

REGULAR ARBITRATION PANEL

28654

In the Matter of the Arbitration *

between: * Grievant: P. Armes

United States Postal Service * Post Office: Lakeland, FL

and * USPS Case No: H06N-4H-D 09346279

National Association of * NALC Case No: LK130907

Letter Carriers, AFL,CIO * 09-143579

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Deborah K. Morley

For the Union: William Sullivan

Place of Hearing: Postal Facility, Lakeland, FL

Date of Hearing: January 12, 2010

Record Closed: January 19, 2010

Date of Award: February 16, 2010

Relevant Contract Provision: Article 16

RECEIVED

Contract Year: 2006

FEB 26 2010

Type of Grievance: Discipline

VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

Award Summary:

The Grievant was issued a Notice of Removal after deliverable mail for his route was allegedly found in the waste bin. The Arbitrator found the due process rights of the Grievant were clearly violated. On that basis the instant grievance is sustained and the Grievant shall be made whole.

JUDITH R. WILLOUGHBY, NALC
National Business Agent

FEB 19 2010



Lawrence Roberts, Panel Arbitrator

Region 9
RECEIVED

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 12 January 2010 at the postal facility located in Lakeland, FL beginning at 9 AM. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a tape recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

The Grievant in this case is employed as a Letter Carrier at a Lakeland, FL Postal facility, the Southside Branch. The Grievant is an eleven year veteran of the Postal Service, the last eight years being spent as a Letter Carrier.

On or about 11 August 2009, the Grievant received the following Notice of Removal letter:

"You are hereby notified that you will be removed from the Postal Service on September 26, 2009.

The reason for this removal action is:

UNSATISFACTORY PERFORMANCE-FAILURE TO FOLLOW INSTRUCTIONS

The record reflects that on Saturday, July 25, 2009, you were assigned to deliver Route #72. The record further indicates you were responsible for the delivery of a Priority Mail item with delivery confirmation # 420 33813 9101 6047 3430 1181 9287

96. Investigation reveals that during a check of the hampers outside the building after you left for the street, Manager Baerhold discovered the above mentioned Priority mail item under the flat tubs in the hamper. Although the item was brought out to the street for you to deliver, it does not negate the fact you failed to check under the flat tubs for any mail as instructed.

An investigative interview was conducted with you on August 6, 2009, regarding the above cited incident. During the investigative interview you were unable to provide a satisfactory explanation for your actions. You further acknowledged that you are well aware that you are to check under the flat tubs in your parcel tub daily to insure that there is not any mail that might have slipped under the tubs.

Postal employees are expected to discharge their assigned duties conscientiously and effectively, and to obey the instructions of their supervisors. As indicated above, you have failed in this regard. Your actions are considered a serious offense, and are inconsistent with Part(s) 665.13 and 665.15 of the Employee and Labor Relations Manual and will not be tolerated..

In reaching this decision, I considered the seriousness of your actions. Your continued disregard for performing your job in a satisfactory manner for which you were hired and the possibility of lost revenue due to the customer losing faith in the integrity of the Postal Service to provide the service for which the customer paid for it unacceptable. Because of your actions, I have lost all confidence in you to effectively perform your duties as a Postal employee. You have severed the employee/employer trust necessary in a working relationship.

A review of your record indicates the following:

You were issued a Letter of Warning for Unsatisfactory Performance-Failure to Follow Instructions, dated October 5, 2006.

You were issued a Notice of Seven (7) Day no Time Off Suspension dated January 23, 2007 for Unsatisfactory Performance.

You were issued a Notice of Fourteen (14) Day No Time Off Suspension dated June 30, 2008 for Unsatisfactory Performance-Improper Conduct.

You were issued a Notice of Fourteen (14) Day No Time Off Suspension dated September 3, 2008 for Unsatisfactory Performance."

The above Letter prompted the filing of the instant grievance. The Employer claimed the Notice of Removal was issued with just cause while the Union does not believe there to be any basis for the Removal action.

The Parties were unable to resolve the dispute mentioned above.

