

C#16189

## **REGULAR ARBITRATION PANEL**

**BEFORE:** Thomas J. DiLauro, Arbitrator

**APPEARANCES:**

For the Postal Service: Miriam F. O'Leary, Labor Relations Specialist

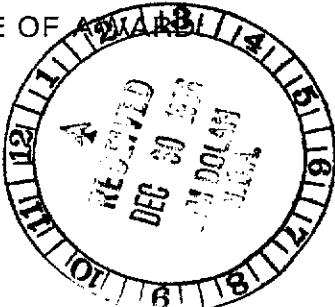
**For The Union:** Matthew Zebin, Advocate

**PLACE OF HEARING:** Philadelphia, PA

DATE OF HEARING: December 3, 1994

**AWARD:** The grievance is arbitrable and is sustained to the extent that the grievant is to be paid COP benefits and have his probationary period extended as stated in the last paragraph of this Opinion. The Union's request for back pay and benefits from the time he was injured until the present is denied. This arbitrator will retain jurisdiction of the case for a period of 60 days.

DATE OF AQUARIUS



DEC. 24, 1996

Thomas J. Dilasco

BACKGROUND:

The grievant, Robert Leadum, was appointed as a part-time flexible (PTF) letter carrier on December 11, 1993. By letter dated February 25, 1994, Supervisor of Customer Services Juanita Waters, notified the grievant that the letter confirmed his separation from the Postal Service effective February 2, 1994. The reason given for the action was because of unsatisfactory service in that he failed to meet the proficiency and conduct requirements of his position.

A grievance was filed by the Union stating that the grievant should not have been terminated because he was injured while on duty and that event should not prevent him from completing his probationary period. The Union asked that the grievant be returned to duty, be made whole and, also, be given another 90 day probationary period.

The Postal Service contended that the grievant was not terminated because he was injured on duty but was terminated for a number of reasons which indicated that he failed to meet the proficiency and conduct requirements of his position. The Postal Service noted that employees who are terminated during their probationary period do not have access to the grievance/arbitration process and, thus, rendered the grievance defective.

The parties were unable to resolve their differences and the grievance was appealed to arbitration. This arbitrator, by letter dated October 3, 1996, was appointed by the parties to hear this case on December 3, 1996.

The hearing was held as scheduled and the parties were given the opportunity to present testimony, exhibits and argument in support of their respective positions. The hearing was declared closed upon completion of the parties' final oral arguments.

**ISSUES:**

Is the grievance arbitrable? If so, did the Postal Service properly terminate the grievant during his probationary period? If not, what is the remedy?

**CONTRACT PROVISIONS:**

**ARTICLE 12 - PRINCIPLES OF SENIORITY, POSTING AND REASSIGNMENTS**

**Section 1. Probationary Period**

A. The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto.

**ARTICLE 19 - HANDBOOKS AND MANUALS**

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the

Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

## ARTICLE 21 - BENEFITS PLAN

### **Section 4. Injury Compensation**

Employees covered by this Agreement shall be covered by subchapter I of Chapter 81 of Title 5, and any amendments thereto, relating to compensation for work injuries. The Employer will promulgate appropriate regulations which comply with applicable regulations of the Office of Workers' Compensation Programs and any amendments thereto.

## EMPLOYEE AND LABOR RELATIONS MANUAL:

### **540 Injury Compensation Program**

#### **541.11 Law**

Under the provisions of the Postal Reorganization Act, 39 USC 1005 (c), all employees of the United States Postal Service (USPS) are covered by the Federal Employees' Compensation Act (FECA), 5 USC Chapter 81.

#### **541.51 With Termination of Pay.**

On the basis of information submitted by the employee or secured by independent investigation, the USPS will controvert a claim and terminate continuation of pay only if:

- a. The disability is a result of an occupational disease or illness, as defined in 541.2. (The employee may apply for compensation or take annual or sick leave, but the employee is not entitled to continuation of regular pay for an occupational disease or illness under FECA.)
- b. The injury occurred off of USPS premises when the employee was not engaged in official duties.
- c. The injury was caused by:
  - (1) The employee's willful misconduct: or
  - (2) The employee's intent to bring about injury or death to self or another person: or
  - (3) The employee's intoxication by alcohol or illegal drugs was the proximate cause of the injury.
- d. The first absence caused by the injury occurred 90 days or more after the injury.
- e. The employee failed to make an initial report of the injury until after employment was terminated.
- f. The injury was not reported on Form CA-1 within 30 days following the injury.

