covert notified the Union of the accident by sending a letter to Wayne Alesio, who was not the local branch president. The branch president at the time, Daniel Ayianakopolos, learned of the accident when he received a telephone call from the state Union president two days later.

The Postal Service convened an Accident Investigation Board which conducted an investigation on July 15 and 16, 2009. The Board visited the scene of the accident and also met with OIC Covert and with the grievant. It also requested copies of all safety talks and driver observation forms from the OIC and it had the vehicle inspected for defects. The grievant told the Accident Review Board that he was familiar with the rollaway/runaway parking procedures and had seen posters about the procedures but had not had a safety talk about them for many years.

The Accident Review Board determined that there were no vehicle defects that contributed to the accident and that the primary case was operator noncompliance with established safety rules. Its review of documents provided by the OIC showed a lack of documentation of safety talks or service alerts regarding prevention of rollaway/runaway accidents. The Board's review of Forms 4584 (driver observations) showed that observations had been conducted infrequently. The Board made a number of recommendations, including monthly safety talks on rollaway/runaway procedures, quarterly driving observations of all carriers and street observations for safe work practices.

Postmaster Covert conducted a PDI with the grievant on July 20, 2009. Labor Relations Specialist Linda Sanborn attended as a witness and Union Steward Harry Cahill was present with the grievant. Ms Sanborn testified that she became involved in the case when she realized that OIC Covert had no previous experience with cases of this nature. She drafted the PDI questions and advised Mr. Covert at this and other stages of the proceedings. OIC Covert was initially unaware that it was up to him to decide whether discipline should be imposed and to determine the appropriate level of discipline, but Ms. Sanborn explained to him that it would be his decision.

At the PDI the grievant was asked to explain the proper way to secure a vehicle for a dismount delivery and was able to do so. He stated that he curbed the wheels when he left the truck but admitted that he left it running. He was unable to explain why it happened and said he believed he had secured the vehicle. At the PDI the grievant repeated his claim that he had not received safety talks about runaway/rollaway accidents for about two years. The grievant also offered a written statement at the conclusion of PDI, in which he stated that he had only made this one serious mistake in his career but that no lives had been lost and no one had been hurt, and it would never happen again.

OIC Covert issued a Notice of Removal to the grievant for Failure to Perform Your Duties/Safety on July 28, 2009. POOM Richard Tilton, Jr. reviewed and concurred in the decision. Postmaster Covert based the removal decision on the severity of the accident. Although the NOR cited no past elements of discipline it mentioned a safety infraction that occurred in April 2000 that had resulted in remedial training and discipline. The grievant had been observed by the Postmaster twice in one day going through intersections with the driver's door open and not wearing a seatbelt. The prior OIC, James Cooper had requested a seven-day suspension based upon the two incidents but the matter was settled as an official discussion and the grievant attended driver refresher training.

The Union filed a grievance over the Notice of Removal. Steward Harry Cahill met with OIC Covert at the Informal A level. When asked what the Union was looking for, Mr. Cahill replied "a two-week suspension." Mr. Covert's answer was, "I can't." Labor Relations Specialist Linda Sanborn heard and denied the grievance at the Formal A level. Her Formal A response stated that management had considered the grievant's multiple past safety infractions although no past elements of discipline were cited in the NOR. Management believed it had the right to consider the grievant's safety record because he claimed at the PDI that he had only made one mistake in his career and also

because he claimed that he had not received safety training.

OIC Covert testified at arbitration that he posted safety information, including the procedures to prevent rollaway/runaway accidents, prominently in the Post Office when he received the information via e-mail. He also printed safety talks and passed them out to employees. He handled a safety talk about runaway accidents in that manner around April 1, 2009. He did not generally give safety talks verbally because he did not like to speak. James Cooper, who served as OIC in Bristol between February 2006 and June 2008 wrote a memorandum that was included in the arbitration record in which he stated that he gave weekly safety talks while serving as OIC in Bristol.

