

C-24014

IN THE MATTER OF THE ARBITRATION BETWEEN

UNITED STATES POSTAL SERVICE

) CASE NO: H98N-4H-D-02174594

AND

) GRIEVANT: NORMA J. MCRAE

NATIONAL ASSOCIATION OF
LETTER CARRIERS

) PLACE: OCALA, FLORIDA
) DATE: NOV. 1 and NOV. 26 and

DEC 12, 2002

) POST-HEARING BRIEFS
RECEIVED JAN. 13, 2003

BEFORE:

J. REESE JOHNSTON, JR., ARBITRATOR

APPEARANCES:

FOR THE POSTAL SERVICE:

JOSEPH F. WALKER

Labor Relations Specialist

1300 River Place Drive

Post Office Box 40005

Jacksonville, FL 32203-0005

FOR THE UNION:

D. ROBERT JOHNSON

Local Business Agent

National Association of

Letter Carriers

875 Rucker Road

Alpharetta, GA 30004-4050

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FEB 19 2003

VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

AWARD

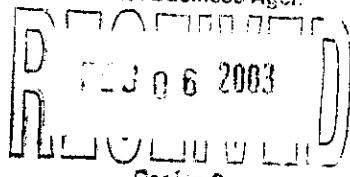
The Postal Service is directed to reinstate the Grievant Norma McRae to the position she occupied at the time of her termination from employment by the Postal Service. She is to receive back pay plus interest at the rate agreed to by the parties. However, prior to her reinstatement she is to be given a Return to Duty physical exam and based on the results of that exam, the number of hours that she is to work, if any, should be determined. I suggest that if Mrs. McRae does not want another Postal Service investigation due to her physical activities after completing her four hours of work, the remaining 20 hours of that day should be totally work-free because she is being paid four additional hours because of total disability. I will retain jurisdiction of this case for sixty (60) days, and if either party writes me, with a copy to the other party, that my AWARD is not being implemented, I will set the matter down for further hearing.

DATE OF AWARD:

1/31/2003

J. Reese Johnston
J. Reese Johnston, Jr., Arbitrator
2692 Alta Glen Drive
Suite 100
Birmingham, AL 35243

Matthew Rose, NALC
National Business Agent



BACKGROUND

By Memorandum dated March 26, 2002, the United States Postal Inspection Services sent their Investigative Memorandum to Management at the Ocala Post Office. A copy of this Memorandum is marked Exhibit A and attached hereto and made a part hereof as if fully set out herein.

By certified mail the Grievant, Norma J. McRae, received the following letter:

"May 14, 2002

MEMORANDUM FOR Norma J. McRae
3241 SE 38th St.
Ocala, FL 34480-9305

SUBJECT: NOTICE OF REMOVAL

You are hereby notified that you will be removed from the Postal Service effective at the end of your tour on June 14, 2002.

CHARGE NO. 1. IMPROPER CONDUCT

You are a full time letter carrier. On April 20, 1987, you filed a workers compensation claim which was initially denied but accepted by the U.S. Department of Labor Office of Workers Compensation Programs on appeal. Since at least 1990 you have provided medical documentation that limits you to four-hour workdays.

In 1994 you transferred to the Ocala, Florida Post Office as a 4 hour per day limited duty employee. As indicated above, you have been receiving disability compensation benefits for the additional 4 hours that your medical restrictions have indicated you are unable to work. Throughout your employment at the Ocala Post Office you have been observed at work demonstrating virtually no indication of any incapacitation although you have severe work restrictions.

An investigation to determine if you were misrepresenting your actual functional capabilities to the Postal Service was conducted by the Inspection Service. A component of that investigation included surveillance that was conducted in September 2000. That surveillance observed you operating a chain saw to cut tree stumps below ground level, using a pitchfork to unload a truckload of mulch, starting and using a gasoline powered weedwhacker and shoveling. Additionally,

you were observed socializing, shopping and utilizing your truck to pull tree stumps from the ground. The latter which required you to repeatedly climb in and out of your truck and experience jerking motions as you attempted to pull the stumps from the ground tied to your truck.

