

C#09680

REGULAR ARBITRATION PANEL

UNITED STATES POSTAL SERVICE	(T. Davis
-and-)	S7N-3Q-D 22055
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	(Baton Rouge, LA
)	

BEFORE: Norman Bennett, Arbitrator

APPEARANCES:

For Management - Larry Hamilton
For the Union - George Cooper

DATE OF HEARING: October 20, 1989

LOCATION OF HEARING: Baton Rouge, LA

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OPINION

Statement of the Case

This is a removal case. The Grievant Davis, a city letter carrier, was issued a document entitled "Effective Date of Removal," dated May 17, 1989. This action alleged that the Grievant had violated the terms and conditions of a Last Chance Agreement which had been signed by the Grievant on November 2, 1988 (Last Chance Agreement herein). This action was grieved by the Union. The matter was not resolved during the grievance procedure, and it was appealed to arbitration by the Union. An arbitration hearing was held in this case on October 20, 1989. At the outset of the hearing, Management raised the issue of arbitrability. Specifically, Management contended that the matter was not arbitrable because the Last Change Agreement waived access to the grievance procedure. The Union took the position that the matter was arbitrable. Management insisted that the issue of arbitrability be decided before a hearing on the merits commenced. The Union did not object to this method of proceeding. Therefore, a hearing was then held on the arbitrability issue. After the presentation of evidence on this issue, the parties elected to file post-hearing briefs in lieu of closing statements. The hearing was then adjourned, pending a determination of the arbitrability issue. Post-hearing briefs were timely filed by both parties. By agreement of the parties, the only matter for disposition herein is the issue of arbitrability.

Factual Background

An Investigative Memorandum from the Postal Inspectors revealed that the Grievant had displayed unacceptable conduct on April 19, 1988. As a result, the Grievant entered into a Last Chance Agreement on May 12, 1988 (First Last Chance Agreement herein). This Agreement was also signed by the Local Union President Copper and Acting Labor Relations Representative Edmunds. This Agreement provides, in part, as follows:

The following agreement is entered into for a period of one year, provided that you comply with the following stipulations.

1. You must satisfactorily participate in a structured EAP Program designed and coordinated by the USPS EAP Coordinator. The program will include, but not be limited to the following:
 - a. Continued outpatient treatment and rehabilitation counseling at the Meadow Wood Hospital.
 - b. Attendance at three AA meetings per week.
 - c. To take a random urine drug screen at your expense whenever deemed necessary by the USPS EAP Coordinator.
- * * *
3. Any period or periods of absence without official leave (AWOL) will be sufficient cause for your removal. Final determination of your reason for the absence charged to AWOL will be the decision of the MSC Director of Human Resources. All questionable documentation will be sent to the MSC Director of Human Resources for final ruling on acceptability.

The Grievant was absent on June 25, 1988, and this absence was charged as AWOL. As a result of the AWOL, the Grievant was sent for a fitness-for-duty examination at the Baton Rouge Clinic on June 27, 1988. The results of this exam were received by the Postal Service on June 29, 1989, and they reflected positive testing for Cannabinoids and Cocaine.

On June 30, 1989, the Grievant was issued a Notice of Removal dated June 29, 1988. This Notice cited the First Last Chance Agreement, the AWOL, and the results of the examination. It also cited the following elements of past history: (1) A Letter of Warning dated 3/26/87 for unsatisfactory attendance; (2) A Letter of Warning dated 12/30/87 for the failure to follow instructions; (3) A Final Letter of Warning dated 3/1/88 for unsatisfactory attendance and the failure to perform the duties of the letter carrier position.

This Notice of Removal was grieved. A Step 1 meeting was held on July 7, 1988, and the Step 1 answer which denied the grievance was issued on July 12, 1988. A Step 2 Appeal, signed by Cooper, was filed on July 15, 1988, and the Step 2 meeting was held on July 25, 1988. The grievance was denied by a Step 2 decision dated August 4, 1988, signed by Edmunds.

The Step 3 Appeal, signed by Cooper, was filed on August 30, 1988. Step 3 Designee Woodall, Manager of Labor Relations, Jackson Division, represented the Management regarding the Step 3 appeal. During the pendency of the Step 3 Appeal, Woodall began receiving calls from NALC representative James and Cooper called regarding a possible settlement of the case. During one of these telephone conversations, Cooper requested that the Grievant be afforded another opportunity for employment and that another last chance agreement be considered. Woodall considered the Union's request and decided to offer the Grievant another last chance agreement. "It was the only way I would put her back to work," Woodall testified. In a later telephone conversation, Woodall made Cooper aware of the basic concepts of the proposed last chance agreement.

