

REGULAR ARBITRATION PANEL

C-29227

In the Matter of the Arbitration *

between:

United States Postal Service

and

National Association of
Letter Carriers, AFL,CIO

* Grievant: M. Elisa

* Post Office: New York, NY

* USPS Case No: B06N-4B-D 10106432

* NALC Case No: 36101432

BEFORE:

Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Lisa Barron

For the Union: Patrick J. McNally

Place of Hearing: Postal Facility, New York, NY

Date of Hearing: June 25, 2010

Date of Award: July 20, 2010

Relevant Contract Provision: Article 16 RECEIVED

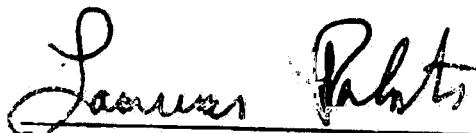
Contract Year: 2006

APR 11 2011

Type of Grievance: Discipline VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

Award Summary:

The Grievant was issued a Notice of Removal following a charge of improper conduct and conduct unbecoming of a Postal Employee. The Arbitrator found the due process rights of the Grievant were violated. The evidence proved the Agency failed to provide the proper format of review and concurrence. The instant grievance is sustained and the Grievant shall be made whole.



Lawrence Roberts, Panel Arbitrator

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 25 June 2010 at the postal facility located in New York, NY beginning at 10 AM. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a digital recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

The Grievant in this case is employed as a Letter Carrier at a New York City Postal facility, Grand Central Station. The Grievant has been employed by the Postal Service for some twenty eight years. At the time of this incident, the Grievant had filed an OWCP claim and accordingly, was only working three hours a day.

On 08 February 2010, the Grievant received a Notice of Removal Letter charging "**Unacceptable Conduct/Conduct Unbecoming of a Postal Employee.**" This Letter is quite detailed and for that reason will not be quoted verbatim. However, in essence, these charges came about as a result of the alleged actions of the Grievant on Monday 14 December 2009 and Monday

21 December 2009.

These charges resulted from her allegedly protesting on the street in front of the Post Office, while in Postal uniform. She also called in and reported off work on these two separate occasions.

This Notice of Removal Letter prompted the filing of the instant grievance. The Employer claimed the Notice of Removal was issued with just cause while the Union does not believe there to be any basis for the removal action. The Union also raised a procedural issue of due process.

The Parties were obviously unable to resolve the dispute mentioned above.

It was found the matter was properly processed through the prior steps of the Parties Grievance-Arbitration Procedure of Article 15, without resolve. The Step B Team reached an impasse on 16 March 2010. Therefore, the matter is now before the undersigned for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine

witnesses. The record was closed following the receipt of oral closing briefs by the respective Advocates.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and The US Postal Service.
2. Grievance Package

COMPANY'S POSITION:

The Employer contends there is just cause to support the removal of the Grievant. Management claims the Grievant's actions in this matter were in violation of the ELM Section 665.16 Behavior and Personal Habits and Section 934.6 Prohibitions.

The Employer argues that not only was the Grievant vocal in her protest against the Postal Service, she also handed out flyers to both Postal Customers and the general public.

Management also explains the Grievant did not cease protest or depart from the premises when asked to do so by Postal authorities.

According to the Service's argument, the Grievant returned some seven days later to only repeat the same protest.

During both protests, the Agency argues the Grievant had reported off requesting Leave Without Pay.

The Service also points out the Grievant's past elements cited in the Notice or Removal proves she is no stranger to the grievance process.

Management also mentions the Grievant is a Postal Employee and, as such, is a "representative" of the Agency for as long as she is employed. As such, according to Management, the Grievant is expected and required to refrain from engaging in any conduct or activity prejudicial to the Postal Service.

Management argues the discipline in this was certainly warranted, and therefore, the next level of progressive discipline was issued.

The Employer mentions the various arguments made by the Union in this case are simply invalidated by the actions of the Grievant in this case.

The Agency maintains that the issuance of the Notice of Removal was just and proper. It is the conclusion of the Service that the Grievant must be held accountable for her actions and requests the instant grievance be denied in its entirety.

