

C-26852
ABC10

National Arbitration Panel

In the Matter of Arbitration)
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)
)
between)
)
)
United States Postal Service) Case No.
) A01N-4A-D 05098663
) A01N-4A-D 05098671
) A01N-4A-D 05098683
) A01N-4A-D 05098702
and)
)
National Association of Letter)
Carriers, AFL-CIO)
)
)
and)
)
American Postal Workers)
Union - Intervenor)

Before: Shyam Das

Appearances:

For the Postal Service: Peter Henry, Esquire

For the NALC: Keith E. Secular, Esquire
 Oriana Vigliotti, Esquire

For the APWU: Anton G. Hajjar, Esquire

Place of Hearing: Washington, D.C.

Date of Hearing: July 14, 2006

Date of Award: January 19, 2007

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VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

Relevant Contract Provisions: Articles 3, 12.1, 16 and 19

Contract Year: 2001-2006

Type of Grievance: Contract Interpretation

Award Summary

The interpretive issue raised in this case is resolved as set forth in the above Findings. The underlying grievances are remanded to the parties to be processed accordingly.



Shyam Das, Arbitrator

BACKGROUND

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The four underlying grievances in this case from the Caribbean District involve essentially identical facts. In 2003 the Postal Service posted a notice (#61030) directed to casuals and transitional employees who had been employed by the Postal Service for a minimum of 180 days, announcing an opportunity to apply for career postal positions in post offices at "Caribbean District, San Juan, PR 00036-9998." The four grievants took and passed the required examination. They then were placed on the hiring register for the Mayaguez installation in the Caribbean District. In April 2004 they were hired off the Mayaguez register as career city letter carriers in that installation. All four successfully completed their 90-day probationary period. These grievances arose in April 2005 when they each received a Notice of Termination of Career Appointment, stating as follows:

You are hereby notified that your employment with the Postal Service will be terminated.... The reasons for this non-disciplinary administrative action are:

At the time of your hiring, you were an applicant on the San Juan register. [This sentence was included in the original April 12, 2004 notice, but evidently was not included in the revised notice issued on April 14, 2004, which superseded the earlier notice.]

Applicants from the San Juan register, including yourself were improperly placed on the Mayaguez hiring register even though that register was not open at the time to applicants. At that time there was no

examination open for the Mayaguez Register. Subsequently, you were improperly hired, effective 4/17/04, from a hiring worksheet generated from the Mayaguez Register, ... for a position in the Mayaguez cluster. This was in violation of postal regulations governing hiring from entrance registers.

In the Caribbean District, conventional hiring registers are separately established for San Juan, Mayaguez, Vieques, Culebra, St. Thomas and Christiansted areas. Each hiring register is distinct and covers hiring opportunities in its specific area only. There was one announcement for San Juan, #61030. This announcement was a Special Opportunity Announcement restricting application to casual and transitional employees who met certain prerequisites.

Based on information from the Office of Inspector General, management conducted an investigation into hiring from Special Opportunity Announcement #61030 for the San Juan Conventional Register. The investigation showed that the only open announcement at the time for casuals and TEs such as yourself was Special Opportunity Announcement #61030 for the San Juan Conventional Register.

As a casual/TE applicant for open announcement #61030, San Juan Conventional register, you were improperly placed on and hired from the Mayaguez Conventional Register.

You have the right to file a grievance under the grievance/arbitration procedure set forth in Article 15 of the National Agreement....

There is no claim that grievants engaged in any wrongdoing. Their placement on the Mayaguez register was an administrative error.

After grievances protesting grievants' terminations were appealed to regular arbitration, the National Association of Letter Carriers (NALC) notified the Postal Service of an interpretive dispute. Specifically: "The Postal Service has taken the position that Article 16 of the National Agreement is inapplicable to the administrative separations at issue. NALC disagrees." The parties were unable to resolve the dispute, and it was appealed to national arbitration by the NALC.¹ The American Postal Workers Union (APWU) has intervened in this arbitration.

A key issue in this case is whether Article 16 of the National Agreement applies to the circumstances of these grievances; that is, does the just cause standard apply? But there is a secondary issue of whether, if grievants' terminations were not discharges subject to Article 16, the Postal Service had authority to remove grievants under the National Agreement?

