

C #10971

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration
between

UNITED STATES POSTAL SERVICE
and

National Association of Letter
Carriers, AFL-CIO

Grievant: John Lennon

Post Office: Boston, MA

Case No: N7N-1E-C32349
GTS: 7146

Before Arthur Talmadge

, Arbitrator

Appearances:

For US Postal Service

Don Campbell

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For Union:

Frederick J. Celeste

AUG 12 1991

NALC - NEW AND REG.

Date of Hearing: May 22, 1991 and July 25, 1991

Place of Hearing: Boston GMF
Boston, MA

Award:

The Postal Service acted reasonably when it made its initial determination that the Grievant was unfit by reason of mental illness. It acted reasonably when it applied for further evaluation of the Grievant at the Massachusetts General Hospital and consequent referral, treatment and care at the Worcester State Hospital etc. The costs of the hospitalization are to be borne in accord with the available coverage and the leave policy. The Postal Service decision was not in violation of the Agreement between the parties.

The Grievance is denied.

Date of Award:

August 8, 1991

Arthur Talmadge

Arthur Talmadge, Arbitrator

Pursuant to the rules and procedures of the Collective Bargaining Agreement between the National Association of Letter Carriers ("the Union") and the United States Postal Service ("The Service"), the undersigned was designated to hear and decide an unresolved dispute. The parties were afforded full opportunity to present their evidence, examine, cross-examine witnesses, and state their positions.

The Grievance:

The notion of the instant grievance may be drawn from the Step 3 Grievance Appeal filed on behalf of the Grievant, Carrier John Lennon under date of August 14, 1990, which reads in significant part:

Management at the IMC and the Boston postal distribution are in violation of the National Agreement when Carrier John Lennon was sent to medical unit by management of the IMC for a fitness for duty examination. The examination was scheduled by management on the basis of allegations by two co-workers of the grievant concerning threats Lennon made against Carrier Janet Gurry and Lennon himself.

Lennon was interviewed at the medical unit by Dr. J. Ryan (Area Medical Director). During the interview with Carrier Lennon, Dr. Ryan asked Lennon if he will mind seeing a psychiatrist. Lennon said he would not, as long as the Postal Service would be responsible for the expense. Dr. Ryan scheduled the interview. At this time Lennon asked Dr. Ryan, twice, if he could contact his Union. Dr. Ryan denied him this opportunity. Lennon was escorted to an ambulance, taken to Massachusetts General Hospital. John Lennon was involuntarily detained in the Massachusetts General Hospital and Worcester State Hospital for over two (2) weeks and had to be cleared by a psychiatrist due to the action and interpretation of Dr. Ryan.

Remedy

Carrier John Lennon be paid administrative leave for the period commencing April 19, 1990 until his return to work. The Postal Service pay all medical costs to cover John Lennon's involuntary detention and that Carrier Lennon be made whole. Carrier Lennon be paid all overtime that he would have been given the opportunity to in his involuntary absence.

Management's Reply

The position of postal management in denying the grievance in the Steps 2 and 3 reply under dates of August 2, 1990 and September 14, 1990 reads in part:

Mr. Lennon went to the fitness for duty examination of his own free will. Dr. Ryan, the area medical officer made the determination that Mr. Lennon was in need of hospital treatment and took the necessary steps. It is management's position that all the necessary steps were taken by management at the IMC and by the medical staff of the Postal Service to protect the safety and well being of Mr. Lennon and all employees of the IMC. Whatever occurred was based on Mr. Lennon's actions... and reliable first hand statements of his peers.

There was no violation of the National Agreement or Mr. Lennon's rights.

This dispute, not having been resolved by the parties was properly brought to arbitration.

Summary of Medical FindingsUSPS Health Unit Record*

April 11, 1990

Says he (John Lennon) was frustrated and showing his emotions at work - says having a lot of personal and job related problems. I asked how are you today. I'm very explosive today....

Acknowledges making threats, but denies significance. A full psychiatric evaluation is indicated.

Refer to MGH Psych. E.R. He says he will not go voluntarily. Sent by private ambulance on Section 12. Telephone referral made to Dr. Birnbaum of the psychiatric emergency service.

April 11, 1990

Application for Temporary Hospitalization
(Ref. Section 12, Chapter 123, General Laws)

...In my opinion (John E. Lennon, Jr.) requires hospitalization so as to avoid likelihood of serious harm by reason of mental illness. [Evidence supporting

*From Health Unit notes.

physician's opinion not reproduced. See P.S. Exhibit #3.]