The referenced surveillance found you to be bending, reaching, lifting, carrying and twisting with no difficulty. The physical capabilities that you displayed were far beyond that of a full duty letter carrier. Furthermore it is noted that you displayed the described physical capabilities after having worked your limited 4-hour tour of duty. Additionally you have been observed commuting to and from work on your Harley Davidson motorcycle during which time you exhibited no restricted movements, hesitation or any other indication that you were experiencing any discomfort or that your physical capabilities were restricted in any way.

On December 21, 2000, your attending physician, orthopedic surgeon Audie M. Rolnick, M.D. was interviewed regarding the surveillance that was conducted on you. Dr. Rolnick was shown a highlight videotape and still photographs of your activity. As described previously, that activity included your using a chain saw, weedwhacker and pitchfork.

Dr. Rolnick described the photography as impressive and stated that based on the surveillance films you demonstrated a physical capability indicating that you were capable of returning to work full duty eight hours daily. Dr. Rolnick further stated that restrictions imposed on patients are done so based to a large degree on the testimony of the patient and that while you may have required restrictions in the past, the evidence showed that you were capable of full duty at that time.

On January 24, 2001 Southeast Area Associate Medical Director Patrick K. Dobbins, M.D., was interviewed by the Inspection Service. Dr. Dobbins was shown the photographs and video surveillance that was shown to Dr. Rolnick. Additionally, Dr. Dobbins was provided with a copy of Dr. Rolnick's memorandum of interview. After reviewing the surveillance evidence, Dr. Dobbins stated that he was in agreement with Dr. Rolnick regarding your ability to return to work full time.

As a Postal Service Medical Director, Dr. Dobbins is required to be knowledgeable regarding the physical requirements of all postal service positions. Dr. Dobbins noted that the surveillance displayed you demonstrating a full range of motion and found you capable of bending, lift-

ing and reaching beyond that required by your position with the Postal Service. Based on the functional capacity you exhibited in the surveillance video, Dr. Dobbins opined that you did not currently suffer from any incapacitation.

Additionally, Dr. Dobbins stated that a physician must rely on their patient being honest to have a diagnosis and prognosis. He further stated that although your condition had improved you have not been completely honest in that you have failed to report the improvement to the Department of Labor or the Postal Service. According to Dr. Dobbins it was apparent that you had become able to perform your full quantity and quality of work but have not fulfilled your responsibility to report that fact.

On January 5, 2001, Postal Inspector Craig Smith and Human Resources Specialist Robert Young interviewed you. According to inspector Smith that interview was conducted in an effort to solicit candid testimony regarding your capabilities specifically if your condition had improved and to determine if you were capable of performing outdoor or any other activity for the Postal Service for 8 hours per day. During that interview you berated Inspector Smith and Mr. Young and refused to complete a questionnaire regarding your physical capabilities.

A statement provided by Inspector Smith indicates that when you were asked to relate how you were originally injured, you replied 'You've got the file, don't you read'. When you were asked how you were presently feeling you responded 'What do you care, it's my back. I've got pain all the time, pain in my butt and down my legs' you then sneered and stated 'but that doesn't bother you guys'. When Inspector Smith asked the name of your attending physician you angrily replied 'Boy you guys don't read. It's in my file. Why don't you know.' After providing Dr. Rolnick's name you went on to say that you came to work and did what you could and 'no early disability was needed.' You then stated that you 'didn't care about what we may be trying to do.'

Subsequently you were asked again if you felt that your condition had stabilized or improved. You replied 'what are you guys trying to make me work more hours?' It was explained to you that the Postal Service was obligated to attempt to return employees to a full duty status when possible. At that point you stated 'Look, I am getting older, why do you think the back would get better? I've got a lot of pain and it's getting worse. If you think you want to do

something, go for it. You do what you want. I'll follow up with my stuff.'