¹ At the interpretive step, the Postal Service took the position that because grievants obtained employment in an improper manner, the NALC was not authorized to represent them, and that the grievances were procedurally defective. The Postal Service did not pursue that position at arbitration.

Article 16.1 of the NALC National Agreement (the AFWU National Agreement includes the identical provision) provides as follows:

ARTICLE 16 DISCIPLINE PROCEDURE

Section 1. Principles

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.

(Emphasis added.)

At the interpretive step, prior to national arbitration, the Postal Service stated its position on the merits as follows:

...Article 16 of the National Agreement does not apply to the circumstances of these cases. The grievants were not terminated under the just cause provisions of Article 16. Rather, the grievants were separated for the non-disciplinary reason that their hiring did not comport to procedures under federal law and postal regulations.

As noted above, none of the grievants were on the Mayaguez hiring register. Accordingly, they were not eligible for the positions for which they were hired. The Postal Service has the responsibility to correct discrepancies in its hiring process, including the improper employment of the grievants. Separating the grievants was necessary to maintain the integrity of the hiring process.

The NALC does not accept the Postal Service's contention that grievants' appointments violated its hiring regulations, but stipulated to that premise solely for the purpose of adjudicating the interpretive issue presented. The NALC also points out that this case does not require the Arbitrator to decide whether the hiring error could constitute just cause for discharge in the absence of any allegation of misconduct by grievants, because the Postal Service has conceded that grievants were not terminated pursuant to Article 16.

Mangala Gandhi, Manager-Selection, Evaluation and Recognition, testified that Postal Service jobs are highly sought after, and it is critical that the Postal Service maintain the trust of the public in the openness and fairness of its hiring process. She stated that what occurred in this case is "highly irregular". When the Postal Service discovers errors in the hiring process it handles them on a case-by-case basis. It assesses the nature and significance of the error. It looks to the balance of interests, taking into account such considerations as: who has been harmed; whether veterans (with statutory preferences) were harmed; the impact on the public at

large who were not provided the opportunity to apply; the effect on customers (if the best persons were not hired); whether the improperly hired employee is receiving benefits to which not entitled; and whether the effects of the error will be perpetuated throughout the employee's career. The Postal Service then uses its discretion and judgment to take the necessary and appropriate corrective actions in the exercise of its management rights.

Article 3 of the National Agreement provides:

ARTICLE 3
MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

- A. To direct employees of the Employer in the performance of official duties;
- B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;
- C. To maintain the efficiency of the operations entrusted to it;
- D. To determine the methods, means, and personnel by which such operations are to be conducted;

* * *

NALC POSITION

The NALC contends that the Postal Service does not have plenary authority to discharge bargaining unit employees outside the context of the collective bargaining agreement. As an independent establishment of the executive branch of the government of the United States, the Postal Service may exercise only such authority as has been delegated to it by Congress through the Postal Reorganization Act of 1970 (PRA). In Section 1001(b) of the PRA, Congress delegated to the Postal Service the authority to appoint all officers and employees of the Postal Service. The Postal Service's right to "discharge" employees is set forth in Section 1001(e) which confers on the Postal Service certain enumerated management rights, including the right to "discharge...employees" and the right to "relieve...employees from duties because of lack of work or for other legitimate reasons." The NALC stresses that, unlike the right to hire in Section 1001(b), all enumerated rights set forth in Section 1001(e) are subject to the overriding requirement that they be "consistent with...chapter 12 of the [PRA] and applicable... collective bargaining agreements." (Chapter 12 of the PRA sets forth the basic provisions for union recognition and mandatory collective bargaining with the postal unions.) Thus, the NALC maintains, under the PRA, the Postal Service has unilateral authority over hiring, but may only exercise such authority to discharge a bargaining unit employee as it has negotiated with the employee's union.

