

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration)
between)
UNITED STATES POSTAL SERVICE) Case Nos. B11M-1B-C 16189293
and) J11M-1J-D 16441426
NATIONAL POSTAL MAIL HANDLERS)
UNION, AFL-CIO)

BEFORE: Shyam Das

APPEARANCES:

For the Postal Service: Lucy Coolidge, Esq.
Brian M. Reimer, Esq.

For the NPMHU: Matthew Clash-Drexler, Esq.

Place of Hearing: Remote Video Conference

Date of Hearing: June 2, 2020

Date of Award: October 14, 2020

Relevant Contract Provisions: Articles 15 and 16 and
MOU Re: Mail Handler Assistant Employees

Contract Year: 2011 and 2016

Type of Grievance: Contract Interpretation

Award Summary:

As set forth in the above Findings, discipline issued to an employee while employed as a noncareer Mail Handler Assistant (MHA) may not be considered or cited in determining whether to issue discipline to the employee after his or her conversion to full-time career status.

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Shyam Das, Arbitrator

BACKGROUND

B11M-1B-C 16189293

J11M-1J-D 16441426

The issue in this national level interpretive dispute is whether discipline issued to an employee while employed as a noncareer Mail Handler Assistant (MHA) may be considered or cited in determining whether to issue discipline to the employee after his or her conversion to full-time career status, or whether the noncareer employee's disciplinary record is eliminated and his or her record starts anew upon conversion and appointment to the career position.

The parties have consolidated two Step 4 appeals in which full-time career Mail Handlers faced disciplinary action -- in Nashua, New Hampshire and Milwaukee, Wisconsin, respectively -- and where the disciplinary action cited infractions and disciplines incurred during the employee's time as an MHA.

MHAs were established by an interest arbitration award issued by Arbitrator Herbert Fishgold in February 2013 and incorporated into the 2011-2016 National Agreement.¹ MHAs are noncareer bargaining unit employees who are hired for terms of 360 days with a break in service of five days if reappointed. When full-time career Mail Handler vacancies arise, MHAs are converted to fill the vacancy in the order of their relative standing on an MHA roster which they are placed on in the order of their initial appointment in the installation.

The parties' Memorandum of Understanding Re: Mail Handler Assistant Employees (MHA MOU), as set forth in the 2016-2019 National Agreement, includes the following provisions:

3. Other Provisions

A. Article 15

* * *

3. The separation of MHAs upon completion of their 360-day term and the decision to not reappoint MHAs to a new term are not grievable, except where it is alleged that the decision to not reappoint is pretextual....

¹ Earlier, in 2011, the Postal Service and the APWU negotiated the equivalent Postal Support Employee (PSE) noncareer position, and an NALC/Postal Service interest arbitration award created the equivalent City Carrier Assistant (CCA) position.

MHAs may be disciplined or removed within the term of their appointment for just cause and any such discipline or removal will be subject to the grievance arbitration procedure, provided that within the immediately preceding six months, the employee has completed ninety (90) work days, or has been employed for 120 calendar days (whichever comes first) of their initial appointment.

In the case of removal for cause within the term of an appointment, a MHA shall be entitled to advance written notice of the charges against him/her in accordance with the provisions of Article 16 of the National Agreement.

4. Discipline for an MHA who does have access to the grievance-arbitration procedure does not generally have to be issued in the same progressive manner as discipline issued to a career employee. However, an appropriate element of just cause is that discipline should be progressive and corrective in nature rather than punitive. When management removes or otherwise disciplines an MHA, determining whether the disciplinary action taken is appropriate must be based on the individual facts and circumstances of each case.

Bruce Lerner, General Counsel for the NPMHU, testified generally about the differences between MHAs and career employees. He pointed out:

MHAs have a different pay scale. They really just have a pay rate. They get no retirement, little health insurance, very little leave. Their schedules are unfixed. They really basically are a separate category of employees in many, many ways. The ways have changed over the years and the negotiations have changed those ways, but coming out of the 2011 contract...there were all sorts of issues about how the MHAs would get implemented, and that led us to extensive bargaining over those issues in 2016 and '19.

In 2016 negotiations, one of the Union's proposals was to include in Article 16 (Discipline Procedure) the following provision:

The disciplinary record of an MHA employee shall be removed from his/her file upon conversion to career status and may not be cited or considered in a subsequent disciplinary action against that employee.