#### 545.521

Continuation of pay will not be interrupted as part of a disciplinary action nor will it be terminated as a result of a disciplinary action that terminates employment, unless final written notice of termination, for cause, was issued to the employee prior to the date of injury.

## **546 Reemployment of Employees Injured on Duty**

### **546.11 General**

The USPS has legal responsibilities to employees with job-related disabilities under 5 USC 8151 and the Office of Personnel Management's (OPM) regulations, as outlined below.

### **546.12 Disability Fully Overcome Within 1 Year**

#### **546.122 Rights and Benefits**

Upon reemployment, all rights and benefits which an employee would have had or acquired in the former position, had there been no injury or disability, must be restored.

#### **FEDERAL LAW:**

##### **United States Code:**

##### **Title 5. Section 8158**

- b. Under regulations issued by the Civil Service Commission-
  - (1) the department or agency which was the last employer shall immediately and unconditionally accord the employee, if the injury or disability has been overcome within one year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States, the right to resume his former or an equivalent position, as well as all other attendant rights which the employee would have

had, or acquired, in his former position had he not been injured or disabled, including the rights to tenure, promotion, and safeguards in reductions-in-force procedures.

**Code of Federal Regulations**

**Subpart C - Agency Obligation to Restore**

353.301 Extent of agency's obligation and how discharged.

When an employee is entitled to restoration under section 2021 or 2024 (a), (b), or (c) of title 38, United States Code, or to restoration or priority consideration under 5 USC 8151, the agency shall follow the requirements of this subpart.

353.302 Time Limit for Restoration.

(b) An employee who has fully recovered from an injury or disability within 1 year after the date of commencement of compensation, or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the United States, is entitled to resume his or her former position (or an equivalent one) immediately upon cessation of compensation.

**POSTAL SERVICE POSITION:**

The Postal Service contended that the grievance is not arbitrable because the grievant was a probationary employee who was separated from employment during his probationary period and, in accordance with

the provisions of Article 12, Section 1, he is not permitted access to the grievance procedure in relation to his separation.

The Postal Service advocate presented three separate arbitration decisions to support its contentions. Arbitrator James E. Rimmel (USPS Case No. E4M-2B-D 3881 [1985]), Arbitrator Philip W. Parkinson (USPS Case No. E7N-2A-C 18905 [1990]), and Arbitrator Harry Graham (USPS Case No. C90C-1C-D 94953624 [1996]) all ruled that probationary employees do not have access to the grievance procedure and found that they did not have the authority to review the merits of the respective employees' terminations.

The Postal Service noted that the grievant's probationary period began on December 11, 1993 and was scheduled to end on March 10, 1994. Records (Exhibit M-5) indicated the grievant was separated effective February 1, 1994. According to Postal Service witness Juanita Waters, Supervisor of Customer Services, the grievant was separated because he failed to meet the proficiency and conduct requirements of his position. She specified that, on several occasions, the grievant extended his street time without authorization and miscased mail which had to be recased the next day. She also noted that he became loud and insubordinate on January 29, 1994 and, subsequently, had to be escorted out of the building.

Ms. Waters testified that the grievant requested an accident report on January 19, 1994, claiming he injured himself on January 11, 1994 when he slipped on ice and snow while delivering the mail. On January 26, 1994, the grievant did not report to work and, when she called him at 1:00 PM after his tour of duty had concluded, he stated he had attempted to call her but could not get through to her. She told him he was AWOL and that he was due to report the next morning at 8:00 AM. He called and reported off sick for the next two days. On Saturday, January 29, 1994, Ms. Waters stated she met with the grievant and a union steward in her office. She claimed he accused her of harassing him and calling his doctor and would not stop yelling at him. She told him to stop yelling and to leave her office. When he continued to yell at her after he left the office she asked him to leave the building.

In her letter to the Postmaster, dated February 1, 1994 regarding termination of the grievant, she noted he was being terminated for disrespect to management, disorderly conduct, AWOL, attendance, inability to complete an assignment in the allotted time, inability to case mail in the allotted time, inability to follow directions and inability to complete an assignment. Ms. Waters noted that, in her "Employee Probationary Period Evaluation Report" dated January 21, 1994, she evaluated him as not meeting expectations in the following areas: instructions given by a supervisor, performing his duties in a timely manner and learning the duties of a carrier. She explained that her letter of February 15, 1994 to

Postmaster Hopkins, in which she requested an extension of the grievant's 90 day probation period, was really written to request an extension for the another PTF mentioned in the letter who only carried the mail for one day before injuring herself. However, she claimed that in fairness to the grievant she asked for an extension for him even though she felt he should be removed.