The NALC argues that the National Agreement does not permit the Postal Service to remove grievants without complying with Article 16's just cause standard. The plain language of Article 16 provides that no employee may be disciplined or discharged "except for just cause". This fundamental tenet of the National Agreement applies to all discharges or removals from service, with certain narrowly enumerated exceptions, none of which apply here. Article 12 of the National Agreement contains the only exception to the just cause requirement of Article 16 in the body of the Agreement. Article 12.1 permits the employer to separate from its employ any probationary employee at any time during the probationary period, and provides that probationary employees shall not be permitted access to the grievance procedure in relation thereto.

The NALC insists that the plain language of Article 16 shows that there is no basis for differentiating between "disciplinary" and "non-disciplinary" discharges, and that all discharges are covered by the just cause standard. Specifically, Article 16.1 states: "No employee may be disciplined or discharged except for just cause..." (Emphasis added.) The NALC asserts that the use of the disjunctive "or" shows that the terms discipline and discharge are separate categories.

In response to the Postal Service's reliance on its management rights set forth in Article 3, the NALC stresses that Article 3 expressly provides that all the rights listed therein are "subject to the provisions of this Agreement", which

includes Article 16. Moreover, the NALC argues, management cannot have it both ways. If non-disciplinary separations are outside the scope of Article 16, then they also are outside the scope of Article 3 which refers to a management right "to suspend, demote, discharge, or take other disciplinary actions against such employees."

The NALC also maintains that the absence in Article 3 of any reference to "relieving" or "separating" employees "because of lack of work or for other legitimate reasons" analogous to PRA Section 1001(e)(3) cannot be dismissed as an oversight by the drafters of the National Agreement. Article 6, which governs layoffs, does contain precisely that reference. Article 6.C.1 defines "layoff" as "the separation of non-protected, non-preference eligible employees...because of lack of work or other legitimate, non-disciplinary reasons." While Article 6 is not relevant to the removal actions at issue here, the NALC stresses that this provision does show, especially read in context with Article 16 and Article 12.1, that the drafters of the National Agreement dealt comprehensively with the topic of separation of employees. Such comprehensiveness, the NALC insists, precludes any finding that management retains a reserved or inherent right to terminate employees in circumstances not covered by the Agreement. Absent a layoff, the National Agreement does not allow the Postal Service to separate an employee through any procedure other than the discharge process set forth in Article 16, which must apply to the circumstances of this case.

The NALC argues that any doubts as to application of the National Agreement are entirely resolved by the plain language of the Employee and Labor Relations Manual (ELM). Section 365 of the ELM details specific procedures the Postal Service must follow with respect to the separation of employees. Section 365.11 provides that "[s]eparations are personnel actions that result in taking the employee off the rolls of the Postal Service." That is what happened in this case. Each grievant was therefore "separated" from employment as defined in the ELM. Section 365.13 provides that a "separation" must be identified by the prescribed term. Moreover, Section 365.32 provides for a standard, recognized procedure applicable to the separation of an employee based on an error in the appointment procedure. Section 365.32 provides as follows:

365.32 Separation-Disqualification

365.321 Applicability

This type of separation applies only to employees who have not completed their probationary period.

365.322 Reasons for Action

Separation-disqualification is an action that results from the failure to meet conditions specified at the time of appointment (such as failure to qualify by conduct or capacity during the probationary period). It may also result from information that, if known at the time of appointment, would have disqualified the employee for the appointment.

365.323 Probationary Period

Separation-disqualification must be effected during the probationary period. Action is initiated at any time in the probationary period when it becomes apparent that the employee lacks capacity for efficient service.

(Emphasis added.)

The NALC insists this exception to the just cause requirement is precisely applicable here. Presumably, had the Postal Service been aware of the grievants' improper placement on the Mayaguez hiring register at the time of their appointment, it would have considered the individuals to be disqualified for the appointments. Here, the Postal Service had clear authority to remove the grievants from duty under ELM 365.323 during their 90-day probationary period. Its failure to do so precludes any further resort to the administrative separation procedure.

The NALC further points out that the hiring regulations cited by the Postal Service do not require that hiring errors be remedied by separation. Indeed, none of the regulations submitted by the Postal Service contain any references to either the consequences of an error in the hiring process or the separation of employees in any circumstances. The Postal Service's expert witness, Mangala Gandhi, conceded this very point, acknowledging that the decision to terminate an employee based on a hiring error is an exercise of management "discretion and judgment".