It was found the matter was properly processed through the prior steps of the Parties Grievance-Arbitration Procedure of Article 15, without resolve. The Step B Team reached an impasse on 22 September 2009. Therefore, the matter is now before the undersigned for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. Oral closing arguments were made by the respective Advocates. The record was closed 19 January 2010 following receipt of arbitral cites from the Employer.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.
2. Notice of Removal Package
3. ELM § 375.2

COMPANY'S POSITION:

The Service believes the evidence will show the presence of just cause in this case.

Management notes the Grievant has been issued previous corrective disciplines for the same thing. The underlying charge, the Employer asserts is exactly the same, that being, Failure to Follow Instructions.

The Service insists the Union's defense in this matter weaves a tale of conspiracy and callous behavior on the part of Management. In the view of the Agency, this alleged conspiracy is aimed at an unsuspecting innocent bystander who made a simple error and should not fall victim to this conspiracy.

The Employer insists the evidence will show that the Grievant, despite Management's previous attempts to correct, continued to follow a path of his own making. According to the Postal Service, Management has given the Grievant numerous opportunities to correct the deficiencies he displayed, however, the Grievant has not taken heed of or paid attention to the warning signs along the way.

It is the argument of the Agency that the Union would like to lay the burden on Management and claim that Management has an obligation far greater and beyond, than that of the Grievant to complete assigned duties conscientiously and effectively.

Management points out that following the instructions of Supervisors and Managers is a requirement, not an option.

Management believes the arbitrator will have no other avenue than to uphold the decision of Supervisor Lorenzato and deny the grievance in its entirety.

UNION'S POSITION:

The Union argues the Employer's burden in this case requires the use of clear and convincing evidence to meet the just cause standard of Article 16. It is the Union's claim the evidence in this case will not meet that just cause standard.

The Union claims the evidence will clearly illustrate that a proper investigation was not conducted in this case. Furthermore, the Union insists the Grievant's right to due process was violated.

It was suggested by the Union that the Manager involved in this case was not only the sole witness to the alleged event, but was also the concurring official and the Formal A Representative.

In the Union's view, this procedural due process issue alone should be fatal to Management's case. The Union contends the Manager could not have remained objective throughout the alleged investigation, from beginning to end.

Regarding the merits, the Union claims the evidence in this case will be unable to prove the Grievant acted both willfully and intentionally in committing this minor infraction. The piece of mail that was allegedly found under a piece of plywood, according to the Union, could have been placed there by Management, or another Carrier in this case, even after the Grievant had left for his route on the day in question.

The Union claims the evidence in this case will also prove that Management has attempted to remove the Grievant under false pretenses in the past.

The Union asks the instant grievance be sustained and the Grievant be made whole in all respects.

THE ISSUE:

Did Management have just cause to issue the Grievant a Notice of Removal. If not, what is the proper remedy?

PERTINENT CONTRACT PROVISIONS:

**ARTICLE 16
DISCIPLINE PROCEDURE**

SECTION 1. Principles

DISCUSSION AND FINDINGS:

In this matter, the Union alleges, as a procedural matter, the due process of the Grievant was violated by the Employer. The Union's prerequisite is that a single supervisor acted as "judge, jury and executioner." And to that end, I agree. Therefore, the instant grievance will be sustained, based solely on the due process argument.

In my considered opinion, controlling is the fact that, a lone Management Employee was able to, almost single handedly, control destiny in this matter.

First, the due process argument of the Union was easily proven by the Joint 2 Exhibit alone. The concurring Management Official of the 11 August 2009 Notice of Removal letter was also the Employer's Step A Representative. In addition, that same person was the single witness to the event which brought rise to this grievance.

Any type of discipline certainly mandates concurrence. This is a basic concept of any just cause provision. And I was not convinced there to be any concurrence in this case.

In the language of Article 16.8, concurrence references that the findings and determination of a manager or supervisor is similar when viewed through a different lens. In fact, the negotiators went so far as providing a precise method of concurrence in facilities with twenty or less Employees.

Yet in the instant case, the Employer did not deny the originator of the discipline, that being the Manager that discovered the piece of mail, also acted as the concurring official of the 11 August 2009 Notice of Removal letter. In addition, that same official was the Employer representative at the Step A meeting.