The record at arbitration included twelve Driver Observation Forms (4584's) that were completed on the grievant between 2004 and 2008. One observation in 2006 noted that curbing the wheels was a driving practice that should be improved. Another observation in 2006 mentioned that the door was open at an intersection. The remainder of the observations, including the three most recent ones completed by OIC Covert, commended the grievant or noted that he displayed safe driving habits. Mr. Covert also observed the grievant's driving on May 28, 2009 OIC when he rode in the jump seat of the grievant's vehicle while doing a 3999. Mr. Covert forgot to complete a driver observation form on that day but he wrote a memo on July 14, 2009 stating that the grievant had displayed safe driving habits by wearing his seat belt, putting the LLV in park, shutting the engine off, using the parking brake and locking the LLV.

The arbitration record included information about past safety issues involving the grievant. In April 2008 OIC Covert and another Postal manager were walking a route in Bristol when they observed the grievant drive through an intersection with his vehicle door open. He was wearing a seatbelt at the time. Mr. Covert had an official discussion with the grievant about the incident. The arbitration record also included a letter from former OIC James R. Cooper stating that the grievant was involved in an accident "some years ago" which involved his pulling into a customer's driveway and hitting the mailbox. Mr. Cooper was quite certain the grievant had received remedial driver's training as a result. Regulations governing Postal Service retention periods establish that records regarding accidents are to be retained for a period of five years.

The Union presented testimony at arbitration concerning a telephone conversation between OIC Covert and Union representatives shortly after the accident. NALC representative Fred Ordway was involved in the MIARAP route inspection process in the summer of 2009 and was responsible

for the evaluation of routes in 25-30 offices including Bristol, New Hampshire. He heard about the accident and thought the fact that the grievant had been removed from his route might affect the process, since consultations are to be conducted with the regular carrier on a route. Mr. Ordway therefore telephoned OIC Covert on July 15, 2009. Timothy Roberts was in the room at the time and they placed Mr. Covert on the speakerphone. According to Mr. Ordway and Mr. Roberts, Mr. Ordway asked Mr. Covert when Carrier Weeks would be back at work and Mr. Covert replied, "In a couple of weeks. " Mr. Covert also said he wanted the grievant back because he was a good carrier and then said that he had made his recommendation to POOM Tilton and it would be inappropriate for him to make further comments. Mr. Ordway wrote a statement concerning the July 15, 2009 conversation on August 26, 2009 and Mr. Roberts reduced his statement about the conversation to writing on August 27, 2009.

OIC Covert denied that he had made any recommendation to the POOM as of July 15, 2009. He pointed out that the Accident Review Board had not yet completed its investigation as of that date and it would have been too early for him to make a recommendation. He did tell Mr. Ordway that he "hoped" the grievant would be back in a few weeks because the TE was scheduled to go on vacation at that time. He also told Mr. Ordway that the grievant was a good carrier. POOM Tilton testified that he did not receive any recommendation from OIC Covert on or before July 15, 2009.

CONTRACT, HANDBOOKS AND MANUALS:

Article 16 Discipline Procedure

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 and alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations.

Section 2. Discussion

For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable. Following such discussions, there is no prohibition against the supervisor and/or the employee making a personal notation of the date and subject matter for their own personal record(s). However, no notation or other information pertaining to such discussion shall be included in the employee's personal folder.

While such discussions may not be cited as an element of prior adverse record in any subsequent disciplinary action against an employee, they may be, where relevant and timely relied upon to establish that employees have been made aware of their obligations and responsibilities.

Article 41 Letter Carrier Craft

Section 3.P

The Employer shall promptly notify the local Union President of any job-related vehicle accidents involving city letter carriers.

M-41 Handbook

Section 822 states that whenever the driver leaves the vehicle, the vehicle must be parked. To park the vehicle:

- a.) Apply the foot brake and place automatic transmission in the park position.
- b.) Turn the vehicle's front wheels toward the curb if you are on a flat surface or when the vehicle is facing downhill. If the vehicle is parked facing uphill, turn the wheel away from the curb.
- c.) Set the hand-parking emergency brake.
- d.) Turn off the engine and remove the key.
- e.) Lock any sliding door(s) between the truck body and cab.
- f.) Lock the doors if you will be out of direct sight of the vehicle.

ASM

355.8 Information Retention

Information must be retained as follows:

- a. Retention of information in automated information processing systems must be consistent with official Postal Service records retention schedules.
- b. Procedures must be established for routine purging/disposition of information maintained on diskettes and other storage media.

...

