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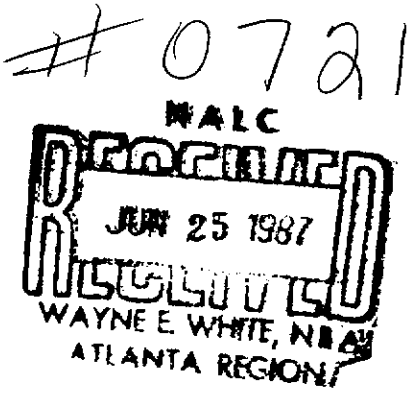

USPS-NALC ARBITRATION PANEL
SOUTHERN REGION
WILLIAM J. LeWINTER, ARBITRATOR

IN THE MATTER OF ARBITRATION BETWEEN	
UNITED STATES POSTAL SERVICE (Boynton Beach, FL)	Case No. S4N-3S-D 44597
-AND-	Record Closed: June 4, 1987
NATIONAL ASSOCIATION OF LETTER CARRIERS (Branch No. 1071)	Arbitrator File No. 1235

OPINION AND AWARD

Representing the Employer:
Gerald B. Huntenburg, Superintendent
Postal Operations, Delray Beach, Florida

Representing the Union:
Don Southern
Executive Vice President

William J. LeWinter
Arbitrator
5001 Collins Avenue, Suite 14B
Miami Beach, Florida 33140-2739

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Preliminary Statement

On November 10, 1986, the Union filed a written grievance on behalf of Charles Rogers, alleging the Employer violated the parties' collective bargaining agreement by issuing grievant a Notice of Removal without just cause. The parties, being unable to resolve the matter, assigned it to arbitration. Hearing was held before William J. LeWinter, Panel Arbitrator, at Boynton Beach, Florida, on June 4, 1987, at which time the parties were accorded full opportunity to present witnesses for direct and cross examination and such other evidence as was deemed pertinent to the proceedings.

From the evidence adduced at the hearing, the arbitrator makes the following:

Findings of Fact

According to official court records, on November 4, 1983, the grievant "Pleaded Guilty as charged" to the crime of Grand Theft in the Circuit court of the 15th Judicial Circuit in and for Palm Beach County, Florida, Criminal Division, at Case No. 83-2958-CF-A-02. "Adjudication and Sentence w/held". The record further states:

> Deft. placed on prob. for 3 years Standard Special Conditions.
>
> (1) Pay $3950. Restitution to Coral Gables Federal Saving & Loan 5070 W. Atlantic Ave. Delray Bea.
>
> (2) Deft. to undergo an evaluation for Drug & or alcohol abuse & receive treatment if required by Prob Dept
>
> (3) Pay $39.00 court costs
>
> (4) Pay $100.00 atty fees + $25 Deposition cost.

Thereafter, on November 14, 1984, grievant similarly pleaded guilty and adjudication was further withheld to the crime of Violation of Probation, whereby the probation was extended for a period of one year.

On February 4, 1986, grievant applied for employment with the Postal Service. On the application form, grievant checked the "NO" column on question No. 18:

> 18. HAVE YOU EVER BEEN CONVICTED OF AN OFFENSE AGAINST THE LAW OR FORFEITED COLLATERAL, OR ARE YOU NOW UNDER CHARGES FOR ANY OFFENSE AGAINST THE LAW? (You may omit: (1)traffic violations for which you paid a fine of $30.00 or less; and (2) any offense finally adjudicated in a juvenile court.)

Grievant was hired by the Employer on March 15, 1986. On July 4, 1986, grievant was arrested for possession of

Marihuana under 20 grams and possession of drug paraphernalia. On September 4, 1986, grievant was arrested for possession of drug paraphernalia. On September 4, Grievant called his Supervisor, Mark Zupo, and told him he was in jail and expected to be released by the next day, or so. Mr. Zupo informed grievant that he had only three days of Annual Leave available, and that grievant should let him know his status as soon as possible, so Zupo could handle his scheduling requirements. Grievant also spoke with the Postmaster, Robert Eades, who told him that when he ran out of Annual Leave, he would be listed as LWOP (Leave Without Pay).