UNION'S POSITION:

The Union contends the Notice of Removal was issued without just cause. Procedurally, the Union argues that due process demands that when Management discovers misconduct, discipline must be initiated in a timely manner.

The Union insists the evidence will illustrate that Management did not issue the discipline until 8 February 2010 when the last allegation occurred on 21 December 2009.

It is the contention of the Union that a Pre-Disciplinary Interview occurred on 23 December 2009 and Management had all the information at that time.

The Union argues the Grievant's due process rights were also violated because the Concurring Official on the Notice of Removal was unable to make an independent review of the evidence due to his involvement in the situation.

The Union also mentions that consideration must be given to the Grievant's length of service.

It is the argument of the Union that this record lacks evidence to show that Management acted in a fair and objective manner in this case.

The Union requests the Notice of Removal be rescinded in this matter and the Grievant be made whole.

THE ISSUE:

Did Management have "Just Cause" to issue the Grievant a Notice of Removal dated 01/27/10 for Charge #1) Unacceptable Conduct/Conduct unbecoming a Postal Employee? If not, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS:

**ARTICLE 16
DISCIPLINE PROCEDURE**

DISCUSSION AND FINDINGS:

This matter involves an issue of removal, wherein the facts and circumstances surrounding the incident bringing rise, is contrasting between the Parties. Regardless of circumstance or respective argument, the burden of proof falls on Management to establish reason for their actions.

While Article 3, Management Rights, provides the Employer with the power to "suspend, demote, discharge, or take other disciplinary action..." the Employer is limited in any decisions as restricted by other Articles or Sections of the Agreement.

According to the Agreement, no Employee may be disciplined or discharged except for just cause. In my view the "just cause" provision is ambiguous; however, its concept is well established in the field of labor arbitration. The Employer

cannot arbitrarily discipline or discharge any Employee. The burden of proof is squarely on the Employer to show the discipline imposed was supported with sound reasoning.

In addition, the just cause standard cannot be gauged in the same matter in all cases since each discipline case is unique to its own set of facts and circumstances.

The chief negotiators of Article 16 suggest progressive discipline. In many cases, that guideline prevails and progressive discipline works to serve both the Employer and Employee. As an example, absenteeism is oftentimes corrected with progressive discipline.

Then, there are those infractions, whereby progressive discipline, is simply improper. Theft would certainly be a good example of one of these instances. In this business, such an act would be intolerable and removal following the first occurrence would only be appropriate. I'm sure the chief negotiators would agree with this reasoning.

However, each matter of discipline rests solely on its own merits. What is found to be applicable in this case cannot be applied evenly to other similar issues. In fact, this case

shares uniqueness when compared to other matters of discipline that I've decided throughout my arbitral career.

The one constant is the burden of proof rests with the Postal Service. It's their obligation to establish just cause or, at the very least, via their case in chief, demonstrate the existence of clear and convincing evidence to prove the allegations.

It is not up to the Union to prove innocence, instead, for the moving party to establish guilt. In order to prevail however, Management need not prove their case beyond a reasonable doubt.

Instead, in arbitral matters, the preponderance of evidence rule applies. Clear and convincing evidence is proof via the preponderance. Regardless of the specific term employed, this Agreement, like most others, requires a showing, via evidence, that, more likely than not, the Grievant is guilty as charged.

This is based on the probability of the evidence, its probable truth and accuracy, not necessarily the quantity. In any case, the meaning is somewhat subjective and this forum lacks a steadfast rule that can be applied to all cases.

Instead, only a guideline delineates the evaluation of the evidence and accordingly, is considered on a case by case basis.

In this matter, the Union argues a due process error of timeliness. It is the Union's argument the evidence will show the Employer's investigation was concluded during the last week of December 2009 and the Notice of Removal was not issued until 8 February 2010.

The Union insisted this some six week lag somehow prejudiced the Grievant's due process rights. While I do concur that all discipline should be issued in a timely manner, the burden is on the Union to show the Grievant's due process rights were somehow violated or prejudiced.