For a third time you were informed that the interview was an inquiry into your present status. You were advised that it was an effort to determine if any amendments made to your current job duties would enable you to perhaps increase your work hours by working additional hours either inside or outside if you so desired. In response you stated 'inside-outside. I still have a pain. I prefer outside. It's better to move.'

You were then asked if you could increase your duties. You replied by stating 'Why don't you read the medical reports, you would know what I am capable of.' When you were asked what you felt you were capable of you said, 'I am okay doing what I do. I don't bend much or pick up too much. I know what I'm capable of. My back has deteriorated.'

You were then shown a short questionnaire with a list of outside activities that asked whether you could perform the activities listed. The questionnaire described activities related to yard-lawn type work. According to Inspector Smith you annoyingly flipped the pages aside and challenged the Inspector by stating 'Why don't you send it to my doctor and we'll see what happens.' You then stated that sometimes you hurt so much that you have to stay home. When asked if it was your intention to not complete the questionnaire you replied, 'Yea, that's right, you know if I were you two guys I wouldn't come here and not know the case.'

Inspector Smith described your demeanor during the interview as combative, rude and confrontational. During the interview you would not give any consideration to increasing your work hours. You made it clear to Inspector Smith that you would challenge any effort by the Postal Service to have your work hours or duties changed and furthermore you implied that you would be successful in preventing any such change to your work hours or duties.

On February 2, 2001 Inspector Smith and Mr. Young returned to the Maricamo Branch office to interview you for a second time. At approximately 1330 hours you were preparing to leave the office and begin your 4 hour period of disability compensation. When I informed you that Inspector Smith and Mr. Young were waiting in the office and that they wished to speak to you regarding your workers compensation claim, you responded, 'You know what Dan, I'm going to punch off and

leave. If they want to see me they will come back when I'm on the clock.' You subsequently clocked off and left the building.

A few minutes later you arrived at the Manager's office with Rural Carrier Sue Alsop. Present in the office were Station Manager Doug Clark, Inspector Smith, Mr. Young, Sue Alsop, you and myself. Inspector Smith began by informing you that he desired to speak with you regarding your workers compensation claim. You stated that it was your preference to have union representation but that there was not any available at that time. Inspector Smith asked you if you would object to him presenting you with the status of his investigation and you replied that you had no objections.

Inspector Smith proceeded to inform you of the activity that had been observed and the opinions of Dr. Rolnick and Dr. Dobbins, both of whom stated that you could return to full duty. With regard to your activities, when Inspector Smith addressed your use of a chain saw you quickly snapped 'yea, it weighs 10 pounds.' The Inspector addressed your use of the truck to remove stumps and the fact that you had crawled under the truck. The Inspector also discussed the fact that it was your responsibility to notify Department of Labor, your doctor and the Postal Service when your condition had improved to the point of allowing you to increase your work hours or even return to full duty. In response you acknowledged that it was your responsibility but perhaps you were just having a good day.

Having been made aware that Dr. Rolnick had found you capable of returning to work full duty, you revisited Dr. Rolnick on February 13, 2001. As a result of your visit with Dr. Rolnick you submitted a Duty Status report signed by Dr. Rolnick, indicating you continued to have work restrictions but that your work hours could be extended to 8 hours per day. In light of Dr. Rolnick's reversal in opinion after your February 13, 2001 visit, Injury Compensation arranged for you to attend a Functional Capacity Evaluation and an Independent Medical Evaluation with the intention of obtaining additional medical evidence to determine your actual functional capability.

A Functional Capacity Evaluation conducted on April 13, 2001, determined that you were in fact capable of working 8 hours per day. Industrial Rehab Coordinator Misty J. Norris and Physical Therapist John W. Waller of Health South Rehab conducted the evaluation. Ms. Norris described your attitude

toward the evaluation as 'resistant'. The evaluation also established that you 'engaged in maximum range of magnified illness behavior'. Mr. Waller stated that your behavior during the evaluation may be suggestive of possible intentional avoidance of participation in the testing.