James Ryan, M.D.

April 11, 1990

Mass. General Hospital Psychiatric Emergency Room
Physician's Evaluation

I believe he is at risk for further worsening and that he is at risk for the development of impulsive suicide behavior. I do not believe that he can care for himself adequately out of the safety of the hospital and support his being committed on a Section 12 to his local state hospital.

Another MGH psychiatrist observed:

Patient will have to be carefully evaluated prior to discharge...

Worcester State Hospital Admission Record

4/11/90 - 4/25/90

Discharge Diagnosis:

1. Major depression
 2. Adjustment disorder with mixed features
- [See Worcester State Hospital Aftercare Plan/Discharge notes.]

Human Resource Institute

May 23, 1990

[Comprehensive Psychiatric Evaluation performed by Dr. Bernard Katz at request of the Grievant's attorney.]

Mr. Lennon has never been psychotic and, in my opinion, has never constituted a significant risk of harm to himself or others... [See Union Exhibit #1 and Dr. Katz's hearing testimony.]

Character Reference

The record contains a number of letters from postal employees (Letter Carriers from the East Boston Unit, IMC) attesting to the Grievant's character.

I quote in part from an interview summary:

John is extremely sociable. Lennon would give the shirt off his back.

Janet Gurry (a fellow Letter Carrier against whom the threat to kill was "made" by John Lennon) wrote:

John Lennon is no threat to me....I have no uneasy feelings to John.

The record contains testimonial statements from the grievant's co-workers attesting to grievant's reputation as a helpful, generous, and concerned human being. See also testimony of Thomas Flynn, Janet Gurry, and Linda Larsen, letters of commendation from postmasters and area clergy.

Position of the Parties

The Postal Service as any employer has the duty to maintain a safe and orderly work place and thereby protect all employees. The Service has the right to order a medical examination (Fitness for Duty). Management was properly concerned because of past record and the grievant's personal history there was a good faith and genuine perception that the Grievant may have been a threat to himself and/or his fellow employees. The Area Medical Officer felt that a psychiatric evaluation was essential for the safety and well being of the employee and of others.

The Service argues that the decision to refer the Grievant for psychiatric examination was not based on any malicious intent to harm the Grievant or to deprive him of any rights. The determination for psychiatric referral was strictly predicated on medical judgment. The Union had not established that Dr. Ryan's judgment was clearly erroneous. The Postal Service argues that Dr. Ryan's preliminary evaluation was confirmed and substantiated by the three examining psychiatrists at Massachusetts General Hospital Emergency Room and after further diagnostic evaluation by the psychiatrists at the Worcester State Hospital. The Postal Service through its medical service acted in compliance with the directives of the Commonwealth of Massachusetts Department of Mental Health and in concern for

a workplace "free of attacks or threats of physical violence" (U.S. Postal Service, Boston, MA, Memorandum: Assaults/Threats, January 5, 1990).

In summary, the Service contends that the medical unit took into account the Grievant's history and his emotional state at the "fitness for duty" examination. For all the above reasons, the Service asked that the Union's claims for corrective action be denied in entirety. The Service asks that the grievance be dismissed.

The Union argues that the Service treated the Grievant unjustly and unfairly. The Union stresses that not a single individual - or co-worker took the "threats" of injury seriously. This alleged victim Janet Gurry reiterated that the Grievant was not a threat to her. (See written statement and her testimony.) The IMC Chelsea postal management was aware of the relationship between Janet Gurry and the Grievant. Had the Postal Service informed her of the "alleged threat," she would have advised them that their fear and alarm were misplaced.

The Union further argues that Dr. Ryan acted impetuously in signing the "pink slip" for a Section 12 hospitalization. The focus on who was to pay for the evaluation and transportation to the hospital triggered a hostile and intense reaction by the Grievant. He was more than willing to go for further observation - matters were blown out of proportion and he became uncooperative.

The Union further notes that the then area medical officer acted reprehensibly and irresponsibly. Had the doctor been informed by the Inspection Service officers, he would have known that Janet Gurry did not consider herself threatened. Dr. Ryan was not a certified psychiatrist but he was quick to judgment.

The Grievant may be loud and boisterous, but he has been a responsible and effective thirty (30) year carrier.

The Grievant was improperly handled, his "figures of speech" which were widely known by his fellow employees, were misdiagnosed by the medical unit physician and consequently the Grievant was hospitalized and traumatized. The Union argues that the Grievant be granted in full the remedies proposed on his behalf and that he be made whole, reimbursed for all medical costs and be paid for all missed overtime opportunities allocated to his route.