Zupo discussed the matter with the Postmaster. Mr. Eades checked grievant's Employment Application and asked the Postal Inspection Service to check grievant's criminal record. After finding the above-listed matters, the Postmaster "assumed" grievant had lied on the application and called the Employee and Labor Relations Department (E&LR) from where he was advised that removal would be an appropriate discipline.

Grievant was not released from jail until September 16 or 17. He made no further contact with Supervisor Zupo until his release. At that time he called and was told to report for work. Grievant reported on September 18.

Zupo testified that upon grievant's return, he held a pre-disciplinary interview wherein he informed grievant that following the application of three days Annual Leave, he has

been listed as AWOL. He further informed him that a Notice of Removal would issue to remove grievant from employment. Grievant testified that he was put back to work upon his return and did not discuss the arrests with Zupo for about a week. At that time he was informed of the pending removal. He was not told of the AWOL status until after he received his Notice of Removal.

On October 8, 1986, grievant appeared in Court and pleaded *nolo contendere* to the possession of marihuana charge. Adjudication and Sentence was withheld. The Court dismissed the charge of possession of drug paraphernalia. Grievant was directed to pay costs of $80.00 and surcharge of $20.00 on the marihuana charge.

On October 22, 1986, the Employer issued a Notice of Removal to grievant, dated October 15, 1986 stating:

> You are hereby notified that you will be removed from the Postal Service effective November 21, 1986.
>
> The reasons for this removal are:
>
> Charge 1: You are charged with: Falsification of Official Documents
>
> On or about 2-24-86, you signed and dated the PS Form 2591 certifying that all statements made in the application were true, complete, and correct to the best of your knowledge and belief and are made in good faith. Question #18 of the PS Form 2591 form reads as follows: (The question is quoted.) You answered this question in the negative. Our records reveal that on 11-4-83 you were adjudicated guilty of an offense against the law and were placed in a 3 years probation period. On November 14, 1984 you were adjudicated guilty of V.O.P., extending you probation for one year.
>
> Charge 2. You are charged with violation of Postal Rules and Regulations con-

tained in the Employee & Labor Relations Manual: specifically,

On July 4, 1986 you were arrested for possession of drug papaphernalia and marihuana under 20 grams. Section 661.3 of the Employee & Labor Relations Manual states in part that Postal employees must avoid actions affecting adversely the confidence of the public in the integrity of the Postal Service. Section 661.55 of the Employee and Labor Relations manual states that the use of drugs may be grounds for removal from the Postal Service. Section 666.2 of the Employee and Labor Relations Manual requires that postal employees be honest, reliable, trustworthy, courteous and of good character and reputation. Your arrest on 7-4-86 and you failure to declare your arrest record on PS Form 2591 violates the Postal Rules described herein.

Charge 3. Absent Without Official Leave (AWOL)

On 9-4-86 you were required to report for duty as scheduled. On this date you notified this office that you were in jail for drug paraphernalia and would not be able to report until 9-5-86. you did not report for duty nor notify this office of your intended absence. You failed to report for duty as scheduled and required in Section 666.8 of the Employee and Labor Relations Manual, through 9-17-86. For the reasons contained herein, you are charged with being absent without official leave from 9-5-86 through 9-17-86.

On November 10, 1986, the Union filed the written grievance on behalf of grievant as follows:

The grievant was issued a Notice of Removal charging him with falsification of his employment application and AWOL. Investigation reveals no foundation for the charges as cited. The grievant states he did not knowingly falsify his employment application and he was prevented from reporting for work ...

The charges are without merit. The removal is punitive in nature and is without just cause.

Expunge the Notice of Removal from all files and reimburse the grievant for all lost wages and benefits plus an appropriate amount of overtime and interest.

