

C-20380

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)
) Grievant: Class Action
 between)
) Post Office: Nashua, NH
 United States Postal Service)
) Case No: B94N-4B-C 99231980
 and) GTS No: 27650
)
)
 National Association of)
 Letter Carriers, AFL-CIO)

Before: GEORGE R. SHEA, Jr.

Appearances:

For United States Postal Service: J.F. McClusky
For National Association of
Letter Carriers (Union): K.P. Sullivan
Place of Hearing: Nashua, NH
Date of Hearing: December 10, 1999
January 10, 2000
Date of Award: January 22, 2000

AWARD SUMMARY

For the reasons more fully set forth in the attached Opinion, the Arbitrator determines that the Postal Management at the Nashua, NH Post Office, [Post Office] did violate the National Agreement [Agreement], including the parties' Joint Statement on Violence and Behavior in the Workplace [Joint Statement], by its actions toward Letter Carrier R. Rolfe.

The Arbitrator orders the Service to cease and desist immediately from requiring Letter Carrier Rolfe to work under the direct supervision of Gravel until such time as it has provided Gravel with training on the proper techniques of supervising employees and Gravel has

completed successfully such training. This order shall be effectuated in a manner which does not alter Letter Carrier Rolfe's current route assignment or the location of his currently assigned workstation.

A handwritten signature in dark ink, appearing to read "George R. Shea, Jr.", written in a cursive style.

GEORGE R. SHEA, JR.

OPINION

STATEMENT OF PROCEEDINGS:

The National Association of Letter Carriers, AFL-CIO [Union], in accordance with the parties' National Agreement [Agreement], appealed the above captioned matter to arbitration. The undersigned was designated as the Arbitrator to hear and decide the matter. The Arbitrator held hearings on and at the previously referred to dates and location. The parties' representatives appeared and the Arbitrator provided them with a full and fair opportunity to be heard, to present evidence and argument, and to examine and cross examine witnesses.

The Union called A. Miclette, D. Warner, W. LaFay, B. Pelley, V. Trombley, G. Selfridge, S. Martin, J. Soubosky, R. Louf, H. Ladner, C. Hebra, D. Migneault, B. Hagerty, D. Bell, E. Jean and R. Rolfe as its witnesses. The Service called R. Gauthier Sr, T. Carr, T. Wheland, M. McDuffey, R. Venti, W. Olihovik, W. Vezina, and R. Gravel as its witnesses.

BACKGROUND and CONTRACT PROVISIONS:

1. The Joint Statement, in parts relevant to this matter, provides the following:

"We openly acknowledge that in some places or units there is an unacceptable level of stress in the workplace; that there is no excuse for and will be no tolerance of violence or any threats of violence by anyone at any level of the Postal Service; and there is no excuse for and will be no tolerance of harassment, intimidation, threats or bullying by anyone.

We also affirm that every employee at every level of the Postal Service should be treated at all times with dignity, respect and fairness.

The needs for the USPS to serve the public efficiently and productively and the need for all employees to be committed to giving a fair day's work for a fair day's pay

does not justify actions that are abusive or intolerant."

2. On or about July 9, 1999, the Union reduced the underlying grievance to writing and initiated a Step 2 appeal of the Service's Step One denial of the grievance. (J-#2, pages 6-7)

ISSUE:

The parties could not agree to a statement of the issue before the Arbitrator. In consideration of the parties' evidence and arguments at the Hearing, the arbitrator determines the following to be a fair and neutral statement of the issue presented to him.

Did the Postal Management at the Nashua, NH Post Office, [Post Office] violate the National Agreement [Agreement], including the parties' Joint Statement on Violence and Behavior in the Workplace [Joint Statement], by its actions toward Letter Carrier R. Rolfe? If so, what shall be the appropriate remedy?

FACTS:

The events regarding this matter were described in the varying testimony of the parties' witnesses and in the documentary evidence offered by the parties. Based upon his review of that evidence, including his personal observation of the witnesses during their testimony, the Arbitrator determines that the preponderance of the credible evidence supports the following findings of fact.

1. Letter Carrier Rolfe, at the time of the Hearing, was a Letter Carrier at the Nashua, NH Post Office. He had been employed by the Service in that capacity for twenty-eight years and had been employed by the Service for thirty years. Rolfe's entire postal employment had been at the Nashua, NH Post Office. During Rolfe's employment as a Letter Carrier, he received approximately twenty full inspections of his assigned routes. Some of these inspections resulted in route adjustments. At least one such route inspection resulted in discipline. (Sr-#1)