In support of these arguments, the Union submitted an arbitration award and article on the "Weingarten Doctrine."^{*}

Opinion

The right of the service to manage and direct the workforce must be considered. During the hearing, there was a lot of talk about the basis for the "Fitness for Duty" examination. It is very clear from the evidence that the basis in this case was a genuine concern about whether the Grievant was a threat to a fellow employee and posed a threat to harm or to kill himself. The "threat" itself is sufficient to justify the fitness for duty examination. Indeed the Service might have been negligent if it did not make any effort to provide safe working conditions. "...and to develop a safe working force..." (Article 14, Section 1).

At the outset, the Union contends that the Service did not have the right to require the Grievant to submit to "fitness for duty" examination which in effect was a psychiatric examination, performed by a physician who was not properly certified to make a psychiatric diagnosis. The Union asserted that the area medical officer lacked proper expertise and demonstrated inadequate sensitivity to appraise the Grievant's condition on April 11, 1990. Alternatively, the Postal Service acted hastily without due

*Case No. 90N-979, NALC 19-612-90 (April 1991, Germano); M.J. Fox, Louis V. Baldovin and Thomas R. Fox, "The Weingarten Doctrine."

investigative restraint. With full use of the Inspection Service capacities, it could have readily determined that the Grievant, an employee with thirty (30) years of outstanding employment, was generous and widely prized as a friend, but with an overriding fault of bluster and loud talk and a propensity to use "figures of speech" to project his thoughts [who never intended to harm his fellow carrier Janet Curry or to commit suicide.]

The Service contends otherwise. In the opinion of the undersigned, the Service had the right to pursue the "fitness for duty" examination and had cause to require a psychiatric evaluation.

Dr. James C. Ryan, as a licensed physician made a responsible judgement in keeping with the "Application for Temporary Hospitalization," Ref. Section 12, Chapter 123, General Laws of Commonwealth of Massachusetts. (He applied to the Massachusetts General Hospital Emergency Room psychiatric unit to avoid the likelihood of serious harm, i.e. substantial risk of physical harm to the person himself as manifested by evidence of threats, or attempts at suicide or serious bodily harm.)

There was nothing capricious or arbitrary in the physician's determination.

After the preliminary "fitness for duty" evaluation the area medical officer concluded that it was necessary to refer the Grievant immediately for hospitalization to the Massachusetts General Hospital Emergency Room Psychiatric Service. He was sent by private ambulance.*

The prevailing view of arbitrators would appear to be that management has not only the right but also the responsibility to take corrective action when an employee

*See, infra, re: cost and disposition of payment for use of ambulances to transport grievant from postal facility to hospital and between hospitals.

has a physical or mental disability which endangers his own safety or that of others.

Arbitrator James McBrearty stated:

The Employer has the right to require medical examination (including psychiatric examination) of any employee at any time to determine if the employee is fit to work, so long as there is reasonable or substantial basis to question fitness, such as Grievant presenting a danger to any of his fellow employees...by reason of his physical or mental condition...

Public Service Company of New Mexico,
82 2 ARB PARA #8494 (1982)

The Union raised the question of the authoritative competence of Dr. Ryan. We have little difficulty in resolving in favor of the Service. ELM 864.3.32.

Arbitrator James Doyle sums up much of what is involved here and the weight of arbitral authority on it:

It is axiomatic that the initial judgment in matters of this kind belongs to management. The judgment of the plant physician is entitled to great weight....

Hughes Aircraft Co., 49 LA 535 (J. Doyle, 1967);
Miles Laboratories, 168-2 ARB PAR 8416 (J. Larkin, 1969).

The evidence of the Service's physician is entitled to great weight. In this case, the three (3) examining psychiatrists at the Massachusetts General Hospital concluded: ...Mr. Lennon to be clinically depressed and with significant need for psychiatric intervention...They believed he is at risk for the development of impulsive suicidal behavior. They do not believe that he can care for himself adequately out of the safety and support - his being committed on a Section 12 to his local state hospital. After ten (10) days evaluation, the treating psychiatrist at Worcester State Hospital provided us with this psychiatric diagnosis: "major depression - adjustment disorder and mixed features." See Worcester State Hospital, "After Care Plan."