On May 16, 2002, an Independent Medical Evaluation conducted by Dr. William H. Knibbs determined that you were able to work 8 hours per day. The results of the Functional Capacity Evaluation and the Independent Medical Evaluation were submitted to Dr. Rolnick on June 28, 2001. On September 11, 2001, Dr. Rolnick responded that it was his intention to return you to 8 hour work days when you returned for a follow up visit that had been scheduled for August 14, 2001. The doctor indicated that you did not return for the August 14, 2001 visit.

It was determined that on May 3, 2001 you requested that the U.S. Department of Labor grant you a change in physicians. According to Department of Labor records, you requested that your treatment be transferred from Dr. Rolnick to Dr. Oregon Hunter. On May 16, 2001, the Department of Labor advised you that they could not grant your request. You made a second request for a change of physicians on July 11, 2001. Your request was granted by Department of Labor on August 28, 2001.

On February 14, 2002, Dr. Oregon Hunter was provided a summary of the Inspection Service Investigation along with supporting medical documentation and surveillance photography. After reviewing the evidence he was provided, Dr. Hunter immediately indicated that you were capable of returning to work on a full time basis.

On April 22, 2002, I held a fact finding pre-disciplinary interview with you to determine your explanation for the events as described above, also present was Frank Swift NALC representative. To begin the interview I presented you with a copy of the Investigative Memorandum and allowed you time to review the findings. I then allowed you to view the video surveillance obtained by the Inspection Service. After viewing the video surveillance I proceeded to ask you a number of questions. You initially answered a number of preliminary questions but then refused to answer others pertaining to your current condition and the results of the investigation.

When I asked you if there were times that you felt you could

work more than 4 hours per day you responded 'Not going to answer that, iffy question.' When asked if your condition is the same or improving you answered 'that's what I have a doctor for.' I then asked if you knew that it was your responsibility to inform the Department of Labor of any improvement in your condition, you refused to answer the question. When asked if you had informed Department of Labor of any improvement in your condition you again refused to answer.

I asked if Dr. Rolnick was your current doctor and again you refused to answer. When I volunteered that I believed that Dr. Hunter was your current doctor you responded 'that's correct.' When asked if you had informed Dr. Hunter of Dr. Rolnick's findings or if you had shared the results of the FCE with Dr. Hunter you did not provide an answer. The interview was concluded at that time.

Later that morning I again afforded you the opportunity to answer my questions and to provide your explanation regarding the findings of the Inspection Service investigation. I also advised you that I considered your lack of responses to be a failure on your part to cooperate in an official investigation. I advised you that I would allow you to provide your responses to my questions no later than Thursday, April 25, 2002.

On April 25, 2002 you provided your responses, however your answers were vague and not forthcoming. You revised your response to my question regarding your ability to work more than 4 hours per day by writing 'To my knowledge I've been working according to my doctor's restrictions.' You further indicated that there has been no improvement in your condition and that you changed doctors solely for convenience. You indicated that you 'can't recall' if you shared Dr. Rolnick's or the FCE findings with Dr. Hunter.

I find that you have destroyed the trust required to be a Postal Service employee. You are currently receiving 4 hours of disability compensation although there is substantial objective medical evidence and surveillance evidence that you are capable of working more than 4 hours per day. There is clear and convincing evidence that you have actively engaged in an effort to avoid having your work hours increased with the intention of continuing to receive 4 hours of disability compensation per day. Furthermore, although required to do so, you have failed to fully cooperate in the investigation into this matter. Your conduct

is improper and strikes at the heart of the employee employer relationship.

Your actions are contrary to your duties and responsibilities as a postal employee, as well as 545.33 (d), 661.3(a), 661.3(c), 661.3(f), 661.53, 666.2, 666.3 and 666.6 of the Employee and Labor Relations Manual.

Please turn in all government property issued to you on your last day of service. We are enclosing Standard Form 8, which gives instructions regarding unemployment compensation, Notification of Personnel Action. PS Form 60 will be forwarded to you later.