The NALC also points out that courts consistently have held that the Postal Service's internal hiring regulations are not legally enforceable by individuals who claim they should have been hired under those regulations.

The NALC maintains that the Postal Service's argument that the separation of grievants is necessary to preserve the integrity of the Postal Service's hiring regulations also is belied by numerous prior arbitration awards holding that even where an employee falsifies information on an employment application, and is appointed based on this faulty information, the Postal Service must proceed pursuant to Article 16 in terminating the employee. The Postal Service ignores this established precedent and takes the counterintuitive position that, despite its own culpability in this matter, it somehow has greater discretion to separate the employees than if the employees lied on their employment application.

The NALC contends that several regional or regular arbitration awards, cited by the Postal Service, which ruled that the incorrect appointment of an employee renders the appointment void ab initio are without support in the National Agreement or the law, and defy common sense. Grievants were placed on the Postal Service rolls and undoubtedly were employees covered by the National Agreement. The Postal Service cannot now argue that they failed to attain some metaphysical employee status such that they are not covered by the National Agreement. Further, any argument that an irregular federal appointment is void ab initio runs contrary to over 100 years of

civil service precedents. The court decisions cited by the Postal Service upholding federal employee separations based on erroneous appointments are readily distinguishable because they involved appointments which violated applicable legal requirements, a circumstance not present here.

Finally, the NALC contends that, even assuming, *arguendo*, that the arbitrator were to find that the separation of grievants was justified by the need to correct management's hiring error, that determination, by itself, would not resolve the Unions' Article 16 claim. Management has conceded the absence of just cause, and, in the absence of just cause, the separations necessarily violate Article 16. Grievances based on violations of Article 16 are not limited to requests for reinstatement. The grievants have been injured by a breach of the collective bargaining agreement and, accordingly, are entitled, at the very least, to a make-whole monetary remedy and/or some other appropriate remedy, even if immediate reinstatement is not now available.

APWU POSITION

The APWU contends that only the National Agreement governs this dispute. Nothing in the National Agreement recognizes or authorizes the kind of non-disciplinary removal suggested by the Postal Service. The only provision in the National Agreement addressing the standards for and procedures governing removal are those in Article 16.

Once an employee completes his or her probationary period the employee may be discharged or removed only for just cause under Article 16.1 for conduct occurring during the employee's employment. This arbitrator so ruled in U.S. Postal Service and APWU, Case Q98C-4Q-C 99251456 (2001) (Das Award). Article 12.1.B provides one exception where a permanent employee may be subject to discharge pursuant to Article 16 for an event that occurred prior to completing the probationary period: "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." The APWU argues that applying the recognized rule of contract interpretation that including one thing excludes others, it is clear that this is the only exception once an employee completes the probation period.

Alternatively, the APWU contends that nothing in the ELM authorizes post-probationary "administrative" terminations outside Article 16. The ELM provides for only four types of "involuntary-separations": removal of an employee who has completed the probationary period for cause; separation-disqualification, applicable only to employees who have not completed their probationary period; separation-disability, applicable where an employee's medical condition renders the employee unable to perform the duties of the position and the employee is ineligible for disability retirement; and reductions in force.

The APWU stresses that there is no law or regulation which required these grievants' removal. The Postal Service has pointed to no law which was violated when it appointed these employees to career positions.

The APWU emphasizes that the Postal Service's position in this case does not explain where the discretion it claims comes from and how it is guided in its application. Clearly Article 3 is not the source of such discretion, nor has the Postal Service cited any applicable provision of the ELM. Clearly, the only guiding rule comes from Article 16.

The APWU also notes that if there were individuals on the Mayaguez register who should have been hired instead of grievants, there is nothing to stop the Postal Service from going ahead and hiring them. At worst, the Mayaguez office will end up overstaffed by four city letter carriers. This may impose a financial cost on management, but that cost should be borne by the wrongdoer, not the victims of management's errors.