The second Last Chance Agreement was prepared and signed by Woodall on November 1, 1988, and it was then forwarded to Baton Rouge. A conference call involving Woodall, the Grievant and Edmunds occurred on November 2, 1988. During this call, the Last Chance Agreement was discussed and fully explained to the Grievant. The Grievant executed the Agreement on November 2, 1988 in the presence of Edmunds. Cooper was not present during this conversation and did not sign the Agreement. This Agreement provides, in part, as follows:

By Notice dated June 29, 1988 and received by Ms. Toyne G. Davis (SSN: 435-84-8497), Ms. Davis was informed that she would be removed from the U.S. Postal Service effective July 31, 1988 based on the charge as in the removal notice. In a final effort to provide Ms. Davis with a LAST CHANCE to demonstrate her worthiness for continued

employment with the U.S. Postal Service she voluntarily agrees to the following conditions in exchange for this LAST CHANCE opportunity being provided Ms. Davis.

* * *

II. Ms. Davis will be reinstated as an unassigned full-time city letter carrier without loss of seniority. The period beginning July 31, 1988 until her reinstatement will be classified as a disciplinary suspension.

* * *

V. Ms. Davis agrees to maintain a satisfactory level of attendance. For all absences due to illness or emergency, regardless of length or duration, Ms. Davis agrees to submit acceptable documentation immediately upon her return to duty. The documentation must clearly establish the need for the absence. All questionable documentation will be sent to the SCD, Human Resources for final determination of acceptability. This ruling will be final and binding. Failure by Ms. Davis to furnish acceptable documentation will constitute a breach of this LAST CHANCE AGREEMENT and Ms. Davis will be immediately removed from the U.S. Postal Service without any recourse of appeal either through the Grievance Procedure, Merit Systems Protection Board, or Equal Employment Opportunity Commission.

* * *

VIII. Ms. Davis, by accepting this LAST CHANCE opportunity for continued employ with the U.S. Postal Service, asks the Union (National Association of Letter Carriers) to withdraw grievance no. S7N-3Q-D-16669 initiated by the Union protesting the removal action. Ms. Davis understands that by withdrawing the grievance no further avenue of appeal is available to her concerning the removal action and such request for withdrawal is strictly voluntarily on her part. Ms. Davis acknowledges that withdrawal of grievance no. S7N-3Q-D-16669 is at her request and her request alone. She agrees not to hold the Union responsible in any form or matter based on her decision to request withdrawal of the grievance. Ms. Davis also acknowledges that it is her decision alone to waive any future grievance(s), MSPB or EEO appeal rights as they relate to the provisions of this LAST CHANCE opportunity.

This agreement was entered into freely and is not the product of duress, intimidation or coercion.

/s/ Toyna Davis /s/ Ted Woodall 11/1/88
Ms. Toyna Davis 11/2/88 U.S.P.S. Representative
SSN: 435-84-8497

The Grievant requested that the Union withdraw the grievance pursuant to the terms of Last Chance Agreement, and the grievance was withdrawn by the Union. The Step 2 grievance resolution was signed by Cooper and Edmunds. Woodall confirmed the disposition of the grievance at Step 2 and closed the appeal based on the Step 2 settlement reached at the local level.

The Grievant left work on May 9, 1989. Before she left work, she submitted a 3971, requesting 5½ hours of COP from 10:00 a.m. until 3:30 p.m. This 3971 was disapproved by the Director of Human Resources Hamilton on May 15, 1989. The reason stated on the 3971 for the disapproval is, "appt. with phys. was at 1400 on 5/9/89." Hamilton did approve 2 hours of COP from 1350 until 1550 for this date.

The "Effective Date of Removal" was issued to the Grievant on May 17, 1989. This document stated that the Grievant was removed, effective May 17, 1989. It also referenced the Last Chance Agreement and stated: "You have failed to maintain satisfactory attendance as evidenced by the fact that you were 3½ hours AWOL on May 9, 1989.

This action was grieved by the Union, and the Step 1 meeting was held on May 19, 1989. Present at the Step 1 meeting were the Grievant, Cooper and Supervisor Tanner. The Step 1 Decision was rendered on May 23, 1989 by Supervisor Tanner, denying the grievance. The Step 2 Appeal was signed by Cooper and filed on May 26, 1989. The Step 2 Appeal states, in part, as follows:

The charge is denied. The grievant notified the clerk in charge, Benny Hooper, that she was leaving the work place and had submitted a 3971 for 5½ hours. The supervisor, Mark Tanner, was not available and the grievant had been told when she was assigned to CMU that in the absence of the primary supervisor, Mr. Hooper was in charge. Even though the 5½ hours were later disapproved by Mr. Larry Hamilton, the supervisor in charge of authorizing sick leave and/or COP for employees on limited duty which the grievant was on at the time (approved the request). The grievant was totally unaware of the disapproval until after the time had been taken.