POSITIONS OF THE PARTIES:

UNITED STATES POSTAL SERVICE

The Postal Service maintains that it has established just cause for the Notice of Removal. The grievant left his vehicle while the engine was turned on and the vehicle was in gear. The procedures for securing vehicles are well known to all letter carriers and are repeatedly emphasized by the Postal Service. The infraction was one of the most serious a letter carrier can commit and it resulted in an extremely serious accident that could easily have caused personal injury or death.

The Union has raised a number of procedural arguments in the grievant's defense. Even if accepted as errors none of these affected the decision to remove the grievant and therefore none amounted to harmful error. For example, the failure to notify the local Union president of the accident caused no harm. The Union was notified of the accident through Mr. Alesio and the grievant was represented by the Union at all stages of the proceedings, including at the Accident Review Board convened two days after the accident.

The Union's allegation that there had been no safety talks regarding rollaway/runaway accidents at the Bristol Post Office within several years of the accident is untrue. OIC Covert explained that he posted information he received about safety procedures. The grievant was not harmed by the manner in which safety information was disseminated since he admitted that he was familiar with the procedures for securing the vehicle.

The Postal Service did not improperly consider the grievant's past safety record. The record was not considered as a matter of progressive discipline since there was no live discipline in his record and no discipline cited as a past element. However, past safety violations were relevant because the grievant claimed at the PDI to have made only one mistake in his career. His safety record was also relevant to the issue of whether the grievant had received proper training. The grievant denied at the PDI that he had received refresher training but the record shows that he did receive remedial training after his safety infractions in 2000.

The Union did not argue at the lower levels of the grievance process that the supervisor lacked the authority to settle the grievance at the Informal A level. This is new argument raised for the first time at arbitration and should not be considered by the arbitrator. The evidence in support of the Union's claim is also unpersuasive. OIC Covert had not made a recommendation to POOM Tilton as of July 15, 2009. The witnesses who testified that Mr. Covert said he had done so are not credible. It is significant that their recollections were not reduced to writing until more than a month after the telephone conversation. Mr. Covert made the decision to remove the grievant and had full authority to settle the grievance at the Informal A level.

The Postal Service asks that the grievance be denied and argues that it cannot be required to employ letter carriers whose disregard for fundamental safety procedures exposes the Postal Service to enormous potential liability.

NATIONAL ASSOCIATION OF LETTER CARRIERS

The Union does not deny that the rollaway accident occurred and that the grievant, who believed he had followed the proper procedures to secure his vehicle, must have failed to do so. It points to mitigating factors, including the grievant's fifteen-years of service, and exemplary record, including a statement by the OIC who described him as an excellent employee.

The Union also points to a number of fatal flaws in management's handling of this matter. Management violated Article 41.3.P by failing to notify the Union president of the accident. The Union was deprived of the opportunity to investigate the accident scene because the local Union president was not notified of the accident as required.

Management improperly considered past safety violations that were handled as official discussions and should not have been part of the grievant's record or been citable in a discipline case. Management also referred to an accident that occurred more than five years before the discipline in this case was issued and should have been expunged from the records.

Management failed to give required safety talks at the Bristol Post Office for more than two years prior to the accident. There is no documentation that such talks were given and the Accident Review Board concluded that management had failed to give required safety talks. The fact that posters describing prevention of rollaway/runaway accidents were displayed on the back of carrier cases is not a substitute for required safety talks.

The Informal A grievance representative had no authority to settle the grievance. Mr. Covert told Union representatives on July 15, 2009 that he hoped the grievant would return to work within a few weeks and that he had already made his recommendation to the POOM. This indicates that the decision to remove the grievant was made by a higher-level official. Given that situation, OIC Covert certainly had no authority to resolve the grievance over the removal when the parties met at the Informal A level. This was confirmed by Mr. Covert's statement at the Informal A meeting when asked to reduce the removal to a 14-day suspension. Mr. Covert's reply was, "I can't."

The Union asks that the grievance be sustained and that the grievant be reinstated with back pay or, in the alternative, that the penalty be modified.

