

REGULAR ARBITRATION PANEL

C#10043
A+B

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

GRIEVANT: A. Daniels
POST OFFICE: Lake Charles, LA
CASE NO: S7N-3Q-D 25259

BEFORE: Robert G. Williams, Arbitrator

APPEARANCES:

For the U.S. Postal Service:

Billy F. Roberts

For the Union:

G.E. Cruise

Place of Hearing:

Lake Charles, LA 70601

Date of Hearing:

April 4, 1990

AWARD:

The Grievance is hereby sustained in accordance with the opinion. The Grievant shall be reinstated with back pay from the beginning of his indefinite suspension to the date of his reinstatement minus any unemployment benefits and income from other sources. This Arbitrator retains jurisdiction in the event a dispute arises regarding the implementation of this award.

Date of Award:

May 22, 1990

Robert G. Williams

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I. BACKGROUND

This case arose under the National Agreement effective from July 21, 1987 until November 20, 1990. The Grievant was placed on indefinite suspension on July 29, 1987. No grievance was filed protesting his indefinite suspension. On June 5, 1989 the Grievant was notified of his removal. He protested his removal and suspension in his grievance dated September 8, 1989. The time limits for filing this grievance from June 5, 1989 were extended by the parties. An arbitration hearing was held on April 4, 1990 at which time the parties stipulated undisputed facts, introduced their evidence, examined all witnesses and argued their respective positions. The issues presented at the hearing were as follows:

- (A) Whether the Grievance dated September 8, 1989 was timely filed to protest the Grievant's indefinite suspension?
- (B) Whether the Grievant was suspended and removed for just cause and, if not, what shall be the remedy?

The parties filed their written briefs on or before the extended filing date of May 9, 1990. Following the receipt of these briefs the hearing was closed.

II. FINDINGS

The material facts in this case are not disputed by the parties. On December 15, 1986 the Grievant was convicted of Aggravated Criminal Damage to Property as the result of non-duty related misconduct. On or about March 5, 1987 the Grievant was removed and placed in a non-duty and pay status while he grieved his removal. This removal was rescinded later. While in this status, the Grievant was arrested on April 16, 1987 for Aggravated Battery, Possession of Firearms by a Convicted Felon and Flight from an Officer. If proven, these charges would violate the terms of the Grievant's probation resulting from his December 15, 1986 conviction.

On July 29, 1987 the Service notified the Grievant he was being placed on Indefinite Suspension as a result of his arrest and charges of April 16, 1987 and his prior December 15, 1986 conviction. The Grievant pleaded innocent to the April 16, 1987 charges on November 2, 1987. On or about June 5, 1989 the Grievant was notified of his removal from the Service. At the time of the arbitration hearing, the Grievant had not been tried or convicted of the April 16, 1987 charges against him.

III. POSITIONS OF PARTIES

The Service contends the indefinite suspension commenced on July 29, 1987 was not arbitrable. The Grievance dated September 8, 1989 was not timely filed to contest the indefinite suspension. Article 15 sets out the steps and time limits for processing grievances. Those time limits began to run on July 29, 1987 and have long passed before the filing of this grievance. At no time during the processing of the current removal grievance did the Grievant protest his indefinite suspension. The Service then concluded that if the current removal was not for just cause the Grievant simply should be returned to his indefinite suspension status pending the determination of the charges against him.

The Union, on the other hand, contends the Grievant was not removed for just cause on or about June 5, 1989. The only grounds cited by the Service were the April 16, 1987 arrest and charges that had not been proven at the time of the arbitration hearing. The December 15, 1986 conviction occurred two and one-half years earlier and could not be used as grounds for discharge. Management has failed to prove that it had just cause for the indefinite suspension and removal. The Grievant, therefore, should be reinstated immediately with full back pay.

IV. DISCUSSION

"Under Article 16, Section 6, the parties negotiated provisions for administering indefinite suspensions in crime situations when Postal Service employees are suspected of committing crimes. The parties adopted a three (3) step process to protect the rights of Employees as well as the Employer:

Article 16 - Discipline Procedure

Section 6 - Indefinite Suspension -
Crime Situation

A. An Employer may indefinitely suspend an employee in those cases where the Employer has reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed....

B. The just cause of an indefinite suspension is grievable. The Arbitrator shall have the authority to reinstate and make the employee whole for the entire period of the indefinite suspension.