The Postal Service argued that the granting of continuation of pay does not grant automatic tenure to employees. Such employees can be dismissed and remain on workmen's compensation until they are released. It contended that Article 12 of the National Agreement specifically states that employees terminated during probation do not have access to the grievance/arbitration process and therefore, the grievance is not arbitrable. The Postal Service further contended, in the event the grievance is found to be arbitrable, that the evidence presented indicates clearly that the action it took to separate the grievant from employment was proper under the facts and circumstances of the case and asked that the grievance be denied in its entirety.

UNION POSITION:

The Union maintained that the grievance was arbitrable in order to determine whether the Postal Service violated the terms of the National Agreement, Handbooks and Manuals and Federal law and, thus, improperly separated the grievant from service during his probationary period.

The grievant testified that he began work with the Postal Service as a part-time flexible (PTF) letter carrier on December 11, 1993. He denied that he was ever disrespectful, disorderly or AWOL or that he had poor attendance or failed to complete his assignments. The grievant claimed he injured himself on January 11, 1994 when he slipped on the ice and snow as he was delivering the mail. He stated he told a supervisor about the incident when it occurred but did not file a report because he felt he could work through the injury by taking a hot bath and resting. However, a few days later, on Saturday, January 15, 1995 while delivering the mail, he noticed blood in his urine when he went to relieve himself. The grievant claimed he returned to the office and informed his supervisor of the problem and went home. He was off on Sunday and Monday, January 16 and 17, respectively and went to see a doctor on January 19, 1994. As a result of that examination the grievant filed a claim for continuation of pay (COP) on that date. He claimed that the reason for his behavior on January 29, 1994, when he met with Supervisor Waters, was because of his frustration due to his inability to get a copy of the COP claim he filed. He denied that he was disrespectful to Ms. Waters at that time. He noted that his claim was accepted by the Office of Worker's Compensation which directed that his pay for the period of disability should be continued for a period not to exceed 45 days. The grievant stated he was released for work on March 31, 1994.

The Union argued that the arbitration awards presented by the Postal Service to buttress their position were not applicable in the instant case since none of the awards involved an on-the-job injury. Instead, it presented two Merit Systems Protection Board cases which stated that, under the provisions of 5 USC 8151, recovered employees have an unconditional right and entitlement to be restored to their former or equivalent positions where the employees' separation was substantially related to a compensable injury, notwithstanding that such employees may be serving a probationary or trial period.

The Union noted that, under the provisions of Article 21, Section 4 of the National Agreement, employees are covered by subchapter I of Chapter 81 of Title 5 of the USC, and any amendments thereto, relating to compensation for work injuries. Title 5 of the USC, Section 8151, subparagraph (b) gives employees the right to resume their former or an equivalent position if the injury or disability has been overcome within one year after the date of commencement of compensation. Article 19 of the National Agreement incorporates Handbooks and Manuals as part of the National Agreement , one of which is the Employee & Labor Relations Manual (ELM). Section 541.11 of the ELM states that all employees of the USPS are covered by the Federal Employees' Compensation Act (FECA), 5 USC Chapter 81. Section 545.51 states that the Postal Service can controvert a claim and terminate COP for a number of specified reasons, none of which applied to the grievant. Section 545.521 of the ELM states

that COP is not to be interrupted or terminated as part of a disciplinary and/or termination action. Section 546 of the ELM notes that the Postal Service has legal responsibilities to employees with job related disabilities under 5 USC 8151 and the Office of Personnel Management's (OPM) regulations. Sections 546.121 and 546.122 of the ELM state that the Postal Service must give employees the right to resume employment in their former or equivalent position when they fully overcome the injury or disability within one year after the commencement of compensation benefits from OWCP and that upon reemployment all rights and benefits must be restored.

The Union contended that, if the Postal Service had terminated the grievant prior to his injury or after his return to work, he would have no case. However, once the grievant was injured while on duty and filed a claim for COP, a different set of rules, regulations and laws covers and protects him. The fact that management terminated him on February 2, 1994, then recommended that he be reappointed for another 90 day probationary period and, on February 25, 1994, sent him a separation notice is indicative that it did not proceed properly in this case. It separated an employee from service who was off due to an IOD in direct contradiction to the terms of the National Agreement, the ELM and Federal law.