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. If the Employer intends to separate an employee during the probationary period for a scheme failure, the employee shall be given at least seven (7) days advance notice of such intent to separate the employee. If the employee qualifies on the scheme within the notice period, the employee will not be separated for prior scheme failure.

B. The parties recognize that the failure of the Employer to discover a falsification by an employee in the employment application prior to the expiration of the probationary period shall not bar the use of such falsification as a reason for discharge.

C. When an employee completes the probationary period, seniority will be computed in accordance with this Agreement as of the initial day of full-time or part-time employment.

***

ARTICLE 16

DISCIPLINE PROCEDURE

Section 1. Statement of Principle

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result

in reinstatement and restitution, including back pay.

Employee and Labor Relations Manual (ELM)

***

661.5 Other Prohibited Conduct

***

.53 Unacceptable Conduct

No employee will engage in criminal, dishonest, notoriously disgraceful or immoral conduct, or other conduct prejudicial to the Postal Service. Conviction of a violation of any criminal statute may be grounds for disciplinary action by the Postal Service, in addition to any other penalty by or pursuant to statute.

.55 Illegal Drug Use

Illegal use of drugs may be grounds for removal from the Postal Service.

***

666 USPS Standards of Conduct

666.1 Discharge of Duties

Employees are expected to discharge their assigned duties conscientiously and effectively.

666.2 Behavior and Personal Habits

Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal personnel be honest, reliable, trustworthy, courteous and of good character and reputation. Employees are expected to maintain satisfactory personal habits so as not to be obnoxious or offensive to other persons or to create unpleasant working conditions.

666.81 Requirement for Attendance

Employees are required to be regular in attendance.

666.82 Absence Without Permission
Employees failing to report for duty on scheduled days, including Saturdays, Sundays, and holidays, will be considered absent without leave except in actual emergencies which prevent obtaining permission in advance. In emergencies, the supervisor or proper official will be notified as soon as the inability to report for duty becomes apparent. Satisfactory evidence of the emergency must be furnished later. An employee who is absent without permission or fails to provide satisfactory evidence that an emergency existed will be placed in a non-pay status for the period of such absence. The absence will be reported to the appropriate authority.

Issue

Did the Employer violate the National Agreement by removing grievant without just cause. If so, what is the remedy?

Discussion

The prime reason for discharge in this case is the charge of falsifying the employment application. There is no question in this case of grievant's awareness of the charges or of their status. Grievant takes the position that he was tried under a procedure whereby, if he behaved himself during his probation, would result in no criminal record. It was therefore his understanding that he was not required to disclose these proceedings in an employment application. The failure to include the information was knowingly made. Grievant states that it was done on the advice of his criminal trial counsel.

On this point, the Union has submitted a portion of the Florida Law Encyclopedia on Criminal Law, 15 Fla Jur 2d Sec. 884, et seq.:

Sec. 884. Adjudication of guilt required

> An adjudication of guilt is necessary to support a sentence, and if there is no adjudication of guilt there is no judgment upon which a sentence can be based.
>
> It has been held that there should be a clear, positive, and definite adjudication by the court of the defendant's guilt, and if a judgment does not show a clear adjudication of defendant's guilt, it is defective. If a judgment does not contain an adjudication by the court of the defendant's guilt of the crime charged, it is not a valid or effective judgment. An adjudication of guilt must be in conformity with the verdict or a plea of guilty on which it is founded. ...

Following this approach, the courts have held that an entry merely showing that the defendant pleaded guilty and that the court "defers the passing of sentence" during good behavior did not constitute a judgment, since a formal judgment of guilt is essential to support a subsequent sentence accompanied by probation. *Shargaa v. State* (1958, Fla) 102 So2d 809, cert. den. 358 US 873, 3 L. Ed 2d 104, 79 S. Ct. 114.

The record of the proceedings in 1983 and 1984, the Grand Theft and Violation of Parole proceedings, respectively, show clearly that adjudication was withheld. That means there was no adjudication as alleged by the Employer. There never was a judgment of guilt. Accordingly, when grievant filled out question 18 of the employment application, he was not adjudicated as guilty of any crime.