C. If after further investigation or after resolution of the criminal charges against the employee, the Employer determines to return the employee to a pay status, the employee shall be entitled to back pay for the period that the indefinite suspension exceeded seventy (70) days, if the employee was otherwise available for duty, and without prejudice to any grievance filed under B, above.

These provisions are controlling in this case.

The just cause doctrine which is the spinal cord of the discipline procedure under Article 16 permits Employer's to indefinitely suspend employees suspected of misconduct and subject to a pending investigation. If an Employer with such suspicions and conducting such an investigation, is unable to prove the suspected misconduct, the suspended Employee is entitled to reinstatement with back pay for the entire period of suspension. If the suspended employee is proven to have engaged in suspected misconduct that warrants discharge under the just cause doctrine no back pay is allowed. If the warranted discipline is less than a discharge, the Employee is entitled to back pay for the suspension time not warranted during the suspension period. This indefinite suspension process is generally recognized as an element of the just cause doctrine. The parties to the National Agreement simply have codified the process with some variations in crime situations.

First, Section 6 (A) sets out the beginning of the process in a crime situation. Whenever an Employer has "reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed," "the Employer may indefinitely suspend an employee." To initiate the indefinite suspension process, the Employer only is required to have

"reasonable cause." Certainly, the arrest and charging of an employee with such a crime is reasonable cause. The Postal Service is entitled to rely on the criminal justice system to do its job properly. It is their business to know when they have sufficient evidence to charge and convict a person. Sometimes the system and its personnel make mistakes or don't proceed when they should. Nevertheless, the Postal Service has the right to rely on the system as a reliable basis for making its initial "reasonable cause" determination. Otherwise, the Postal Service would be required to assume criminal justice personnel were inept and, no indefinite suspension could be initiated until after the Postal Service conducted a duplicate investigation. The parties chose to allow reliance on criminal justice personnel in making their initial determination.

Nevertheless, the parties preserved the right of the Grievant to contest the indefinite suspension under the just cause doctrine. Section 6 (B) expressly provides the indefinite suspension is arbitrable and an arbitrator has the authority to reinstate and make an employee whole for the period of the indefinite suspension. This provision coordinates the just cause test of the suspension with any arbitral determinations regarding alleged misconduct. If an arbitrator later determines that the Employer has not proven an employee engaged in any misconduct,

the employee must be reinstated with full back pay including the entire indefinite suspension period. If an arbitrator determines the appropriate discipline should have been a counseling, warning, seven (7) or fourteen (14) day suspension, the employee must be reinstated with full back pay including the indefinite suspension period, except for the appropriate seven (7) or fourteen (14) day disciplinary suspension. These determinations, of course, are made by an arbitrator after the Postal Service has attempted to prove in a hearing that an employee engaged in the suspected and alleged misconduct.

Such a just cause arbitration hearing is not to determine whether the Employer in its first step initially had just cause to indefinitely suspend an employee. The test for that decision is whether the Employer had reasonable cause to believe an employee committed a crime for which imprisonment could be imposed. That issue may be raised in a grievance filed immediately following the initial suspension. It can be processed like any other grievance to arbitration. The only issue in that arbitration would be the "reasonable cause" question. Unfortunately, the parties have no practical method for holding a "reasonable cause" hearing to determine whether "reasonable cause" exists to indefinitely suspend an employee pending further investigation and possible charges of misconduct.

The parties tend to wait until after the indefinite suspension is over and the employee is charged with an offense warranting removal, a suspension or other discipline. The "reasonable cause" issue at this later date may be moot. The employee already served an indefinite suspension period. The just cause resolution of the offenses charged will determine whether the indefinite suspension was partly or entirely proper or improper. An employee only should receive back pay in accordance with the final just cause determination. This decision will compensate an employee for any time lost as a result of any improper indefinite suspension. In other words, the Employer who indefinitely suspends an employee takes its chances on being able to charge and prove an employee engaged in misconduct that warranted discipline at least as severe as the period of the indefinite suspension.

