

Regular Arbitration Panel

C# 11262

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In The Matter of Arbitration
between
United States Postal Service
and
National Association of
Letter Carriers, AFL-CIO
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Grievant: H. Linderman
Post Office: Falls Church, VA
USPS Case No: E7N-2P-D 38930
NALC Case No: FC 4-90

Before: Linda DiLeone Klein, Arbitrator

Appearances

For the Postal Service: Luke Sheridan
For the Union: Angelo E. Parker

Place of Hearing: Merrifield, VA (Northern Virginia Division)

Date of Hearing: September 24, 1991

Award: The grievance is arbitrable.

Date of Award: October: 9 1991.

Linda DiLeone Klein
LINDA DILEONE KLEIN

I S S U E

Is the grievance arbitrable?

O P I N I O N

Prior to March 7, 1990, Mr. Linderman was a Supervisor in Falls Church, Virginia. In a "Notice of Proposed Adverse Action-Removal" dated March 7, 1990, he was advised of the proposal to remove him from the Postal Service for "unacceptable behavior/creating a hostile work environment and sexual harassment".

On March 26, 1990, Mr. Linderman, the Branch President of the National Association of Postal Supervisors, the Director of City Operations and the Director of Human Resources entered into a stipulated settlement agreement whereby the proposed removal would be modified to a "reduction in grade to full-time regular city letter carrier, PS-5". The settlement contained nine stipulations. The following stipulations are relevant to the instant grievance: 1) the grievant agreed to serve a one year probationary period; 2) if, during that one year, there was "documented evidence of recurrence of the type of misconduct referenced in the letter of charges dated March 7, 1990, adverse action to include removal will result"; 3) he freely agreed to "waive his right to appeal such action to any forum", and 4) failure to comply with the conditions of the settlement would nullify said agreement and result in the imposition of the "Removal Action". Mr. Linderman then entered the Carrier Craft in March 1990.

In September 1990, events occurred between Mr. Linderman and a female Special Delivery Messenger which, according to Management, constituted the "recurrence of the type of misconduct referenced in the letter of charges dated March 7, 1990". As a result, on October 12, 1990, the grievant was notified that he was being removed effective October 19, 1990, for "conduct unbecoming a postal employee". The notice further cited the stipulation in the prior settlement regarding the grievant's agreement to "waive any rights to appeal the action to any forum".

However, on October 24, 1990, the grievant appealed the removal action to the Merit Systems Protection Board (MSPB). Also, in November 1990, he initiated a grievance which was processed through the grievance procedure to arbitration. Management denied the grievance and claimed that the grievant had waived his right to appeal to any forum when he voluntarily entered into the stipulated agreement dated March 26, 1990. At the hearing, the Postal Service reiterated its position that the grievance was not arbitrable based upon this agreement.

As it relates to the MSPB appeal, it was initially dismissed "for lack of jurisdiction" on November 20, 1990. The grievant petitioned for a review of this decision, and on March 28, 1991, the Board again denied his appeal "because it did not meet the criteria for review".

While the grievant's appeal was awaiting a decision from the MSPB, the Union continued pursuing the matter through the grievance procedure and on February 8, 1991, the appeal to arbitration was made.

At the arbitration hearing, the Postal Service took the posi-

tion that the grievance was not arbitrable because "at the time that the Union appealed the grievance to arbitration, the grievant also had an appeal pending before the MSPB". Management cited a Memorandum of Understanding between the Postal Service and the NALC dated March 3, 1988, wherein it was agreed that "the Union will be deemed to have waived access to arbitration" if the grievant has an appeal pending before the MSPB at the time the matter is appealed to arbitration.

The sole issue before the Arbitrator is whether or not the grievance is arbitrable, and in this regard, two separate arguments must be addressed.

As it relates to the agreement of March 26, 1990, the Arbitrator recognizes that said settlement with Management was entered into by the grievant "without threat or coercion"; furthermore it was the vehicle through which his postal employment was salvaged. However, the NALC was not a party to the settlement. The NALC then became the exclusive bargaining representative for the grievant upon his entry into the bargaining unit; pursuant to Article 15, the Union may initiate a grievance on behalf of its members. In this case, Management is attempting to rely on a document which is clearly outside the scope of the National Agreement.

Although the March 26, 1990 settlement was entered into in good faith, the agreement not to appeal any future action is not enforceable for the reason that it ignores the right to grieve as set forth in the National Agreement which applied to the grievant after March 1990. The local parties do not have the authority to require an employee to bypass rights granted through collective bargaining. In addition, the grievant is entitled to a review of the facts leading to the October 1990

removal for the purpose of determining the existence of just cause and the appropriateness of the penalty.

The March 26, 1990 settlement cannot be the basis for a decision that this grievance is not arbitrable.

As it relates to the issue of the grievance being appealed to arbitration while the MSPB appeal was also pending, the Arbitrator cannot uphold the position of Management.

The decisions from the MSPB clearly deny the grievant access to that forum; the MSPB declined to take jurisdiction of his case. When the initial denial was issued by the MSPB in November 1990, the grievance was also in the process of being appealed from Step 1 to Step 2; in fact, the Step 2 denial was not issued until December 1990. At some point thereafter, the grievance was appealed to Step 3 by the Union, and the grievant asked the MSPB for a review of their initial decision. However, before the second denial was issued by the MSPB, the Step 3 decision was rendered by Postal Management and the grievance was appealed to arbitration by the NALC.

After MSPB made the initial decision that the matter did not fall within its jurisdiction, the Union continued to pursue the grievance to arbitration, as this was the only avenue for adjudication of the dispute. There is no basis for denying the grievant the opportunity to have his grievance heard and resolved on the merits. In this instance, the Postal Service has not yet been required to argue its position on the issue of the appropriateness of the action taken against the grievant. Under such circumstances, it must be held that the Union is entitled to pursue the grievance on behalf of the grievant.

A W A R D

The grievance is arbitrable.

Linda Di Leone Klein
LINDA DILEONE KLEIN

Dated this 9th day of October, 1991
Cleveland, Ohio