The Employer obviously opposed the due process argument of the Union. In support of their position, Management cited the following Opinion of **Arbitrator Jacqueline Drucker**, extracted from Case Number K98C-1K C 00229363:

"Neither Article 16 or Article 15, Section 2, states a restriction on the functions as argued by the Union. In one award cited by the Union, the arbitrator asserts that there is no chance that a management representative who already had concurred in the discipline will be objective at Step 2. Article 15, Step 2, however, does not require pure objectivity. This occurs at arbitration. Moreover, the Union may present at Step 2 additional information of which the designee was not aware when he or she concurred in the discipline. It is entirely reasonable to expect that, upon learning of compelling additional information at Step 2, a concurring official would be willing to reverse the prior decision in which he or she concurred."

Further, even if this arbitrator were to construe this action as a breach of due process, which she does not, it is clear from the awards cited by the Union that even those arbitrators who have found this situation problematic did not consider it to be a fatal procedural error. For these reasons, the Arbitrator finds the Union's procedural challenge to the Notice of Proposed Removal and the denial of the grievance at Step 2 without merit."

I respectfully disagree with Arbitrator Drucker on several fronts. Article 15 is not the controlling venue, instead, the language of Article 16.8 is more applicable to the instant case. But significant is the fact that it is not human nature for an individual to overturn their own decision, even in the face of additional evidence. To that end, I am in direct opposition to the above Opinion. And in my view, the chief negotiators recognized this fact and inserted the language of Article 16.8 for the very reason mentioned above.

I have decided many postal discipline cases involving due process. My decisions have been consistent, in that, any showing that due process rights has been violated are always fatal to the Employer's case.

Article 16.8, Review of Discipline demands concurrence. The Parties Joint Contract Administration Manual even goes on to provide the following:

"Concurrence is a specific contract requirement to the issuance of a suspension or a discharge. It is

normally the responsibility of the immediate supervisor to initiate disciplinary action. Before a suspension or removal may be imposed, however, the discipline must be reviewed and concurred in by a manager who is a higher level than the initiating, or issuing, supervisor. This act of review and concurrence must take place prior to the issuance of the discipline. While there is no contractual requirement that there be a written record of concurrence, management should be prepared to identify the manager who concurred with a disciplinary action so he/she may be questioned if there is a concern that appropriate concurrence did not take place.

For additional information on the 'Review of Discipline' section, see National Arbitration (Eischen) E95R-4E-D-01027978, December 3, 2002, C-23828. (Note that this is a NRLCA case. The NRLCA's 'Review of Discipline' is Section 16.6 and requires written concurrence.)"

In fact, one of the Employer cites included the 3 December 2002 National Award mentioned above. Interesting was the fact that Arbitrator Eischen found the Agreement to be violated "if there is a joint decision by the initiating and reviewing officials to impose a suspension or discharge." Obviously, had the Employer read that decision, this matter may very well have been settled prior to arbitration.

The initiating official, the Manager who discovered the piece of mail, was the same person that concurred in the removal. Additionally, that very same person was the Employer's Step A official. The same Manager initiated the action,

concurred in the removal and also acted as the Step A representative. This fact demands repetition.

The Grievant was clearly placed at a disadvantage. The entire purpose of concurrence is to provide a fresh set of eyes, albeit a different lens, in which to consider the facts of the case. This is a basic concept of the due rights principle and, on a larger scale, part and parcel to the just cause requirements of Article 16.

Whether or not minds would have been changed is not the issue. Paramount is the fact that such an opportunity never arose. And based on the unique facts of this case, the Grievant's due process rights were certainly violated. The actions of the Manager in this case violated a basic premise of just cause. As the Union argued, a single Manager acted as judge, jury and executioner. The instant grievance is sustained for that reason.

Therefore, the 11 August 2009 removal letter will be set aside and expunged from the Grievant's record. Additionally, the Grievant shall be made whole in all respects.

AWARD

The grievance is sustained and the Grievant shall be made whole.

Dated: February 16, 2010
Fayette County PA