EMPLOYER POSITION

The Postal Service contends that the PRA and Article 3 of the National Agreement authorize it to effect non-disciplinary separations in the appropriate circumstances. It stresses that the Postal Service has never agreed to limit its right to take non-disciplinary personnel actions. Article 3 empowers the Postal Service to take a broad range of actions including non-disciplinary personnel action by confirming the

Employer's right to hire, promote, retain, direct its employees, and to determine the personnel to conduct its operations. This language empowers the Employer to take a broad range of actions not explicitly listed including separations, unless the unions have obtained a concession limiting that authority. The history, text and structure of the PRA and the labor contracts provide broad authority to management, with specific limitations ~~garnered by the unions through negotiations.~~

A distinct clause in the PRA and Article 3 authorizes the Postal Service to take disciplinary action including "discharge". But, just as decisions not to hire or promote an employee are not disciplinary, the contract also permits the Employer, for example, to decide not to retain an employee in appropriate circumstances. Employee misconduct is not a prerequisite to such non-disciplinary action.

The Postal Service insists that Article 16 does not apply unless the Postal Service alleges employee misconduct. The term "discharge", as is clear from Article 3, applies only to disciplinary separations. An explicit disclaimer is not necessary to exclude non-disciplinary actions from Article 16. It is an enormous and unjustified leap to assert that because personnel actions listed in Article 16 like discussions and suspensions are disciplinary unless the parties exclude them, any personnel action management might take that adversely affects employees is necessarily subject to Article 16. Arbitrator Snow has determined that Article 16 only applies in cases involving employee misconduct. U.S. Postal Service and

APWU, Case No. D90T-4D-D 93009245 (1996) (Snow Award). In that national arbitration case, the arbitrator held that Article 16 did not apply to enforced leave that was not related to misconduct. In another national arbitration case Arbitrator Mittenthal distinguished between emergency suspensions for misconduct, to which Article 16 applies, and those imposed in the absence of misconduct, to which Article 16 does not apply. U.S. Postal Service and NALC and APWU, Case Nos. H4N-3U-C 58637 and H4N-3A-C 59518 (1990) (Mittenthal Award). Moreover, the Postal Service asserts, the Unions' argument for an all encompassing definition of "discharge" is inconsistent with the understanding in the private sector -- which was long established by the time of the first postal collective bargaining agreement -- that an employee separated for non-disciplinary reasons is not discharged. Because Congress created the Postal Service to function on a private sector model of labor relations, private sector decisions provide persuasive authority in support of the Postal Service's argument that "discharge" is limited to disciplinary separations.

The Postal Service asserts that while neither the PRA nor Article 3 explicitly empowers the Postal Service to separate employees, common experience teaches and the contract clearly shows the parties understand the Postal Service's authority to hire, retain, direct its employees, and to determine the personnel to conduct its operations encompasses the full range of personnel actions available to any employer in the absence of an agreement to the contrary. For example, while there is no explicit provision in Article 3 empowering the Postal Service to

lay off employees or subcontract work, the contract includes certain protections should management take those actions. A "layoff" is "the separation of non-protected non-preference eligible employees in the regular work force because of lack of work or other legitimate, non-disciplinary reasons." This demonstrates that the Postal Service's inherent authority to effect non-disciplinary separations is a foundational assumption of the parties' agreements, the exercise of which requires no reference to a specific enumerated right.

The Postal Service also cites bargaining history in support of its position. It notes that in 1978 negotiations the Unions unsuccessfully sought to expand the scope of Article 16 by treating any management action that results in a loss of pay as discipline subject to that provision. Separation is an action that results in the loss of pay. Moreover, in a 1985 national arbitration case, the APWU sought to exclude from Article 12.1.A the separation of probationary employees for non-disciplinary reasons, arguing that Article 12 only prohibits the filing of a grievance alleging that termination was not for just cause under Article 16. Clearly, "separate" as the parties use that word in the contract captures a greater range of personnel actions than "discharge".

