

C# 10173

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration) GRIEVANT: NANCY LOHLEIN
between) POST OFFICE: WESTWOOD, N.J.
UNITED STATES POSTAL SERVICE) MANAGEMENT CASE NO. N7N-IN-D-26514
and) UNION CASE NO. GTS 6932
NATIONAL ASSOCIATION OF)
LETTER CARRIERS)

BEFORE: ROBERT L. MITRANI, ARBITRATOR:

APPEARANCES:

FOR THE U.S. POSTAL SERVICE: RICHARD ANASTASI
LABOR REL. ASS'T.

FOR THE UNION: ROBERT BORGOGNONI, THIRD V.P.
BRANCH 38, NALC

PLACE OF HEARING: HACKENSACK, N.J.

DATE OF HEARING: JULY 26, 1990

AWARD:

- (1) THE GRIEVANCE IS ARBITRABLE.
- (2) THE REMOVAL OF NANCY LOHLEIN WAS FOR JUST CAUSE.

DATE OF AWARD:

AUGUST 1, 1990



Robert L. Mitrani
ROBERT L. MITRANI, Arbitrator

IN THE MATTER OF THE ARBITRATION)	
BETWEEN)	
UNITED STATES POSTAL SERVICE)	
AND)	OPINION AND AWARD
NATIONAL ASSOCIATION OF LETTER CARRIERS)	
REGIONAL CASE NO. N7N-IN-D-26514)	
GTS # 6932)	
GRIEVANT: NANCY LOHLEIN)	

This case was heard on Thursday, July 26, 1990 in Hackensack, New Jersey before Arbitrator, Robert L. Mitrani, pursuant to the National Agreement between the parties. The Arbitrator is on the regular regional arbitration panel and this was a regular arbitration assignment.

APPEARANCES

U.S.P.S.	RICHARD ANASTASI LABOR RELATIONS ASSISTANT
N.A.L.C.	ROBERT BORGOGNONI THIRD VICE PRESIDENT BRANCH 38, N.A.L.C.

(A) ISSUES

Was the removal of Nancy Lohlein for just cause? If not, what shall be the remedy? The service also entered a threshold issue of arbitrability.

(B) REMOVAL NOTICE DATED SEPTEMBER 26, 1989

Attached to this award as an exhibit is the Removal Notice dated 9/26/89.

The removal notice was amended on 10/10/89 with the following:

On 9/26/89, you were issued a Removal Notice removing you from the Postal Service immediately. This Notice is to advise you that your Removal shall not be effective until October 28, 1989.

You are also advised that as of 9/26/89, you shall be paid Administrative Leave, and shall remain in this status up to 10/27/89 inclusive.

You have the right to file a grievance under the Grievance Arbitration Procedure set forth in Article 15, Section 2, of the National Agreement within 14 days of your receipt of this notice.

(C) ARBITRATOR LEVIN'S AWARD DATED 4/20/89

The following are the first two paragraphs of Arbitrator Levin's award dated 4/20/89:

1. The Postal Service had just cause to discipline Ms. Lohlein however, removal was excessive under the circumstances of this case.
2. Ms. Lohlein shall be reinstated to her job forthwith without back pay and shall be placed on a one year, probationary period during which time she will be required to participate in the Postal Service EAP until such time as the EAP counselor deems that she no longer need attend. The EAP counselor shall report to supervision Ms. Lohlein's adherence to any structured program designed for her. If Ms. Lohlein leaves prior to such release she will be subject to removal.

Also any additional incidents of AWOL, and/or failure to comply with instructions governing absence, during the one year probationary period shall likewise subject her to removal.

(D) BACKGROUND AND GRIEVANCE

Nancy Lohlein started with the Service on 6/11/83.

Lohlein was given a Notice of Removal on 5/13/88 (the date of removal was 6/15/88). This was grieved and eventually Arbitrator Levin rendered his decision on 4/20/89. Nancy Lohlein was then reinstated on 6/27/89. As indicated earlier, she was given a removal notice on 9/26/89 which was amended on 10/27/89.