The court procedure that was followed has become common in recent years. It is aimed toward first offenders. By pleading guilty, a probationary period is given. If no further difficulty occurs, the court will then seal or ex-

punge the record and there will be no record or conviction. The purpose of developing that procedure is demonstrated by this case. It is to permit those who are recognized as not being basic criminals to rehabilitate themselves and carry on their lives without the negative results of a criminal record, especially in applying for work.

In the meantime, the matter is "pending" in that the record has not yet been sealed. The status is that of a criminal charge without any guilty determination.

The Employer takes the position that this must be reported or the "NO" answer on the employment application is fraudulent. I must disagree. The general, wide-spread usage of this procedure occurs from the high statistical rate of success. To require the report during the probation when it is clearly not required after the probation would fly in the face of the basis of the procedure and the public policy of state.

It is not the failure to report the crime situation which would result in the just cause for discharge. It is the wrongful failure to report it. It is the Employer's duty to prove that the grievant knew or should have known that he had to include the information in the application.

The grievant does not deny knowledge of the situation. His defense is that he honestly failed to include it in the application under the advice of his counsel. Grievant was informed that there was no adjudication of any guilt of crime. Indeed, he testified that the only reason he pleaded

guilty, in the first place, was because the elimination of the criminal record from public view was a superior result than a Not Guilty verdict or other judgment which would result in a public record. Ironically, had grievant pleaded Not Guilty and gone to trial, winning a successful Not Guilty verdict or judgment, he would have been required to report the arrest and record in his application. The mere arrest and trial would have been sufficient for many employers to then deny him employment. By pleading Guilty in the withholding of adjudication proceedings, there is no record by which grievant is denied employment. It was reasonable for him to believe that he was protected from any obligation to report his arrest and charge. Otherwise, what benefit would there be to the whole procedure?

I am fully aware that the Employer wants to be able to check on its applicants so as to make a knowledgeable decision as to hiring. That check includes the public criminal court records. However, the State, itself, limits the Employer in this regard when it seals the records in these cases.

This is not a particularly good case for the Employer to make the argument. It obviously was not interested enough to check out the records at the time it hired grievant. It must be remembered that whether or not grievant includes the contested charges, as long as the record had not been sealed, his record could have been easily found at the time of employment, the same way it was found by the Postal Inspectors while checking grievant's record at the

Postmaster's request.

The question concerning omissions on an application form begins to lose its weight with the passage of time. The avowed purpose of obtaining the information is, as previously stated, a method of determining the question of hire on a knowledgeable basis. After hire, time passes with the better knowledge on the part of the employer by being able to view the employee's actual work. First there is the 90 calendar probation period which gives the Employer broad rights of removal. After the employee passes the probationary period, the Employer can assess his quality as an employee much better by viewing him on the job than by the answers to his employment application.

The Employer initially raised the question of the application by reference to Article 12, Section 1, Clause B of the National Agreement, *supra*. It must be noted that Employer's "failure" to discover the lack in the application is limited to the probation period.

Being so labor-intensive, the Employer is continually hiring large quantities of employees, and without hiring even more people merely to check records, it is almost impossible to make a thorough check of all applicants' records before hire. In this case, grievant was hired March 15, 1986. The traditional method of counting days for limitation purposes is to begin with the next day, March 16. The ninetieth day was June 13, 1986. This is far before the time the Employer dredged up the application as grounds for

discharge.

I do not mean to imply that the Employer is barred from using the application as grounds. I do believe, however, that the specific inclusion of the right during the probation period gives the Employer greater rights than it can expect later. Thus, the contract shows an intent, both as to the merits of the charge, and the review of discipline should an application charge be proven, that the Employer bears a greater burden following the probation period than during it. It thereby follows that an employee who has, in the meantime, demonstrated himself to be a good employee must be given full credit for this fact in the arbitrator's determination. As the concept applies to this case, Mr. Zupo characterized grievant's quality as a "fine employee". This demonstrates above average quality and cannot be ignored.