The Postal Service maintains that ELM 365 reinforces rather than limits the Postal Service's authority to separate employees for non-disciplinary reasons. It points out that the list of involuntary separations found in ELM 365.3 is not all encompassing. It omits layoffs, which the National Agreement

defines as non-disciplinary separations. ELM 365 lists several voluntary separations, such as resignation and retirement, where obviously the just clause standard does not apply. Among the involuntary separations listed in ELM 365 are disability and death. It would be absurd for the Unions to argue that the just cause standard applies to every involuntary separation including separation due to death. The only involuntary separation applicable to career employees that mentions "cause" is "removal". If the just cause standard applied to all involuntary separations, the ELM would not list three categories of involuntary separation distinct from "removal".

While the Unions argue that it would be ironic if Article 16 applies to removal of an employee who falsifies an application, but not to improper hires where the employee is not accused of misconduct, the Postal Service sees this as merely the uniform application of the general rule that Article 16 applies to the discipline of non-probationary employees for misconduct. Article 16 does not apply if misconduct is not involved. Through negotiations, the Unions have obtained the limitations on management's inherent authority set forth in the discipline article, but, at the same time, the Postal Service has retained a discretion conferred by Congress in circumstances in which the discipline article does not apply.

Both the Postal Service and the Unions have an interest in remedying improper hirings. The National Agreement does not prohibit the Postal Service from taking such remedial action on its own initiative to protect the integrity of the

hiring process. The Postal Service asserts that it is uniquely situated to design a fair, open and merit-based hiring process and to protect the integrity of the hiring process when circumstances warrant. The Unions' position that hiring errors are irrelevant once the employee passes the probationary period, inadequately protects the integrity of the hiring process. By exercising its authority under Article 3 in this case, the Postal Service maintained the fundamental integrity of the hiring process and served the overall public interest.

Although improper hiring cases are unusual, the Postal Service reviews each case based on the specific circumstances presented. It is uniquely suited and empowered to undertake this task because Congress charged it alone with responsibility for all of the interests at stake.

The Postal Service argues that the law applicable to correcting an improper hiring by federal agencies does not apply to the Postal Service. Nevertheless, federal agencies retain a good deal of flexibility in such cases. This law supports the conclusion that the Postal Service may exercise its discretion to correct hiring errors when it discovers them.

Finally, the Postal Service contends that on remand these grievances must be processed as contractual disputes. Under the parties' contracts, non-disciplinary personnel actions are contract claims. As a result, a significantly lower standard of review than just cause applies. It is not necessary in this case to formulate the precise contours of that standard.

However, should the parties resume arbitration at the regular level, the regular level arbitrator must review the personnel actions in issue under the less demanding standard applicable to non-disciplinary actions. In addition, the burden is on the Unions to show that the Postal Service violated the applicable standard.

FINDINGS

Section 1001(b) of the PRA provides that appointments in the Postal Service "shall be in accordance with the procedures established by the Postal Service." For purposes of this interpretive case, it is assumed that grievants' appointments as career city letter carriers were not in accordance with Postal Service procedures. The PRA does not specify what are the consequences of such an occurrence. As the Unions point out, no statute or regulation has been cited which mandates termination of Postal Service employees whose hire is not in accordance with applicable procedures.

There is no dispute that the terminations at issue were not disciplinary in nature. There is no claim of any misconduct by grievants either in the hiring process or thereafter. Both the Mittenthal Award and the Snow Award support the propositions that Article 16 relates to discipline and that discipline involves wrongdoing or misconduct. For present purposes, however, it is sufficient to conclude only that Article 16 contemplates that discipline will only be

imposed as a result of, or in response to, some conduct by the employee.

The Unions stress that the Mittenthal and Snow Awards involved emergency suspensions and enforced leave, respectively, and not separation or termination, and that Article 16.1 uses the disjunctive "or" in stating: "No employee may be disciplined or discharged except for just cause...." Therefore, the Unions argue, "discharge" is not restricted to disciplinary discharges. But Arbitrator Snow's interpretation of Article 16.1 equally applies to both discipline and discharge as those terms are used in that provision. He stated:

Here is the point. The parties have used a general term, namely, "discipline," and joined it with a number of specific terms such as intoxication, pilferage, incompetence, and insubordination. The general term of discipline will be deemed to include only things that are like the specific examples. While "enforced leave" is not listed as a type of discipline in the agreement, it may be considered a disciplinary action if it is similar in character to the types of actions specifically set forth as examples in the agreement. In other words, although enforced leave can be characterized as a negative action against an employee, does the term involve elements of misconduct which are generally present in the other examples listed in the agreement?