DISCUSSION:

The grievant's responsibility for causing the rollaway accident on July 13, 2009 is not in

question and has not been disputed by the parties. The grievant admitted from the outset that he left his vehicle in gear, with the engine running when he went to deliver mail. While he stated at one point that he thought he curbed the wheels and at another point that he was unsure whether he had done so or not, that is a relatively minor consideration under the circumstances. The grievant committed major and serious violations of Postal Service safety regulations whether or not he curbed the wheels of his LLV.

It is, of course, a violation of postal regulations to walk away from a vehicle while its engine is running and it is in gear. Doing so must also be considered a matter of gross negligence, if not recklessness. It could result in serious property damage, personal injury or even death. In the circumstances of this case, where a family including children were outside near the scene of the accident, the grievant and the Postal Service were very fortunate that a tragic outcome was avoided.

The Union has not denied the seriousness of the safety violation but has argued that the removal of the grievant cannot stand because of a number of fatal procedural errors, which will be discussed below.

Failure to Give Required Safety Talks

The evidence shows that OIC Covert disseminated safety information by printing copies and passing them out to employees and by posting the information in the office. He did not like to speak and therefore did not disseminate the information by giving safety talks. The previous OIC gave regular safety talks to all employees, presumably including the grievant, between 2006 and 2008. I am unaware of postal regulations governing the manner in which safety information is to be disseminated. While it seems that merely posting the information would be an inadequate way of ensuring that all employees are exposed to it, passing out written information to all employees may be acceptable.

The record shows that the grievant received driver training when initially hired and received refresher training on at least one or two occasions. He had heard safety talks including prevention of rollaway/runaway accidents until at least mid-2008 and had seen printed material about the correct procedures after that time. He never denied that he was aware of the correct procedures for securing a vehicle. Under these circumstances I am unable to conclude that OIC Covert's failure to give regular safety talks was a fatal flaw.

Authority of the Informal A Representative to Settle the Grievance

The evidence does not support the Union's claim that the Informal A grievance representative lacked the authority to resolve the grievance. OIC Covert testified that he made the decision to remove the grievant and Linda Sanborn supported his testimony, stating that she told Mr. Covert it was his responsibility to make the decision. Mr. Covert denied that he made a recommendation to Mr. Tilton on or before July 15, 2009 and his testimony on that score was corroborated by Mr. Tilton. Although Union witnesses testified that Mr. Covert told them on July 15, 2009 that he had already made a recommendation to Mr. Tilton, their recollection is undermined by the fact that they did not reduce the conversation to writing until more than a month after it occurred. Moreover, logic and common sense would tend to support the testimony of Mr. Covert and Mr. Tilton since it would be unlikely that an OIC would make a recommendation on discipline prior to receipt of the Accident Review Board report and prior to the completion of an investigation into the circumstances of the accident.

Mr. Covert's response "I can't do that" when he was asked by the Union at the Informal A meeting to reduce the removal to a 14-day suspension was not an admission that he was receiving direction from a higher-level authority, although the Union interpreted it that way. The response could just as readily be interpreted as another way of saying, "I'm not willing to do that."

There is a question as to whether the Union's allegation that the Informal A representative lacked authority to settle the grievance was new argument raised for the first time at arbitration. Since I have concluded that the argument fails on its merits, I have not addressed that issue.

Failure to Notify the Local Union President of the Accident

Article 41.3.P was violated when OIC Covert mistakenly notified the state union president rather than the local Union president of the accident. The local Union president learned of the accident within two days, but only because the state Union called the local. It is unclear that management ever complied with its obligation under Article 41.3.P to notify the local Union president.

The Service argues that this violation is a technical error that caused no harm, because the local Union became aware of the accident and the grievant was represented at all stages of the proceedings, including at the Accident Review Board hearing that took place two days after the

accident. The Union, on the other hand, claims serious harm because it was deprived of the opportunity to send a representative to the scene of the accident to investigate. I consider the violation something more than a technical error, since it caused a delay in the involvement of the local Union that could have compromised its ability to adequately represent a member. The consequences of the error in this case, however, were not so great that the violation, standing alone, would be a fatal flaw.

Improper Citation of Prior Discipline and Safety Violations

The grievant had no prior elements of discipline in his record at the time the Notice of Removal was issued and none was cited in that document. Nonetheless, the grievant's history of safety violations was considered by management. The safety violations that were considered were nine years old and had not resulted in discipline but in official discussions, which are not to be cited as discipline.