Lerner testified that he "stated on the record that we were proposing this to clarify our understanding of what the national agreement already meant." He noted that by that time the issue had arisen in local grievances and that the NPMHU was "winning the issue in regional arbitration," as was the APWU.²

Patrick Devine, Manager of Contract Administration for the NPMHU contract, was the Postal Service's chief spokesperson in 2016 bargaining. He testified that he did not remember the Union claiming it already had the right to have MHA discipline expunged prior to its proposal or stating that the purpose of the proposal was to clarify existing contract language. (He added that there was no language to clarify.) He said he was aware there might have been some grievance activities, but there had been no request to move the issue to the national level as an interpretive issue.

The issue came up again in 2019 negotiations, but there is no dispute that by then the grievances in the present case had been appealed to arbitration at the national level.

Lerner stressed that the issue here is what happens if, after conversion to a career position, an employee engages in conduct that management determines justifies discipline and the Postal Service seeks to cite or rely on discipline issued to the employee prior to conversion. The Union concedes that if an MHA is issued a notice of removal, which the employee challenges, and then is up for conversion, the employee does not acquire career status prior to the removal action being resolved. Devine maintained, however, that the general practice in such circumstances has been to go ahead with the conversion.

In 2015 I issued a national level award in a grievance filed by the NALC involving the right of former CCAs to use annual leave following their conversion to full-time career status. The NPMHU and the APWU both intervened in that arbitration. Case No. Q11N-4Q-C 14239951, hereinafter referred to as "the 2015 arbitration." At issue in that case was the

² The Union cites an NPMHU regional arbitration award, Case No. B11M1BD15279427-N15084 (Thomas July 20, 2016).

requirement in ELM Section 512.313 that: "new employees are not credited with and may not take annual leave until they complete 90 days of continuous employment...." The Unions argued that CCAs (and MHAs and PSEs) are not "new employees." The Postal Service contended that this ELM provision applies only to new career employees. I upheld the Postal Service position.

UNION POSITION

The National Agreement is silent on whether the Postal Service may consider or cite to discipline of a noncareer MHA when determining whether to issue discipline to the employee after conversion to career status. The Union argues, however, that review of the National Agreement as a whole, confirms that the parties' did not intend MHA discipline to carry over to career employment.

ELM Section 421.41 recognizes that a "career appointment" is a "new hire for an appointment without time limit...that confers full employee benefits and privileges." The ELM's declaration that an MHA converted to a career appointment is a "new hire," the Union asserts, is confirmed by a review of the National Agreement. When an MHA is hired into a career position, the employee: has no seniority; receives no credit for any service as a noncareer MHA for placement on the salary schedule; is not permitted to carry over any annual leave -- but instead such leave must be paid out as terminal leave; and has no service credit for retirement purposes or for leave accrual. Moreover, as held in the 2015 arbitration, time as an MHA does not count for satisfying the 90-day qualifying period to utilize annual leave.

The Union also points to unchallenged testimony of its General Counsel, Bruce Lerner, that in both 2016 and 2019 bargaining the Postal Service repeatedly stressed the importance of maintaining the demarcation between noncareer and career to avoid legal challenges to their separate treatment for purposes such as participation in federal retirement and health insurance programs. Not surprisingly, the Union asserts, where the parties wanted

to depart from the general rule that career employees were "new hires" without a link to their noncareer appointment, they did so expressly.³

The Union contends that, consistent with the 2015 arbitration, it would be improper for the Postal Service to discipline a career employee by relying upon prior discipline imposed under a different set of rules and standards than those applicable to career employees, including the full protections of just cause and the disciplinary procedures set out in Article 16. The Union stresses that this is particularly true in the two grievances leading to this case, both of which involved attendance issues. MHAs have unfixed schedules and reduced leave, as well as lower standards for "just cause," which may well have contributed to the underlying attendance issues.

The Union adamantly rejects the Postal Service's claim that the NPMHU is attempting in this case to achieve in arbitration what it failed to achieve in bargaining. During bargaining for the 2016 and 2019 contracts, the NPMHU made, and later withdrew, proposals seeking to prohibit the carryover of MHA discipline. Notably, by the spring of 2016, when the parties were in negotiations, there was an ongoing dispute between the parties on this issue. Not only had the Union filed numerous grievances, including the two at issue here, but the NPMHU had prevailed in regional arbitration on this issue -- as had the APWU. Lerner credibly testified that in both rounds of bargaining he stated on the record that the purpose of the proposal was to clarify the National Agreement to conform to the Union's position as to what it already meant.