The types of employee actions specifically set forth in Article 16.1 are examples of what may constitute just cause without which no employee "may be disciplined or discharged."

Moreover, in Article 3.B, which precisely tracks the language in Section 1001(e)(2) of the PRA, the parties refer to the Postal Service's right "to suspend, demote, discharge, or take other disciplinary action," which seems to include "discharge" as a subset of "disciplinary action".

The APWU reads too much into the Das Award when it asserts that it already has ruled on the matter of whether a non-disciplinary termination or removal is subject to the just cause requirement in Article 16.1. The Das Award held that Article 12.1.A denies a probationary employee access to the grievance procedure to challenge a separation on the grounds of alleged noncompliance with the procedural requirements in ELM 365.32 for separating an employee who still is in the probationary period. It was in that context that I stated:

The Unions, of course, are correct in asserting that there must have been a separation before the end of the employee's probationary period in order for Article 12.1.A to apply. Absent such a separation, the probationary employee becomes a permanent employee and can only be discharged or removed for just cause in accordance with Article 16. The discharge of a permanent employee, in contrast to the

separation of a probationary employee, is subject to the grievance-arbitration procedure.

(Emphasis added.)

The question of a non-disciplinary termination of an employee who has completed the probationary period was never raised in that case, and the quoted language was not written with any thought to the issue presented in the present case.

I am not persuaded by the Unions' argument that the Postal Service's authority to separate employees is limited to the right to discharge employees for just cause in accordance with Article 16 or during their probationary period in accordance with Article 12.1. Section 1001(b) of the PRA authorizes the Postal Service to establish procedures for appointing employees. Under Section 1001(e), the Postal Service has been granted the right "to hire...and retain" employees in positions with the Postal Service, in addition to its right to "suspend, demote, discharge or take other disciplinary action against...employees." Section 1001(e) also grants the Postal Service the right to relieve employees from duties "because of lack of work or for other legitimate reasons" and the right to "maintain the efficiency" of its operations. Taking appropriate non-disciplinary administrative action, including separation, to protect the integrity of its hiring process is not beyond the broad scope of these delineated rights. And the requirement in Section 1001(e) of the PRA that the Postal Service exercise these rights "consistent with...applicable...collective bargaining agreements" does not require that every application

of those rights must be affirmatively spelled out in such agreements, any more than Article 3 of the National Agreement requires that every application of the management rights set forth in that provision must be spelled out in "applicable laws and regulations" in order to be "consistent" with them. What the Postal Service cannot do in exercising its management rights is act contrary to other terms of the National Agreement or applicable laws and regulations.

That is not the end of the matter, however. Under Article 19, applicable provisions of the ELM that directly relate to "working conditions" and are not inconsistent with the National Agreement "shall be continued in effect", except as they are changed in accordance with Article 19. There is no question that the action protested in each of these grievances was a "separation" as defined in ELM 365.11:

Separations are personnel actions that result in taking the employee off the rolls of the Postal Service.

Furthermore, ELM 365.13 provides:

A separation from the service must be identified by the prescribed term. Care must be taken to use the term appropriate to the case, (e.g., death, removal, resignation). Standard procedures and terminology must be used in preparing personnel action forms.

Section 365 of the ELM, thus, is comprehensive; it purports to cover all sorts of separations. These include voluntary separations -- resignation, transfer and retirement -- and involuntary separations -- removal, disqualification (during probation period), disability, reduction in force and even death.