The Union filed a timely grievance in this case. The following is an excerpt from the Union's grievance:

"The Union contends that this action violates the provisions of Article 16 of the National Agreement for the following reasons: 1) The action was issued without the mandatory 30 day notice period, being effective 'upon receipt'; the action is therefore defective in procedure. 2) The action was issued without just cause. The grievant agreed to a structured EAP program and attended meetings. She initially tried to enroll in a 28 day rehab program, but was turned down because the local office had allowed her health benefits to lapse by failing to process necessary paperwork. Once that problem was rectified, the discipline was taken prematurely, before the grievant could take further steps. She has since completed a 28 day rehab program at Mt. Kemble Center for Addictive Illnesses in Morristown, New Jersey."

In its final answer to the grievance, management stated the following:

"Upon full discussion and consideration of this matter, it is determined that the grievance is denied. The reason for this decision is Arbitrator Levin's award clearly states, 'If Ms. Lohlein fails to satisfactorily attend the EAP program designated for her or fails to comply with Postal Service instructions and/or is AWOL she will be subject to immediate removal.' The record establishes that on two occasions the grievant refused to enroll in a rehab program as prescribed by the EAP Specialist and on one occasion, the urine chromatography revealed an illegal street substance in her urine. Management was left with no recourse but to initiate this action."

(E) DISCUSSION

THRESHOLD ISSUE

Management stated that grievance GTS-6932 was not arbitrable based on the language of Article 12, Section 1(A). The first two sentences of this language read as follows: "The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from his 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."

The Postal Service claims that in his award of 4/20/89, Arbitrator Levin placed Nancy Lohlein on a one year "probationary period." She was removed well within the one year period of the arbitrator's award and therefore does not have access to the grievance procedure.

However, it is the Arbitrator's finding that the "probationary period" in Arbitrator Levin's award is different than the "probationary period" in Article 12, Section 1(A). Arbitrator Levin's "probationary period" required Lohlein to do certain things in accordance with his award. Arbitrator Levin stated that Lohlein would be subject to removal if she did not perform in accordance with his award. The right to grieve was not taken away from Lohlein. In fact, this right is specifically stated in the removal notice of 9/26/89. And, if this was not enough, it was repeated in the addendum of 10/10/89. The language of Article 12, Section 1(A) is not applicable to Lohlein. At no time did Arbitrator Levin take away her contractual rights under the Grievance and Arbitration Procedure. The Arbitrator's probationary period was to put the grievant on warning that she had certain responsibilities that she had to meet and if she didn't meet, she would be subject to removal. The Arbitrator rules that the grievance is arbitrable.

MERITS OF THE CASE

In analyzing this case, it must be kept in mind that Arbitrator Levin severely disciplined Nancy Lohlein. She was reinstated but with a disciplinary period that was approximately ten months. And the Arbitrator made it clear that Lohlein had certain responsibilities that she had to meet.

Attached to this award as an exhibit is the EAP Participation Agreement that was signed by Lohlein and Thomas Forbes (EAP Counselor) on 6/20/89. When this program began, the EAP tried to have Lohlein enter a 28 day rehab program. She refused to do this. Then the program outlined in the 6/20/89 Agreement was developed as an alternate. In the month of July 1989, she had a good record with EAP. But in August 1989, there was only one contact with EAP and that was when a counselor visited her in Westwood. In September 1989, there were no contacts at all by Lohlein. There can be no question that Lohlein had the responsibility to make sure that she was at every meeting that she was supposed to attend. Lohlein claimed that she did not have a driver's license --but this was of her own making. Nothing could have been more important to Lohlein than to make sure she followed the directions of Arbitrator Levin. She did not. for example, on 8/17/89, Robert Fredrick (EAP Specialist) wrote the following memo:

On June 20, 1989, during her initial EAP interview, Nancy Lohleim agreed to participate in a structured EAP program. During this interview it was strongly suggested that Nancy enter into a rehabilitation center, for a 28-day stay, to take care of her problems. Nancy refused, she wanted to work them out without the aid of a re-hab center.

For a short period of time it appeared that Nancy was making an effort to work on her problems. After several observations of her participation, I reinterviewed Nancy on August 11, 1989 at the Westwood Post Office and again suggested strongly that Nancy enroll into a 28-day re-hab, I believe that at that time she was under the influence of an alcoholic beverage. For over an hour I tried to get her to go to a re-hab center, that it would most definitely be in her best interest, she refused.

It is the opinion of this EAP Specialist that as of today, Nancy Lohleim has not taken her problems seriously and I find her participation in the EAP Program to be unsatisfactory.