The Union also rejects the Postal Service's arguments that barring the Postal Service from considering discipline imposed while an employee was an MHA is impractical or

³ The Union points to the following instances where linkage between noncareer and career appointments is set out in the National Agreement: (1) relative standing of MHAs hired as career employees on the same day is based on service as an MHA; (2) MHAs who have successfully completed a 360-day term are not required to serve a probationary period when hired for a career appointment; (3) dues deduction authorization forms stay in effect, subject to a proviso; (4) time as an MHA is counted for determining FMLA eligibility; and (5) MHA time is counted for the lock-in period for transfers from one postal installation to another.

unreasonable. In particular, the NPMHU conceded at arbitration that in the rare case where a removal is pending at the time of conversion, the MHA is not going to get a career position unless that removal is overturned.

POSTAL SERVICE POSITION

The Postal Service contends that, in the absence of specific contract language addressing the issue in this case, an arbitrator should apply the long-held principle of "just cause" to gauge the appropriateness of management's disciplinary actions. The concept of just cause has long been fundamental to contracts between the parties. As stated in Article 16.1 of the National Agreement, "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...."⁴ Application of just cause necessarily must be highly fact-specific, and any deciding party must be able to consider the totality of the circumstances. See USPS and NALC, Case No. NC-NAT-16, 285 (Garrett 1979). The Postal Service insists that regional arbitrators are more than equipped to consider the facts and circumstances of each case and employee, and determine if consideration of that individual's MHA record is appropriate. Just cause, the Postal Service argues, demands that arbitrators have that flexibility. Automatically absolving an employee of their record taints not only the principle of just cause, but the purpose of progressive discipline.

The Postal Service maintains that the 2015 arbitration case can be distinguished from the present case because it dealt with the interpretation of very specific ELM handbook language -- not the absence of any language. A blanket application of the 2015 award misses the nuance that interpretation deserves.

The Postal Service also contends that the Union is attempting to gain rights through arbitration that it was unable to achieve in bargaining. In 2016, the NPMHU made a proposal to achieve what it is seeking in this arbitration -- expungement of records of an employee upon conversion from MHA to career. Postal Service negotiator Patrick Devine

⁴ Likewise, the MHA MOU provides for application of just cause elements in discipline of MHAs.

testified he had no recollection of hearing the Union state that it considered its proposal to be a clarification proposal as Lerner testified. Moreover, Devine testified that at the time he received the 2016 proposal he had not previously been aware of any Union position, including in a local grievance, that mail handlers already had expungement rights. The Postal Service stresses that if the Union previously had understood that MHA records were to be expunged upon conversion to career, there would have been no need to make the changes it proposed.

The Postal Service argues that adopting the Union's position would lead to unworkable and absurd results. It stresses that when a career vacancy opens up, management is required to convert an MHA based on their relative standing. It might be that, as in one of the underlying grievances, an MHA is converted when on the brink of being issued a Notice of Removal. In that case, it makes no sense that the employee start with a clean slate. The Postal Service asserts:

If the newly converted employee continues to have attendance issues, management would have to start at square one in implementing progressive discipline. This would be true even though the employee had actual notice and opportunity -- during his time as an MHA -- to correct the offending behavior. That is to say, he already knew that such absences were unacceptable, and management had already attempted to deter him from such behavior with gradual discipline.

Additionally, while employees who do not improve their attendance work their way through the disciplinary process *for a second time*, management may be forced to make on-the-spot adjustments to preserve operational integrity and function, possibly placing additional burdens on the employee's coworkers.

The Postal Service also points to certain positive vestiges of employment that carry over upon conversion to career. For example on-the-job training which is not repeated upon an MHA's conversion to career. Similarly, when individuals are converted, they bring their relative standing, vis-à-vis others converted at the same time. It argues this only emphasizes that newly converted career employees are not "brand new persons."

FINDINGS

Article 16 of the National Agreement addresses Discipline Procedure. It provides:

Section 16.1 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.... Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement....

The parties' Contract Interpretation Manual further elaborates:

Corrective Rather than Punitive

The requirement that discipline be "corrective" rather than "punitive" is an essential element of the "just cause" principle. In short, it means that for most offenses management must issue discipline in a "progressive" fashion, issuing lesser discipline (e.g., a letter of warning) for a first offense...and a pattern of increasingly severe discipline for succeeding offenses (e.g., short suspension, long suspension, discharge)....