The Union asked that the grievant be restored to his position and that he be paid all wages and benefits from the time he was injured in January,

1994 until the present and that he be paid the COP benefits to which he was entitled.

OPINION:

The parties are to be commended for the careful preparation, excellent presentation and persuasive closing arguments in support of their respective positions.

The Postal Service raised the issue of arbitrability at the outset of the hearing citing the provisions of Article 12, Section 1. which provides that it has the right to separate from its employ any probationary employee at any time during the probationary period and that these probationary employees shall not be permitted access to the grievance procedure in relation thereto.

The three cases cited herein by the Postal Service, to support its position regarding the arbitrability issue, do not involve the fact situation of this case. In Arbitrator Rimmel's 1985 decision, he noted that an alleged claim of discrimination because of an alleged handicap may not be challenged in the grievance-arbitration procedure. Likewise, Arbitrator Graham, in his 1996 decision, found that the Union's claim of discrimination in the discharge of a probationary employee was not sufficient to determine the claim on its merits. Finally, Arbitrator Parkinson, in his 1990 decision, noted that the caveat in the clause at 546.422 of the ELM, regarding not completing the probationary period because of compensable injuries, was

simply not applicable inasmuch as the medical problem was because of military duty and preexisted the grievant's reinstatement.

Arbitrator Bert L. Luskin, in Electric Storage Battery Co., (AAA Case No. 17-13 (1959) explained that although the dischargee was a probationary employee, a grievance over his discharge presented an arbitrable issue because:

"The issue in question involves the interpretation and application of provisions of the collective bargaining agreement, and to that extent the grievance is arbitrable. A distinction must be made between issues which, by their nature, fell outside the scope of the arbitrator's authority in areas which would prohibit the issuance of an award in cases where the application or interpretation of provisions of the agreement are not involved. The fact that provisions of the agreement permit the Company to exercise its right to terminate a probationary employee would constitute a good and sufficient defense to the claim of the discharged employee; but the issue, however, may be the subject of a grievance with the terminal point of arbitration since, it does in fact involve the application and interpretation of specific provisions of the collective bargaining agreement." (Fairweather's Practice and Procedure in Labor Arbitration, Schoonover, ed., BNA, 3rd Ed. [1991]).

The instant case does, in fact, involve the application and interpretation of not only specific provisions of the collective bargaining agreement but also provision of Federal law. Article 21, Section 4 of the

collective bargaining agreement states that employees covered by the agreement shall be covered by subchapter I of Chapter 81 of Title 5 of the USC, and any amendments thereto, relating to compensation for work injuries. The ELM at Section 541.111 provides that all employees of the USPS are covered by the Federal Employees' Compensation Act (FECA). 5 USC Chapter 81, Section 546.11 notes that the USPS has legal responsibilities to employees with job-related disabilities under 5 USC 8151 and the Office of Personnel Management's (OPM) regulations. Subparagraph (b) of Section 8151 of Title 5 of the USC, as well as Section 546.121 of the ELM, are explicit in their instructions that when an employee fully overcomes an injury or disability within one year after the commencement of compensation payments from OWCP, the USPS must give the employee the right to resume employment in the former or equivalent position.

The question to be answered in the instant case is what caused the Postal Service to separate the grievant from employment during his probationary period? The Postal Service listed a number of reasons for the grievant's termination: 1. disrespect to management; 2. disorderly conduct; 3. AWOL; 4. failure to meet the attendance requirements; 5. failure to complete assignments in allotted time; 6. failure to case mail in the allotted time; 7. failure to follow directions, and 8. inability to complete an assignment. These items appeared in Supervisor Water's letter of termination dated February 1, 1994.

The grievant was first employed as a PTF letter carrier on December 11, 1993. His first "Employee Probationary Period Evaluation Form" dated January 21, 1994, was completed by Ms. Waters. She indicated, as an overall rating, that he did not fully meet expectations at that time and needed casing experience, street experience and safety training. Ms. Waters noted specifically that he met or exceeded expectations in attendance/punctuality (Factor A) and in compliance with regulations (Factor C) and did not meet expectations in following directions (Factor B), task performance (Factor D) and job knowledge (Factor E).