The Step 2 Decision dated June 13, 1989 stated that Hamilton's decision with respect to the AWOL was final and binding. The Step 3 Appeal dated June 23, 1989 was received by the Postal Service on June 29, 1989. The Step 3 Decision dated August 4, 1989 states: "Furthermore, the grievant waived any access to the grievance procedure by waiving any future grievances as they relate to the provision of the Last Chance Agreement." The matter was timely appealed to arbitration by the Union.

Issue Presented

By agreement of the parties, the issue presented for resolution herein is as follows:

WHETHER OR NOT THE GRIEVANCE IS ARBITRABLE?

Cited Statutes and Contractual Provisions

I. The National Labor Relations Act (Act herein).

Section 8 (a) (5).

II. The Postal Reorganization Act of 1970.

Section 223. Bargaining Units.

Section 224. Recognition of Labor Organizations.

II. The Agreement.

Article 15, Section 2, Grievance Procedure - Steps.

Step 2 (c), Step 2 (h), Step 3 (b), Step 3 (c) and Step 3 (d).

Article 15, Section 3, General.

Management's Position

1. The grievance is not arbitrable. The Last Chance Agreement is final and binding. It waives access to the grievance procedure.

2. Prior arbitration awards have upheld the validity of last chance agreements.

3. The Union contends that the Last Chance Agreement is an unfair labor practice under the Act because it seeks to refuse to bargain collectively with the Union. However, although Cooper did not sign the Agreement, he was very instrumental in the process.

4. The Union was not required to withdraw the grievance which resulted in the Last Chance Agreement. It could have taken the matter to arbitration. If the Union had some problem with the Agreement, it should not have withdrawn the grievance.

5. The Grievant was not coerced into signing the Agreement.

Union's Position

1. The grievance is arbitrable. The Last Chance Agreement cannot be enforced because it was negotiated between the Postal Service and the Grievant without the impute, blessing, cooperation or participation of the Union as is required by Law.

2. The Union has jurisdiction of a grievance past Step 1 of the grievance procedure. In this case, the grievance concerning the 1988 removal was processed to Step 3. While the grievance was pending at Step 3, the Postal Service and the Grievant negotiated the Last Chance Agreement.

3. The grievance concerning the June 1988 removal was withdrawn because the discipline was set aside and, therefore, the issue was moot.

4. The National Agreement, the Postal Reform Act and the National Labor Relations Act directs that an employee is entitled to access to the grievance procedure. To circumvent these rights is unlawful.

5. It is a violation of Section 8 (a) (5) of the Act for the Postal Service to bypass the Union and bargain directly with an employee.

Discussion

Last chance agreements typically arise from the following set of facts. An employee is removed for alleged misconduct, and this removal is grieved. The grievance is then settled in the grievance procedure. The settlement provides that the grievance is to be withdrawn and that the employee is to be reinstated pursuant to a last chance agreement. The last chance agreement sets forth the conditions of reinstatement in terms of what the employee agrees to do and what constitutes a breach of the agreement. It further provides that a breach of the agreement is grounds for removal, that the decision of the employer is final and binding with respect to what constitutes a breach of the agreement, and that access to the grievance procedure is waived regarding the employer's decision and action.

It is clear that these last chance agreements are valid and enforceable if the Union is a party to such agreement. They are specifically enforceable regarding the waiver of access to the grievance procedure. see USPS & APWU, B. Adams, S7T-3T-D 21136, Memphis BMC, TN (Arbitrator Marlett - 1989). In the Memphis case, the Union signed the last chance agreement. Thus, it is clear that the instant case would not be arbitrable if the Union agreed to the Last Chance Agreement.

The Union contends that the Last Chance Agreement was entered into by the Grievant without any "impute, blessing, cooperation or participation of the Union." On this point, the Last Chance Agreement was negotiated directly with the Grievant. Cooper was not a party to the discussions between the Grievant and Management. There is no evidence that Cooper ever saw the Last Chance Agreement before it was signed by the Grievant. Cooper did not sign the Agreement, nor was he present when the Grievant signed the Agreement. There is evidence that Cooper advised the Grievant not to sign the Agreement.

The most important consideration regarding whether the Union agreed to the Agreement is that Cooper did not sign the Agreement. The fact that Cooper requested reinstatement pursuant to a last chance agreement does not prove that Cooper agreed to the terms and conditions of the Agreement. Neither does the fact that Woodall made Cooper aware of the basic concepts of the Last Chance Agreement establish that Cooper agreed to the terms of the Agreement. Further, Management does not contend that Cooper agreed to the Agreement; it only contends that Cooper was "very instrumental in the process."