From a close review of the testimony, an inference arises that management now fears that grievant's arrests, being drug related, presage future employment problems it would prefer to avoid now. This is an example of the broad rights granted under Article 12.1.B during the probationary and the "lesser" rights discussed above. It is now premature to remove or discipline grievant for private acts which have not been shown to affect Employer's reputation.

There can be no fraud so long as the grievant reasonably believed he had no duty to report. Fraud can only occur if the grievant knew or should have known that he had a duty to report the specific facts. The manner grievant

was processed through the criminal courts in 1983, together with the advice of his attorney, created a situation where grievant could reasonably believe that his record was one which need not be reported.

As to the AWOL charge, this too must be disallowed. The Postmaster testified that he had spoken with the grievant and told him that since he had only 24 hours, or three days, of Annual Leave, the balance of any absence which may result from his being in jail at the time would be taken care of by reporting him off on LWOP.

Grievant had every right to believe that this would be conveyed to his immediate supervisor, Mr. Zupo. The usual method of handling absence is for the employee to file a Form 3971 for the Supervisor's approval or rejection. When the employee is not present, it is common for the Supervisor, himself, to make out the 3971. In any event, it is the front-line supervisor who initially determines the nature of the absence. Grievant rightfully expected the Postmaster to convey this to Mr. Zupo. Had the Postmaster done so, no AWOL designation would have been applied, as Mr. Zupo testified that he does not question the Postmaster's directives. Instead, Mr. Zupo was left to his own devices, and a result occurred which, at the hearing, the Postmaster still disagreed with. He testified that the grievant should have been designated as LWOP.

Management also argued that grievant failed to report that he had been arrested on July 4, 1986, and that failure

provides just cause for discharge. I must agree with the Union that I can find no such requirement to report in the National Agreement, including the incorporated manuals under Article 19. Part 666.2 of the ELM contains the "Boy Scout" clause wherein the general nature of an employee's acts are specified:

> ... Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal personnel be honest, reliable, trustworthy, courteous and of good character and reputation. ...

When an employee's private, non-working life brings discredit to the Service, a disciplinary question arises. In this case, after a close examination of the evidence, both by way of testimony and exhibit, I can find nothing which would lead the public to discredit the Service. There were no newspaper or other media coverage of grievant's problems, nor was there any evidence which would indicate the Employer was discredited in any manner.

Grievant's private life is his own. Unless and until the Employer proves that his private life negatively invaded his employment, it has no right to discipline grievant for acts he may commit.

Grievant apparently has a problem in his private life. Neither I nor the Employer have the right to judge him in his private life. I am as bound by the contract as the parties. It is under the National Agreement that I receive my jurisdiction to act. What I may believe as to grievant's personal life and the general desirablity of having him employed is of no moment. Suffice it to say that the char-

ges filed have not been made out with the weight of the evidence. I must accordingly put grievant back to work without loss of contract rights in the meantime and with back pay for the amount he would have earned from the time he was taken off the payroll until his reinstatement.

The remedy as to back pay is set forth in the Employment and Labor Relations Manual. It is presumed that the parties will be able to resolve the remedy within the framework of that document, and they will be required to meet and do so. In the event they are unable to agree on the remedy, the arbitrator will retain jurisdiction of that issue, alone, and will hold a hearing thereon at the request of either party hereto.

AWARD

The grievance is sustained. The grievant shall be reinstated in his job without loss of any contract rights. He shall receive back pay from the time he was removed from the payroll until his reinstatement. The parties shall meet and resolve the remedy in accord with the principles set forth in the Employee and Labor Relations Manual. In the event they are unable to agree as to remedy, I shall reserve jurisdiction solely over that issue. A hearing shall be held thereon at the request of either party hereto.

Respectfully submitted,

William J. LeWinter

William J. LeWinter, Arbitrator
Dated: June 20, 1987