2. Supervisor Gravel, at the time of the Hearing, was Supervisor of Customer Service at the Post Office. He had been employed by the Service for thirty-two years and assigned to the Nashua, NH Post Office for twenty years. He had been a supervisor for fifteen years and had supervised Rolfe intermittently for approximately four years and continuously for the two years immediately preceding the Hearing.
3. The duties of a supervisor include the observation and evaluation of the office and street work performance of the employees under his/her supervision. (Sr-#4, 5, 6) The supervisor is responsible for correcting any time wasting practices engaged in by those employees, including unnecessary talking with other employees and the unnecessary leaving of their assigned cases. (Sr-#7)
4. Gravel determined that Rolfe expanded his office time by talking unnecessarily with other employees and leaving his case excessively and unnecessarily.
5. During the two years of his supervision of Rolfe, Gravel's duty station was immediately opposite Rolfe's case. Gravel did engage in continuous observation of Rolfe while he was seated at his duty station, did on numerous occasions follow Rolfe when he left his assigned case and went to the vending machines on the workroom floor, to the rest room or to other parts of the Post Office.
6. On June 28, 1999, Gravel and Rolfe were engaged in a heated discussion regarding the latter's work performance. Gravel issued two Letters of Warning and one Seven-day Suspension to Rolfe relating to his work performance. (Sr-#1)
7. As a result of this constant observation, discussions and discipline, Rolfe felt uncomfortable and concerned. Rolfe testified that Gravel's observations caused him to be absent from work and resulted in marital problems and low self esteem.

8. The Union and Rolfe reported Gravel's actions toward Rolfe to postal management at the Post Office prior to filing the underlying grievance in this matter. (U-#1, pages 14-17)

POSITIONS OF THE PARTIES:

National Association of Letter Carriers, AFL-CIO [Union]

The Union maintained that the issue before the Arbitrator is Supervisor Gravel's direct acts of harassment and disparate treatment of Rolfe and postal management's acquiescence in those actions. The Union further maintained that these actions and postal management's acquiescence violated the Agreement and the Joint Statement. The Union argued that Gravel's actions toward Rolfe were consistent with his fifteen year pattern of behavior toward employees at the Post Office.

Based upon these factual assertions and contractual contentions, the Union requested the Arbitrator sustain the grievance and award the following: (a) order the Service to instruct Gravel to apologize to Rolfe; and (b) order the Service to transfer Gravel out of his position as a supervisor of Letter Carriers at the Post Office. The Union maintained that its requested remedy was within the contractual authority of the Arbitrator.

United States Postal Service [Service]

The Service argued that the issue before the Arbitrator should be limited to the alleged actions of Supervisor Gravel toward Letter Carrier Rolfe. The Service further argued that the Union failed to establish the factual basis of its allegation that Supervisor Gravel harassed Rolfe or treated him in a disparate manner. The Service maintained that Supervisor Gravel supervised Rolfe in a manner consistent with the duties and responsibilities of his position. In the alternative, the Service argued that, if the Arbitrator determines that Gravel did harass or treat Rolfe in a disparate manner, thereby, violating the Agreement, the

Arbitrator is without the contractual authority to award the remedy requested by the Union in this matter.

Based upon these factual assertions and contractual contentions, the Service requested the Arbitrator deny the grievance.

DISCUSSION:

It is well established by national arbitral authority that the parties' Joint Statement is an accord which either party may enforce through the grievance and arbitration procedure of the Agreement. (Q90N-4F-C 94024977, Snow, 1996) Significant judicial and arbitrable authority supports the premise that, unless specifically limited by the parties' agreement, an arbitrator who determines that a contractual violation has occurred has the flexibility to formulate a remedy which will correct the found violation and will prevent similar violations in the future. (United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, (1960)) This remedial authority of postal regional arbitrators has been recognized in matters related to violations of the Joint Statement. (Q90N-4F-C 94024977, Snow, 1996 at page 23; See also Elkouri and Elkouri How Arbitration Works 5th Edition, BNA 1996 at 801-805)

The Service has the contractually sanctioned right to supervise and discipline its employees subject to the provisions of the Agreement, including the Joint Statement. The Service, however, may not exercise this contractually sanctioned right in a discriminatory manner in violation of Articles 1, 2 or 17 of the Agreement, or in a manner which harasses, intimidates, or bullies an employee in violation of the Joint Statement, or in a disparate manner.

Allegations of Discrimination or Disparate Treatment

The Union alleged that Gravel supervised Rolfe in a disparate or discriminatory manner. The terms "discrimination" and "disparate treatment" are often inappropriately used interchangeably. Disparate treatment involves an unwarranted divergent application

of workplace rules to an employee or group of employees. Discrimination includes an element of disparate treatment; however, the disparate treatment is based upon the impacted employee's inclusion in one of the protected status categories enumerated in Article 2 of the Agreement. The Arbitrator will apply the term "discrimination" as used in Article 2 of the Agreement as the unfavorable treatment of an employee on the basis of his/her membership in a particular group and will apply the term "disparate treatment" as the less favorable treatment accorded an employee not because he/she is part of any group, but because some rule or policy was applied to an employee differently or not applied at all.