Management argues that the Union should not have withdrawn the grievance if it had some problem with the Last Chance Agreement. However, it is noted on this point that the Last Chance Agreement provided that the discipline was to be classified as a "disciplinary suspension;" it did not hold the removal in abeyance. If this was the Union's understanding, the Union's argument that the grievance was withdrawn because the removal was no longer in effect is reasonable. Based on the circumstances, the evidence is insufficient upon which to find that the Union agreed to the Last Chance Agreement. Additionally, the withdrawal of a grievance does not waive the right to file a grievance on a future disciplinary action.

The Last Chance Agreement waives access to the grievance procedure regarding a future removal. It was entered into at a point after Step 1 of the grievance procedure. Both parties agree that the Union has exclusive control of a grievance after Step 1 of the grievance procedure. Therefore, there is no question in this case as to whether the Grievant

could have entered into the Last Chance Agreement at Step 1 pursuant to the provisions of the National Agreement which allows an employee to settle a grievance at Step 1. The question then is whether an employee may waive access to the grievance procedure in a last chance agreement entered into after Step 1.

Section 1209 (a) the Postal Reorganization Act of 1970 states:

§ 1209. Applicability of the National Labor Relations Act.

(a) Labor-management relations shall, to the extent not inconsistent with provisions of this title, be subject to the provision of subchapter II of chapter 7 (the National Labor Relations Act, as amended) of title 29.

This language is construed in Muday v. Cleaver, D.C. Mich., 1984. 590 F. Supp. 1209. The United States District Court stated in that case as follows:

[Section 1209 (a)] makes it clear that the Act is intended to "bring postal labor relations within the same structure that exists for nationwide enterprises in the private sector."

Section 9 (a) of the National Labor Relations Act (Act herein) states:

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. Provided, That any individual employee or group of employees shall have the right at any time to present grievances to their employer and have such grievances adjusted, without the intervention of the Union, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given the opportunity to be present at such adjustment.

According to Section 9 (a) of the Act, an employee may adjust a grievance without the intervention of the Union if: (1) the adjustment is not inconsistent with the collective bargaining agreement, and (2) the union is given the opportunity to be present at the adjustment. Of course,

these restrictions can be waived by the terms and conditions of a collective bargaining agreement, as the parties have done at Step 1 of the grievance procedure in the National Agreement.

The National Labor Relations Board construed Section 9 (a) of the Act in Dazly Corp. 106 NLRB 553 (1953). In that case, the Board states:

Section 9 (a) gives the right to individuals and minority groups to take certain grievances directly to the employer independent of the recognized bargaining representative. However, to invoke the protection of Section 9 (a), such grievance must be outside of and not covered by the collective bargaining agreement. Furthermore, not only must the grievance sought not be covered by the agreement, but such adjustment sought in the procedure must not be inconsistent with such agreement. (emphasis added)

Thus, the Board has added a proviso that the employee may not adjust grievances covered by the collective bargaining agreement.

Article 15, Section 2, Step 1 (a) of the National Agreement addresses the filing of grievances. It provides:

(a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. The Union also may initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. In such case the participation of an individual employee is not required. A Step 1 Union grievance may involve a complaint affecting more than one employee in the office.

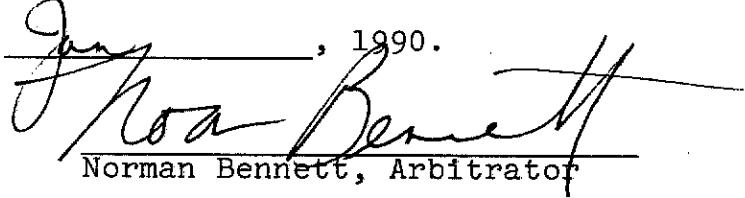
Both the Union and an employee have the right to file a grievance concerning a disciplinary action at Step 1 under Article 15.2, Step 1 (a). The Last Chance Agreement, entered into between the Grievant and Management after Step 1, waives "any recourse of appeal ... through the Grievance Procedure" regarding a future removal action. It purports to waive access to the grievance procedure for the Grievant and the Union concerning a future removal action. The Last Chance Agreement is inconsistent with

the National Agreement in this respect. Further, the Last Chance Agreement agrees to terms concerning a matter covered by the National Agreement, access to the grievance procedure. The only issue in this portion of the case is whether the grievance is arbitrable. For the reasons stated above, the provision of the Last Chance Agreement waiving access to the grievance procedure cannot be upheld. Accordingly, the grievance is arbitrable.

Award

The grievance is arbitrable.

DATED this 29th day of January, 1990.



Norman Bennett, Arbitrator