If this action is overturned on appeal, back pay will be allowed unless otherwise specified in the appropriate award or decision, ONLY IF YOU HAVE MADE REASONABLE EFFORTS TO OBTAIN OTHER EMPLOYMENT DURING THE RELEVANT NON-WORK PERIOD. The extent of documentation necessary to support your back pay claim is explained on the attached Notification of Employees Obligation to Mitigate Damages letter.

A copy of this letter is being sent to your home address by ordinary mail.

You have the right to file a grievance under the grievance-arbitration procedure set forth in Article 15 of the National Agreement within fourteen days of your receipt of this notice.

s. Danny L. Powers
Danny L. Powers
Supervisor, Customer Service
Maricamo Branch, Ocala Post Office

cc - DA file
Personnel
Postmaster
Supervisor
EEO
Injury Comp
EAO"

The Union raised several issues of failure of due process. These issues were:

1. The Grievant was denied Union representation at the January 5, 2001, and February 2, 2001, meetings with the Postal Inspectors. That this constituted a denial of her Weingarten rights.

2. That Management representative at Formal Step A did not have the authority to settle the grievance.

3. Discipline was not issued until May 14, 2002, six weeks after the conclusion of the Investigation Service's investigation, and 18 months after the Investigation Services began its investigation.

4. The Union was denied information necessary to defend the Grievant.

As is my practice, I will discuss and rule on the lack of due process issue raised by the Union before considering the merits of this case. As to the denial of Ms. McRae's Weingarten rights, the Postal Inspectors should have been but were not guided completely by the decision in the United States Court of Appeals for the District of Columbia Circuit, which case was styled United States Postal Service, Petitioner, vs. the National Labor Relations Board, Respondent, and the American Postal Workers Union, AFL-CIO, and the East Bay Area Local, American Postal Workers Union, AFL-CIO, Intervenors. A copy of the decision in

that case is marked Exhibit B and is attached hereto as if fully set out herein.

There was at the arbitration hearing a conflict between Postal Inspector Smith's version of what happened at these two meetings with Ms. McRae and Ms. McRae's version of what happened at those two meetings. However, a reading of paragraph 8 of the Investigative Memorandum shows that Ms. McRae was not permitted to have a Union representative present. She was accompanied by another Postal employee, Rural Carrier Sue Alsop, but Ms. Alsop is not a Union official. Therefore, her due process rights, also known as the Weingarten rights, were improperly denied her by Postal Inspector Smith.

As to ground 2 of the Union alleging that Management violated the Grievant's due process rights, I find that the burden is on the Union when a due process issue is raised by the Union, and that as to the second ground the Union did not sustain its burden of proof.

As to ground 3, the delay of 18 months after the Inspection Services began its investigation and then an additional delay of six weeks after the Postal Inspector's report was given to Management that six additional weeks elapsed before a removal was issued to the Grievant likewise violates her due process rights.

It is my further finding that as to item 4 raised by the Union as a denial of the Grievant's due process rights, that again

the Union has not sustained its burden of proof as to this ground.

Having found that the Postal Service violated the Grievant's due process rights as set out above, it is incumbent on me due to this lack of procedural due process, that the disciplinary action taken by the Postal Service cannot be upheld. My AWARD will set out the action to be taken due to this failure of procedural due process.

The Grievant, however, should find little comfort in the above conclusion. For the offenses which she did commit, that is, performing physical actions which were not only not permissible under her medical restrictions, but also any physical actions after she had completed her four hours of work are prohibited. Since at least 1990 the Grievant has provided medical documentation that limits her to a four hour work day, five days a week. As a result of these restrictions, the Grievant is considered to be totally disabled from work after four hours, and as such she receives four hours of total disability compensation for the four hours that her medical restrictions indicate she is unable to work. Even the testimony by the Grievant indicated that she did perform certain physical acts after completing her four hours of work, which would be clearly in violation of her receipt of total disability compensation which is paid on the basis that she is physically unable to do any work after her four hours of work at the Post Office.

Had the Postal Service not violated her due process rights to such an extent as to cause the reversal of their decision to discharge the Grievant, or in other words, had I reached the merits of this case, I would have sustained the Postal Service's action in terminating the employment of the Grievant.