The evidence is quite clear that during the months of August and September, 1989, Lohlein was not participating in the EAP program.

The Union introduced the following letter dated 11/6/89:

This is to certify that Nancy Lohlein was admitted to the Mount Kemble Center for Addictive Illnesses on October 13, 1989. Her anticipated date of discharge is Friday, November 10, 1989.

Our residential treatment program is for a period of twenty-eight days, unless an extension of treatment is recommended by the clinical staff.

Nancy is participating in all didactic and interactional groups and is receiving individual counseling. Her progress in treatment appears satisfactory thus far. Nancy will be attending aftercare at Bergen Pines in Paramus, NJ.

If you have any further questions, please call me at (201) 285-4700.

However, even if the Arbitrator grants all of the Union's arguments regarding the 28 day rehab program --there can be no question that during August and September 1989 she was not participating in the EAP program. She had an obligation to do this without any exception --and she didn't participate. And, of course, to indicate the seriousness of this entire situation during this period, there was a urine chromatography which revealed an illegal street substance in her urine. The Service tried to work with Lohlein --but she did not follow the clear directions of Arbitrator Levin. Her removal was for just cause.

AWARD

- (1) The grievance is arbitrable.
- (2) The removal of Nancy Lohlein was for just cause.


ROBERT L. MITRANI, Arbitrator
August 1, 1990

REMOVAL NOTICE

9/26/89

Please be advised that upon receipt of this letter you are hereby notified that you are removed from the U.S. Postal Service.

Specifically, on April 20, 1989, Arbitrator Edward Levin issued a decision relative to a Removal Notice that was issued to you on May 13, 1988 for the following reasons:

1. "AWOL"
2. "Failure to Comply with Instructions Governing Absenteeism."

In Arbitrator Levin's decision to return you to duty, "...without back pay on condition you enroll in the Employee Assistance Program (EAP) and continue in it until such time as the EAP Counselor deemed it appropriate for you to leave..." If you failed to satisfactorily attend the EAP program designated for you or you fail to comply with Postal instructions and/or are AWOL you will be subject to immediate Removal."

In addition, Arbitrator Levin stated in his decision that he "shall retain jurisdiction over any dispute arising from the application or interpretation of this Award.

An investigation into your participation in a structured EAP program revealed that you have failed to comply with a structured program. In addition, during a follow-up medical evaluation on 8/7/89, a urine chromatography disclosed the presence of an illegal street substance in your urine. On 8/11/89, you were again visited by Mr. Fredericks, EAP Coordinator, and he repeated his original recommendation of 6/20/89, that you enroll in a 28 day Rehabilitation Program, again you refused.

In light of your demonstrated behavior and refusal to comply with your return to duty stipulations as outlined in the above cited Arbitration Award, your retention as a postal employee would not be in the best interest of the Postal Service.

You have the right to file a grievance under the Grievance Arbitration Procedure set forth in Article 15, Section 2, of the National Agreement within 14 days of your receipt of this notice.

EAP Participation Agreement

USPS 3

I, NANCY LOHLEIU 152-48-2630 do hereby agree to abide by
 (Client's Name) (Client's SSN)

the following conditions as outlined by the Postal Service's Employee Assistance Program (EAP) staff as
 pertains to my individual recovery program:

1. Attend 4 meetings of Alcoholics Anonymous per week.
 (Number)
2. Attend meetings of Narcotics Anonymous per week.
 (Number)
3. Participate in the EAP outpatient treatment program for a
 (Name)
 period of 1YR
 (Length of Time)
4. Meet with FEER JMC GARCIA for therapy ☒ weekly
 (Name of Counselor/Therapist) ☐ monthly
5. Meet with the EAP staff time(s) per week for group and/or individual counseling.
6. Contact the EAP office by phone or in person 1 time(s) weekly.
7. Other agreed to program activities. (Describe):

I acknowledge that my participation in EAP does NOT prohibit disciplinary action for failure to meet acceptable standards of work performance, attendance, and/or conduct problems, and that it does not shield me from discipline or prosecution for criminal activities.

Also, I understand that the US Postal Service is not responsible for any costs incurred by me as an EAP client, and that it is my sole responsibility to pay all treatment costs.

Client Signature

Date

EAP Coordinator/Specialist Signature

Date

Nancy Lohleiu 06-20-89 Thomas Folt 06-20-89