The evidence in this case was unable to satisfy the required burden of proof in that regard. The Union was unable to show that a six week delay somehow hindered the Grievant's ability to offer a formidable defense.

Therefore, the Union's timeliness argument is found to be without merit. The evidence did not show this delay in the issuance by the Employer of a Notice of Removal violated the Grievant's due process rights in any way.

However, the Union's second due process argument of concurrence was found to rise with more substance.

The crux of their argument in that regard centers on a December 2002 National Award by Arbitrator Dana Eischen. While this Decision was based on the language of the National Rural Letter Carrier Agreement, I see no reason why it should not be brought forward to the Letter Carrier Craft Agreement as well.

The language is similar, but more so, one of the points made by Arbitrator Eischen only makes total sense and logic, regardless of Wage Agreement. And pertinent to this case is Arbitrator Eischen reasoned the Agreement to be violated:

"if there is a failure to either the initiating or reviewing official to make an independent substantive review of the evidence prior to the imposition of a suspension or discharge."

This is really paramount. In fact, in my considered opinion, it breaks down, to a very basic level, the due rights concept of the just cause provision of Article 16.

And my point is, if the evidence is there, then an independent review would probably output a similar conclusion. And when that opportunity for an independent review of the facts is blatantly denied, the due process rights of any grievant is

certainly violated. And that is exactly what happened in this case.

I listened to the testimony and read all of the documentation, several times. However, all of the Management officials involved in that decision making procedure, from beginning to end, were not independent from the process.

The Notice of Removal Concurring Official and the Step A Employer Representative were one in the same. And that same official was a part of the Grievant's protest in the first place. While I don't condone that protest, I cannot allow a part of that protest to decide the fate of the Grievant. This would be similar to allowing the victim determine the fate, albeit, judge and jury, of an armed robber.

The real measuring stick of due process is that of an independent review. And that did not happen in this case. Regardless of how one may view the actions of the Grievant, it was quite evident that the concurring official was one of the very reasons of the alleged protest in the first place. The Employer offered absolutely no evidence to the contrary.

In the context of due process, with the above in mind, it was quite clear to me the Grievant did not receive fair

consideration. Maybe the Employer thought this case was crystal clear. And that may very well be so. However, the fact of the matter is, the Grievant wasn't provided fair consideration and that was certainly a violation of her due process rights.

And this is one of the very basic requirements of Arbitrator Eischen's Award. To that end, I concur. It's really a matter of mere reasonableness which, equates directly to the due process concept. For it only makes sense, a subject of protest clearly lacks any ability to personally format an independent evaluation of the event, without prejudice.

Any lack of due process only fortifies a predetermination of guilt. The sole purpose of due process is to extinguish any pre-conceived concepts. And unless the facts are proven to be subject to an independent review, those due process rights have certainly been violated. The Union established that very point in the instant case.

In my view, it was certainly fortunate for the Grievant that Management committed a fatal procedural miscue. As previously mentioned, certain actions are deserving of removal on the first offense. Progressive discipline need not be applied. In my considered opinion, the alleged actions of the Grievant in this case rise to that level. To publicly protest

against the Postal Service, via the alleged method deployed by the Grievant, is certainly deserving of immediate removal.

That may be the reason that Management was lax in the implementation of the Grievant's due process rights. On the other hand, we will never know if the facts as were presented by the Employer are accurate because there was no independent review of the matter. The Union did not dispute the charges and relied on their due process arguments so we do not really know the other side of the story.

Accordingly, the fatal error as described above was committed and the undersigned cannot overlook the due process rights of the Grievant being violated, regardless of the severity of the Grievant's alleged actions.

The Employer insisted the Union's review and concurrence argument was new to arbitration and should not be considered. However, the Grievance Package establishes the fact Union mounted this due process rights argument early on in the grievance procedure.

For all the above reasons, the Notice of Removal shall be expunged and the Grievant will be made whole.

AWARD

The grievance is sustained.

Dated: July 20, 2010
Fayette County PA