Clearly, the separations at issue were involuntary and did not involve disability, reduction in force or death. They can be viewed as disqualification, but they did not occur during the probationary period. Therefore, ELM 365.32 does not apply because "separation-disqualification" provided for in that section only applies to employees who have not completed their probationary period. Moreover, the fact that the Postal Service could have terminated grievants under this provision during the probationary period because of a hiring error -- or just about any other reason the Postal Service deemed to be disqualifying -- does not mean the Postal Service necessarily is barred from separating them under another provision in response to a hiring error brought to light only after the end of the probationary period, provided it meets the requirements of that provision.²

² Similarly, I do not view the provision in Article 12.1 of the National Agreement -- "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." -- as barring the Postal Service from taking non-disciplinary separation action in response to hiring errors not involving misconduct by the affected employee. But, as the Unions argue, it would be anomalous for the Postal Service to have to establish just cause to terminate an employee who lied in the application process, but to have an unfettered

That leaves only "removal" under ELM 365.31 as a possible basis for involuntary separation of an employee who has completed the probationary period, but whose appointment/hire subsequently is determined not to have been in accordance with Postal Service procedures. Section 365.311 provides the following definition:

Removal is an action involuntarily separating an employee, other than an employee serving under a temporary appointment or a career employee who has not completed the applicable probationary period, for cause.

This definition is broad enough to cover grievants' terminations, which certainly are removals. (Cf. Miller v. United States, 717 F. 2d 109 (3rd Cir. 1983) at 113.) And "for cause" need not refer only to the "just cause" standard in Article 16. For instance, in the Mittenthal Award the arbitrator concluded that emergency action under Article 16.7 that constitutes discipline for alleged misconduct is subject to the "just cause" test in Article 16.1. But if management takes emergency action that is not prompted by misconduct, and hence is not discipline, Arbitrator Mittenthal held management need only show "reasonable cause."³ This is not to suggest that

right to terminate an employee for a hiring error not involving any fault on behalf of the employee.

³ Arbitrator Mittenthal further pointed out that even application of the "just cause" standard may vary depending upon the particular disciplinary right being exercised.

"reasonable cause" is or is not the appropriate requirement to be applied to the present separations, but only to show that the concept of "for cause" need not be equated to "just cause" as that term is used in Article 16.1, if management's action is not a disciplinary action covered by Article 16.1.

A removal under ELM 365.311 must be "for cause". If it is disciplinary in nature, it is subject to the "just cause" standard in Article 16. But even if non-disciplinary, the Postal Service rightfully must carry the burden of establishing "cause" to remove an employee who has completed the probationary period.⁴ Just what is required for the Postal Service to show "cause" for a non-disciplinary removal based on an administrative hiring error is not before me.

I note, however, that at least some of the regular or regional Postal Service arbitration awards cited by the Postal Service, in support of its contention that non-disciplinary terminations for errors in the hiring process are not subject to

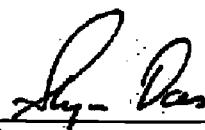
⁴ As I read the private sector arbitration decisions cited by the Postal Service, in support of its position that an employee separated for non-disciplinary reasons is not "discharged," the employer still has to justify the separation. None of those cases involved terminations justified on the grounds that the employee's hire was not in accordance with the employer's hiring policies, and it is difficult to conceive of a case where an arbitrator would uphold such a termination after the probationary period in the private sector. Obviously, however, the appointment to a permanent position in the Postal Service, like federal or other public sector employment, involves considerably different interests.

the "just cause" requirement in Article 16.1, conclude that the appointments in question were void ab initio. Analogous cases in the federal sector do not appear to take such an approach unless the appointment was made in violation of an absolute statutory prohibition. Perhaps more importantly, the Postal Service, in effect, acknowledges that, at least where the appointment is not illegal, the appointment of an employee that does not comport to the Postal Service's hiring policies is not void ab initio, when it claims the right to exercise its discretion and judgment to determine whether termination or some other action is appropriate.

The Postal Service has convincingly explained the importance of maintaining the integrity of its hiring process and the public's perception of the fairness of that process. The Postal Service insists that it is uniquely situated to protect the integrity of the hiring process when circumstances warrant. But it needs to demonstrate that, taking into account all relevant interests and other factors, removal was "for cause," in order to comply with the applicable provisions of ELM 365.

AWARD

The interpretive issue raised in this case is resolved as set forth in the above Findings. The underlying grievances are remanded to the parties to be processed accordingly.


Shyam Das
Shyam Das, Arbitrator