The Union asserted that the evidence of Dr. Bernard Katz who performed a comprehensive psychiatric evaluation of

the Grievant at the behest of the Grievant's attorney, should be given greater weight. The undersigned finds that Dr. Katz recognized that there was "reason for concern." In retrospect, Dr. Katz found the Grievant was "never at risk." He, however, was professionally responsible and observed in his testimony that the physicians who made the examination at the Postal Service medical unit, the Massachusetts General Hospital and the Worcester State Hospital made "a reasonable - good faith evaluation." They made reasonable inference - erred on the side of caution - and they met "the criteria." (Department of Mental Health of the Commonwealth of Massachusetts).

Dr. Laurence Miller's psychiatric evaluation (done at request of Postal Service area medical officer) under date of June 15, 1990 found:

...it does not appear that Mr. Lennon represents a risk to his health or that of his fellow worker at this time. (Emphasis provided.)

He observed:

Mr. Lennon presents us with a history of at least one depressive episode in the past and some current depressive symptomatology....

The undersigned therefore finds that the preponderance of evidence shows that the Grievant required the hospitalization, psychiatric evaluation and care during the period from April 11, 1990 - June (July) 1990 when he was found fit for full duty. See Union Exhibit #2, Dr. Miller's Evaluation, ELM 342.

The question to be determined is: Did the Postal Service act reasonably when it made its initial determination that the Grievant manifested "a substantial risk of physical harm to himself by evidence of threats of harm to himself and to other persons. (Commonwealth of Massachusetts General from 124 Section (f). The examining physicians found that there was a basis for involuntary

retention in a mental health facility...

The instant case is markedly distinguishable from Award NALC 19-612-90, Mgmt. 90N-979. In the case at bar, the Postal Service's action was predicated on diagnoses and evaluations by trained medical/psychiatric practitioners (Area Medical Officer, Massachusetts General Hospital and Worcester State Hospital Psychiatrists) during a period of several weeks not based on an SPO's action linked to "misinformation and/or overreaction." See Union Exhibit #1 and #2 on the collateral evaluation cited supra from hospitals and psychiatrists.

It is indeed true as the Union points out that the Grievant was a responsible thirty (30) year employee who was highly appreciated by his co-workers for his counsel, guidance, and warmth, in particular by Jane Gurry. It is equally incontrovertible that he has had mental health problems that led the psychiatrists to conclude that there was justification for the decision to have him emergently hospitalized to avoid the possibility of serious harm based on both the Area Medical Officer's opinion and the opinion of the qualified psychiatric specialists. The Union claims that he was not allowed required Union representation during the course of the fitness for duty examination. I have considered the issue in the light of the credible evidence and the language in NLRB v. Weingarten, Inc., 420 U.S. 251 (1972). There is absent a clear preponderance of evidence as to whether: a. the Grievant requested that Union representation be present at the Medical Unit, and b. did the area medical officer deny this right. A synopsis of the "Weingarten standards" reads in part:

Protected activity - Union representation at investigatory interview - Possible disciplinary action... a guidelines for representation. An employee may refuse to submit to an interview that he reasonably fears may result in discipline unless he is permitted Union representation. The NLRB has established these guidelines....the right arises only if the employee

asks for aid and ...the right arises only if the employees believe the interview may lead to disciplinary action.

The evidence was not persuasive that "disciplinary action" was remotely linked to the physician's medical assessment at the fitness for duty examination. Article 17.

What is at issue is the initial decision by the Area Medical Officer to have the Grievant hospitalized by reason of mental illness so as to avoid serious harm and also the decision not to permit the Grievant to work until he was fit for duty (see Dr. Laurence M. Miller's correspondence to Area Medical Officer July 15, 1990). We find and the Award will so reflect that the Union has not carried its required burden of proof to demonstrate that the Grievant was not properly dealt with in accord with or in legal contravention of the Commonwealth of Massachusetts, Department of Mental Health rules applicable to temporary hospitalization by reason of mental illness. There was no showing that the Postal Service decision was in violation of the Agreement between the parties. Accordingly, the remedies requested by the Union are not approved. At the hearing, it was agreed by the Service that it would bear the cost of the ambulance which transported the Grievant from South Boston Annex to Massachusetts General Hospital and Massachusetts General Hospital to Worcester State Hospital. (Fallon Service Inc. Bill, Union Exhibit #11)

AWARD

The Postal Service acted reasonably when it made its initial determination that the Grievant was unfit by reason of mental illness. It acted reasonably when it applied for further evaluation of the Grievant at the Massachusetts General Hospital and consequent referral, treatment and care at the Worcester State Hospital etc. The costs of the hospitalization are to be borne in accord with the available coverage and the leave policy. The Postal Service decision

was not in violation of the Agreement between the parties.
The Grievance is denied.

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