Less than two weeks later, after the grievant had reported on January 19, 1994 that he was involved in an accident on January 11, 1994, Ms. Waters authored the aforementioned February 1, 1994 termination letter. She also completed another evaluation report dated February 2, 1994 in which she gave the grievant an overall rating of failure to meet expectations and recommended separation. She rated him as not meeting expectations in all the rating factors noted above. Ms. Waters also commented that he had been out sick; been AWOL; had not carried mail since January 15, 1994; did not finish his assignments in the allotted time when he did carry the mail; reported an accident eight days after it happened, and, did not report the accident from the scene. She commented further that he cannot case proficiently; that his conduct was unbecoming of a USPS mail carrier; that he showed no respect for management and, was told to leave the building because of insubordination to a supervisor.

It should be noted that payroll records (Union Exhibit 7A) for the last pay period in 1993 and the first two pay periods in 1994 do not indicate any unscheduled absence or AWOL through January 21, 1994, while Ms. Waters' statement and evaluation report are to the contrary. The only evidence of disrespect for management and/or conduct unbecoming a mail carrier is Ms. Waters' testimony regarding the grievant's conduct during a meeting held on January 29, 1994. If he acted as Ms. Waters described, it may have been because of his frustration regarding the processing of his medical claim. As far as casing and delivering mail in a proficient and timely manner, the Union advocate noted that the grievant had only a little over one month of service and that it takes a carrier, especially a PTF, an extended period of time of up to one year to become proficient.

Despite Ms. Waters' February 1, 1994 termination letter and February 2, 1994 evaluation form, she wrote a letter to the Postmaster, dated February 15, 1994, wherein she requested an extension of the grievant's 90 day probation so that she could make an accurate evaluation as soon as he returned to full duty. She then followed that letter with a letter dated February 25, 1994 wherein she confirmed the grievant's separation from the Postal Service, effective February 2, 1994. Ms. Waters stated the separation was a result of his unsatisfactory service in that he failed to meet the proficiency and conduct requirements of his position. She specified that he extended his street time without authorization and miscased mail on

several occasions. She also noted he became loud and insubordinate on January 29, 1994 and was escorted out of the building.

The foregoing evidence makes it crystal clear that no action was taken against the grievant until after he reported that he had been injured on the job. The supervisor's evaluation report dated January 21, 1994 indicated he met or exceeded expectations in attendance/punctuality and yet one of the reasons given for his termination was failure to meet attendance requirements and AWOL. Ms. Waters' request of February 15, 1994 to extend the grievant's 90 day probation flies in the face of her concerns about his failure to case and deliver mail in a proficient and timely manner wherein, she admitted that she needed additional time to make an accurate evaluation. The only conclusion to be drawn from Ms. Waters' action is that the grievant's reported injury and the ensuing problems with processing his claim caused her to change her overall rating of January 21 of not fully meeting expectations at this time to her overall rating of February 2 of failure to meet expectations.

The Merit Systems Protection Board cases cited by the Union illustrate the proposition set forth in the aforecited Electric Storage Battery Co. case, i.e., that during a probationary period employees can appeal their removal in order to show that the removal was the result of, or was substantially related to their compensable injury and thus was covered by the various Federal codes cited herein. In the instant case, the provisions of the collective bargaining agreement, handbooks and manuals closely parallel the

language of Section 8151 of Title of the USC and Section 353.031 of the Code of Federal Regulations with regard to allowing employees to resume their former position upon cessation of compensation received as a result of a compensable injury.

A review of the unique facts and circumstances of this case indicate that the grievant's separation was substantially related to his compensable injury. Since he was never paid COP benefits in accordance with the Department of Labor's March 24, 1994 letter, he is to be paid such benefits not to exceed 45 days beginning from the date of his disability through March 31, 1994, the date of his release, or whichever occurs first. Also, in accordance with Supervisor's Waters' request of February 15, 1994, his probation period is to be extended up to 90 days so that an accurate evaluation of his capabilities can be made.

AWARD:

The grievance is arbitrable and is sustained to the extent that the grievant is to be paid COP benefits and have his probationary period extended as stated in the last paragraph of this Opinion. The Union's request for back pay and benefits from the time he was injured until the present is denied. This arbitrator will retain jurisdiction of the case for a period of 60 days.



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Thomas J. DiLauro  
Arbitrator  
DEC. 24, 1996