In matters which involve Union allegations of a supervisor's discrimination or disparate treatment toward an employee, it must (a) produce evidence of dissimilar treatment of the employee, if the allegation is disparate treatment, or (b) produce evidence of disparate treatment and circumstances from which it may be inferred that there was a causal connection between the contested action and the employee's protected status, if the allegation is discrimination. If the Union produces such evidence, the employer will be considered to have rebutted that inference if it articulates a legitimate, nondiscriminatory reason for its actions. In the event the employer proffers such evidence, it then becomes incumbent upon the Union to prove that the reason given by the employer was a pretext. (McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)) Upon his review of the evidentiary record of this matter, the Arbitrator determines that the Union failed to meet its initial burden of proof regarding the factual basis of its allegation that Gravel's supervision of Rolfe was discriminatory or disparate treatment.

Allegations of Harassment and Intimidation

The Union argued that Gravel's supervision of Rolfe constituted harassment, intimidation and bullying in violation of the Joint Statement. "Harassment" may be defined as an abuse by the

supervisor of the relationship or position which gives him actual or apparent power to damage the employee's employment or pecuniary interests. Such abuse may include verbal or physical conduct which denigrates a person, or shows hostility or aversion toward the person; such as, epithets, slurs, negative stereotypes, threats, intimidation and hostile acts. Other forms of supervisor harassment include, interrogation under stressful circumstances, obscene language, repetitive humiliating tactics, ridicule, repetitive sessions of berating and demeaning conduct, contradictory instructions, and arbitrary denial of employee benefits. "Intimidation" may be defined as putting a person in fear of physical or economic injury for the purpose of compelling or deterring conduct. (William Prosser, Law of Torts 4th Edition, West Publications (1971) at pages 49-62)

An employee's work performance is a proper management concern and often may be the subject of a supervisor's observation and notes. While intensive observations by a supervisor may cause an employee to be alarmed, annoyed, fearful or apprehensive, it does not necessarily constitute harassment. (Elkouri and Elkouri How Arbitration Works 5th Edition, BNA 1996 at 1079-1081; See also Fairweather's Practice and Procedure in Labor Arbitration 3rd Edition, Schoonhoven, editor at page 279) The Arbitrator opines, however, that a supervisor's constant, continuing, long term and intensive observation of an employee, without a disclosed purpose or closure in the form of recommendations or other related definitive actions is inherently intimidating.

The Union, if it is to prevail in its contentions in this matter, must establish the following: (a) Gravel's intent to cause Rolfe distress, or the fact that he should have known that his conduct would cause Rolfe stress; (b) conduct that was extreme; (c) Rolfe suffered distress; (d) a casual connection existed between Gravel's conduct and Rolfe's distress. (Wagenmann V. Adams 829 F.2d 196, 213-214.)

The Arbitrator determines that Gravel did engage in constant close observation of Rolfe at his workstation and obviously took

notes during those observations over an unreasonable period of time. In addition, the Arbitrator determines that Gravel followed Rolfe to the rest room and to the coffee machine on a regular basis. The purpose of these observations was not self evident and while informing Rolfe of his belief that he engaged in time wasting practices, Gravel did not provide Rolfe or the Union with a clear statement of the purpose of these observations.

The appropriate standard for making the determination of harassment is whether a reasonable person, under the same circumstances, would find the conduct hostile and intimidating. In the Arbitrator's opinion, the intensity and the duration of Gravel's observations of the Rolfe, without related recommendations or other contractually sanctioned corrective action, made the observations unreasonable, hostile and intimidating.

The record contains extensive testimony regarding the supervisory methods utilized by Gravel with other employees in the past. The described incidents are strikingly similar to the acts at issue in this matter. While the Union may not rely on such past acts to establish that Gravel engaged in similar acts toward the Grievant, it may rely on these past acts as proof of Gravel's intent to use proven acts to harass and intimidate Rolfe. (Federal Rules of Evidence, Rule 404) In full consideration of the inconsistencies between the testimony of the Union's witnesses and that of Gravel, the Arbitrator determines that Gravel engaged in the observations of Rolfe to harass and intimidate him. Finally, the Arbitrator determines that these observations did cause Rolfe undue embarrassment, anxiety and stress.

The Arbitrator finds that Gravel's belief that Rolfe engaged in time wasting practices during his office time was not without factual foundation. The Arbitrator recognizes the Service's right to correct deficiencies in an employee's work performance. The Arbitrator further recognizes that the supervisor has a contractual right, if not an obligation, to investigate, by personal observation and other means, the circumstances which he believes require correction. The implementation of such investigations,

however, must be neither harassing nor intimidating in nature. In the instances at issue in this matter, the Arbitrator determines that Gravel's purposes may have been contractually correct, however, his means were not.

The Arbitrator further determines that postal management was aware or should have been aware of Supervisor Gravel's intimidating and harassing supervisory methods and took no remedial action to terminate these methods.

Based upon the findings and reasoning set forth in this Opinion, the Arbitrator makes the attached Award.