The Postal Service argues that it did not cite the grievant's prior safety record, including official discussions, as elements of prior discipline. It claims these matters were referenced only because the grievant "opened the door" by claiming that the July 13, 2009 accident was his only mistake in a career of almost fifteen years. It is true that the grievant seriously overstated his case by claiming that the accident in which he was involved was the only mistake of his career. The parties have agreed, however, to strict rules that govern the circumstances in which previous discipline can be considered and arbitrators have an obligation to enforce the rules to which the parties have agreed. Neither official discussions nor accidents more than five years old are to be included in an employee's record. Since they are not part of an employee's record they cannot be considered as evidence of a history of infractions when weighing the penalty that should be imposed for a new infraction.

The application of these rules may result in certain injustices. There is no doubt that it is difficult to ignore information that is indisputably true. It is the parties, however, who have fashioned the rules that govern their relationship, including the rules that official discussions cannot be cited in future discipline and accidents more than five years old are to be purged from records. The role of arbitrators is limited to applying those rules.

There is no doubt in this case that the grievant was treated as an employee with a record of

safety infractions even though the infractions never resulted in discipline that could be cited.

Mitigation

The Union has argued that there are mitigating factors in this case that must be weighed in the grievant's favor. The grievant has been a good employee and was described as such by OIC Covert. He was essentially forthcoming and honest in his description of the accident. Although he stated at one point that he curbed the wheels of the vehicle and later said that he was unsure, he essentially admitted his failure to follow required safety procedures from the outset. He offered no explanation for this failure, other than to say that he thought he had complied with required procedures and had evidently failed to do so.

It is true that anyone can make a mistake. Even those who are normally cautious, reliable and meticulous about following established procedures can, at a given moment, make enormous mistakes that have tragic consequences. The Postal Service has established detailed procedures that must be followed by all employees when they secure a vehicle for dismount in order to prevent normal human fallibility. The failure to follow those procedures is a serious violation that can lead to tragic consequences. It must also be recognized that even if the absence of regulations governing the method of securing vehicles, the degree of negligence involved in walking away from a vehicle when it's engine is running, it is on an incline and in gear is almost incomprehensible. In the absence of procedural errors affecting due process the penalty imposed by the Postal Service in this case would be within reason and would not be reduced by mitigating factors.

Conclusion

It is true, as the Postal Service argues, that employees have been removed for first offenses involving safety violations as serious as the one in this case. In some of those cases the employee's negligence in causing the accident was compounded by a failure to report it or by other attempts at dishonesty or cover-up. There have also been cases where employees have received lesser penalties than removal for violations of this nature. Nonetheless, in the absence of procedural irregularities, removal for a first safety violation as serious as the one at issue in this case could not be considered an arbitrary or capricious penalty. The procedural irregularities that occurred in this case cannot

easily be dismissed as harmless error, however.

The failure to promptly notify the local Union president of the accident as required by Article 41.3.P caused a two-day delay that may have compromised the ability of the local Union to investigate the accident and represent the grievant at the crucial early stages of the process. Management's consideration of safety violations that occurred more than five years ago and resulted only in official discussions was improper despite the grievant's claim at the PDI that the accident was his first serious mistake as a postal employee. The grievant's rhetorical excess should not have opened the door to consideration of matters that were not legitimately included as part of his employment record.

Management's claim that it considered the grievant's previous safety violations but did not view them as elements of progressive discipline is a meaningless distinction. Management viewed the grievant as an employee with a history of safety violations even though the safety violations resulted in official discussions that cannot be considered. The decision to remove the grievant was based upon his past record as well as the extremely serious nature of the accident in which he was involved. It is impossible to say to say that the outcome would have been the same if the grievant had been viewed as an employee with no previous violations. It is clear, however, that a serious penalty would have been imposed even in that situation. The procedural violations thus affected the outcome of the case but should not completely invalidate the discipline.

In light of the foregoing, the grievance is sustained in part. Management had just cause to discipline the grievant but the Union has proven procedural violations that may have influenced the level of discipline. Just cause for removal is therefore lacking. The grievant is to be reinstated to his former position with no loss of seniority but without back pay. He may be required to present proof of a valid driver's license and to undergo remedial safety instruction as a condition of his reinstatement