Finally, the parties recognized that the criminal justice system often proceeds at a very slow pace. The Employer may wait for a criminal case to reach a conclusion or settle the matter eventually by returning the Grievant to work rather than endure the continuing potential liability awaiting a final judgment in a criminal case. Section 6 (C) covers this situation. Regardless of guilt or innocence, an employee

returned to pay status is entitled to back pay for an indefinite suspension exceeding seventy (70) days. Of course, the same employee may recover back pay for the seventy (70) day period if he prevails in a Section 6 (B) just cause case." USPS v. NALC, Case No. S7N-3T-20026, pp. 4-9 (Williams 1989).

Section 6 resolves the issues raised in this case. On April 16, 1987 the Grievant was arrested and charged with Aggravated Battery, Possession of Firearm by a Convicted Felon and Flight from an Officer. Certainly, these charges are sufficient grounds to establish "reasonable cause" under Section 6(a). Any grievance protesting an indefinite suspension would be denied on the grounds these three (3) charges are "reasonable cause" for an indefinite suspension. In any event no grievance was timely filed protesting the reasonable cause for the indefinite suspension.

The real issue in this case is whether there was just cause for suspending and removing the Grievant for being arrested and charged with the three alleged crimes. No doubt Management believed the Grievant committed these three (3) offenses and eventually he would suffer the consequences. Certainly, reasonable cause existed for these beliefs. Suspicions are grounds for further investigation and development of proof. They are not proof, however. The just cause

doctrine requires proof that offenses were committed. None has been introduced in this case. The charges still are pending. The Service simply has contended that the Grievant eventually will be tried and convicted of these three (3) charges. According to the Service, the Grievant should be returned to his indefinite suspension if his removal was not for just cause. Clearly, without proof no just cause exists. The Service has had two and one-half years to develop such proof. It has offered no method of proof requiring a longer time period for investigation.

Even if such a time period could be justified, proving these three (3) charges would not sustain the suspension or removal for just cause. There must be a nexus between the offenses and the Grievant's employment. The just cause test only encompasses offenses that arise out of and are related to the employment relationship. The Grievant was never charged with offenses as employment related misconduct. All of the charges occurred while the Grievant was in a non-duty and non-pay status. They were incidents occurring in his private, not his employment life. The just cause doctrine distinguishes between private misconduct and employment misconduct. Employees may do in private what they would not

do in their employment. Management's discipline arm is limited for this reason to offenses that arise out of or are related to a person's employment. The Service has offered no evidence to show the three (3) charges of April 16, 1987 were related to the Grievant's employment. Even if they eventually are established, they would not be encompassed as employment related offenses under the just cause doctrine. The indefinite suspension and removal for these three (3) charges on April 16, 1987 are not employment related grounds for such action under the just cause doctrine. The Grievant shall be reinstated with back pay. Management must understand under Section 6 that even though it has the right to indefinitely suspend for reasonable cause, ultimately it must prove the suspension and/or discipline taken were for just cause. Delay, indecision and equivocation simply prolong the inevitable and escalate the accruing liability.

The Grievant should recognize he has a problem controlling himself and adhering to standards of conduct in his private life. The criminal justice system often misleads offenders who interpret leniency as ineffectiveness. Repeated offenders eventually serve time and destroy their attractiveness as employees. This Grievant is approaching this stage of

employment self-destruction. The Service certainly can remove an employee who can not report for work. Try to get a job after an active sentence.

Under Section 6 the Service could have continued the Grievant's indefinite suspension until the criminal justice system administered an active sentence. At that time the Grievant would be unable to maintain regular attendance and would be subject to removal under the just cause doctrine. Instead, the Service attempted to remove the Grievant before such grounds existed. Now, this Arbitrator is required to rule on a record that does not establish any necessary grounds for suspension or removal under the just cause doctrine. The Service has relied on the criminal justice system to provide an active sentence for this Grievant. Before an active sentence was invoked, the Service attempted to sustain its position under the just cause doctrine. Admittedly, Management could have continued the indefinite suspension for "reasonable cause." Once it sought to remove the Grievant, he was entitled to assert the just cause test under Sections (B) and (D) of Article 16.

V. AWARD

The Grievance is hereby sustained in accordance with the

opinion. The Grievant shall be reinstated with back pay from the beginning of his indefinite suspension to the date of his reinstatement minus any unemployment benefits and income from other sources. This Arbitrator retains jurisdiction in the event a dispute arises regarding the implementation of this award.

This the 22nd day of May, 1990.

Robert G. Williams

Robert G. Williams, Arbitrator