MHAs who convert to career status are hired as "new employees." ELM Section 421.41 includes the following description:

- a. Career appointment -- a new hire for an appointment without time limit requiring the completion of a probationary period that confers full employee benefits and privileges. The term applies to (a) new employees, (b) former employees who are being reinstated, (c) employees transferring from federal agencies, and (d) current Postal Service employees who choose to transfer to or from the rural carrier craft.

As the Union points out, MHAs who are hired as new career employees do not receive service credit for seniority or retirement purposes or, as determined in the 2015 arbitration, for eligibility to start taking annual leave upon being hired as a career employee.

In Article 12.1.E of the National Agreement, the parties expressly provided:

MHAs who successfully complete at least one 360-day term will not serve a probationary period when hired for a career appointment, provided such career appointment directly follows an MHA appointment.

The parties also expressly agreed in an MOU Re: Relative Standing of Mail Handler Assistants and Subsequent Seniority Upon Conversion to Career Mail Handlers that:

MHAs will be converted to career positions in the Mail Handler craft in precisely the same order as the relative standing list. If more than one MHA is converted to career status on the same date in the same installation, seniority ranking will be based on their position on the MHA relative standing list.

The parties notably did not provide for carryover of the disciplinary record acquired as an MHA when an MHA is converted and hired as a new career employee.

The evidence does not show that the Union's 2016 (or 2019) bargaining proposal on this matter was an acknowledgement that -- absent agreement on such proposal -- the Postal Service contractually could consider MHA discipline. In addition to the testimony of its General Counsel that he stated during bargaining that the Union's proposal was to clarify its understanding that the existing contract did not permit such consideration, the Union had asserted that position in the grievance process. And while the issue had not yet been elevated to the national level -- which the Postal Service chose to do in this case -- the Union's position was successfully presented in regional arbitration cases by both the NPMHU and the APWU. Where an existing contract is ambiguous or open to different interpretations and the parties appear not to agree, a party may seek to obtain agreement on an explicit provision consistent with its position as to the meaning of the existing contract without detracting from that position.

The Postal Service argues that it makes more sense and better comports with the concept of just cause to take into account an employee's entire discipline record including discipline previously imposed when in a noncareer position. The Postal Service seems to recognize that the situations are not entirely the same, by arguing that the deciding party -- such as a regional arbitrator -- should and can consider the appropriate weight to accord to discipline imposed while the individual was employed as an MHA. It also does not dispute that MHAs not only are subject to different working conditions -- particularly as regards scheduling -- but do not have the full scope of just cause protection afforded to career employees.⁵

From a policy perspective, arguably there may be some appeal to the Postal Service's position -- just as in the 2015 arbitration I noted that the Union's position to credit service as a CCA (or MHA) for leave-taking status did not seem unjustifiable as a policy matter. But, on balance, the record supports a finding that when the parties to the National Agreement wanted to include or carry over experience while an MHA after conversion to new career employee status they did so expressly, as they did for probationary period and relative standing.⁶

In conclusion, consistent with their status as new hires, former MHAs who are converted to career positions start afresh for disciplinary purposes.⁷

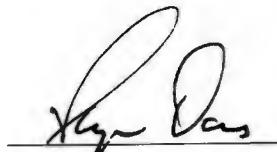
⁵ It also is noteworthy that upon completion of each 360-day term the Postal Service is free not to reappoint an MHA to a new term without having to justify its decision, provided the decision is not pretextual.

⁶ The Postal Service points out that employees who convert from MHA to career status, unlike other new hires, do not undergo on-the-job training although this is not spelled out in the contract. A decision by management not to provide redundant training, even if it could be subject to bargaining, hardly is comparable to the issue at hand, particularly as discipline of both career and MHA employees is addressed in some detail in the contract.

⁷ The Union essentially has conceded that if an MHA is the subject of a notice of removal at the time the individual otherwise would be converted to a career position, that removal process -- including any challenge by the MHA -- is first to be completed.

AWARD

As set forth in the above Findings, discipline issued to an employee while employed as a noncareer Mail Handler Assistant (MHA) may not be considered or cited in determining whether to issue discipline to the employee after his or her conversion to full-time career status.

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Shyam Das, Arbitrator