

REGIONAL ARBITRATION PANEL

C-24702

In the Matter of Arbitration

Between

United States Postal Service

And

National Association of Letter Carriers,

Grievant: Frank Perkins

Post Office: Baton Rouge, Louisiana

USPS No. G01N-4G-D 02248534

NALC DRT No. 08-040259

BEFORE: Jo Ann Nixon, Arbitrator

APPEARANCES:

For the U.S. Postal Service

Larry Hamilton
Labor Relations Specialist

For the National Association of Letter Carriers

George Cooper
National Association of
Letter Carriers

Place of Hearing: 8101 Bluebonnet Boulevard; Baton Rouge, Louisiana

Date of Hearing: June 3, 2003

Briefs Due: July 5, 2003

Date of Award: October 2, 2003

Relevant Contract Provision: Article 16

Contract Year: 2000 - 2003

Type of Grievance: Discipline - Notice of Removal

AWARD: The grievance is sustained.

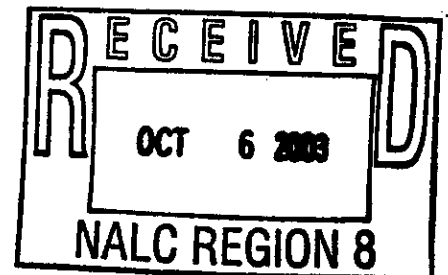
RECEIVED

OCT 23 2003

VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

Jo Ann Nixon
Arbitrator

1



I. ISSUE

Did the United States Postal Service violate the National Collective Bargaining Agreement specifically Articles 16, 17, and 31 when the Grievant received a Notice of Proposed Removal dated January 13, 2003 for Unauthorized Opening of the Mail and Converting the Contents to Personal Use, if so, what is the appropriate remedy?

II. STIPULATIONS

The parties submitted the following documents as joint exhibits.

1. The Collective Bargaining Agreement between the National Association of Letter Carriers and the United States Postal Service – November 21, 2000 - to November 20, 2003. (Joint Exhibit No. 1)
2. A packet of information consisting of Ninety-Six pages containing memoranda and letters documenting the grievance (Joint Exhibit No. 2)

III. RELEVANT CONTRACT PROVISIONS

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 would result in reinstatement and restitution including back pay.

Section 9. Veterans' Preference

A preference eligible is not hereunder deprived of whatever rights of appeal such employee may have under the Veterans' Preference Act; however, if the employee appeals under the Veterans' Preference Act, the employee thereby waives access to any procedure under the Agreement beyond Step 3 of the grievance-arbitration procedure.

IV. BACKGROUND

This grievance was initiated by the National Association of Letter Carriers (NALC) and is before the Arbitrator for decision pursuant to the National Collective Bargaining Agreement between the parties, USPS and NALC from 2000 – 2003. The hearing was held on June 3, 2003 at the Main Post Office in Baton Rouge, Louisiana. Both parties agree that this case is properly before the Arbitrator for decision. However, before the merits of the case, the Union objected. The parties agree to present the procedural objection before the merits of the case. Should the procedural objection be sustained, the arbitrator would sustain the grievance on that reason and the case would not go to the merits. If the procedural objection is not sustained, the parties will reschedule the case for a hearing on the merits of the Grievant's claim.

V. FACTS

On or about August 22, 2002, a Postal Customer came to the Scotlandville Station to complain that she had not received a money order from her son who was overseas. The money order was a Japan International Postal Money Order. The customer's son had sent the customer a copy of the money order. Following investigation begun by the Postal Inspectors, they received the original postal money order. The original money order showed that the name "Frank Perkins" was written over the name of "Bernice Trask" and the money order had been endorsed with the name of "Frank Perkins" on the reverse of the money order. There was additional evidence obtained from a forensic laboratory that compared the signature of the Grievant to the signature on the money order. The laboratory concluded that the Grievant had endorsed the money order.

Because of this investigation, the United States Postal Service issued a Notice of Propose Removal on January 13, 2003. (Joint Exhibit No. 2 pages 28 - 34) The Union has raised two procedural issues. The first issue raised is whether there was a violation of the Veteran Preference Act by the issuance of the Notice of Proposed Removal without adequate notice of the veteran's rights under this act. The second question that the Union raised is whether there has been a violation of the *Weingarten* Right in the handling of the investigation.

The record shows that the Grievant, Frank Perkins is a Letter Carrier who is assigned to the Scotlandville Station in Baton Rouge, Louisiana. He is a veteran who has a seniority date of June

15, 1977.

VI. UNION'S POSITION

The position of the Union is that under the circumstances, the United States Postal Service violated certain rights of the Carrier Perkins in the issuance of the Letter of Proposed Removal. Because these violations are so critical, the discipline cannot stand and the arbitrator must sustain the grievance. The Union argues these points.

As a preference eligible veteran, the Veterans Preference Act affords the Carrier Perkins certain rights. The actions of Management violated the National Collective Bargaining Agreement by failing to give notice required by the Veterans Preference Act.

The Union also complains that although Carrier Perkins was allowed an opportunity to meet with his Union representative before the meeting with the Postal Inspectors, they did not give the Grievant an opportunity to meet privately before the meeting began. These violations are substantial and vitiate any action taken in contravention to these requirements.

The Union asks that the Arbitrator assume jurisdiction over this grievance sustain the grievance on procedural grounds.

VII. MANAGEMENT'S POSITION

Management alleges that there are no violations of the National Collective Bargaining Agreement in the actions taken against Carrier Perkins. Management alleges that neither objection has merit and asks that the case go on to the merits.

The action taken against Carrier Perkins is a Notice of Proposed Removal. MSPB rights do not attach to this action. This is because it is not one of the actions listed in the act. To appeal to the MSPB an action must be either a removal, reduction in grade or pay, suspension for more than fourteen days, furlough. (5 CFR part 752 C and D; 5 USC 7512) This action is not an enumerated action and does not apply.

Management responds that Carrier Perkins could not meet with his union representative before the postal inspectors questioned him on November 13, 2003. However, so that this omission is enough to sustain the grievance, the Union must prove "harmful error." The United States

Supreme Court in *Cornelius v. Nutt* 472 U.C. 648, 86 L. Ed 2d 515, 105 S. Ct. 2882 (1995) the court held that a violation of due process does not always require setting aside the discipline imposed particularly if the due process that was left out did not result in harmful error to the Grievant. The Postal Service states that this is the case here.

Considering the particular circumstances, Management asks the Arbitrator to dismiss claim of the procedural Due Process allegations and go to the merits of the case.

VIII. DISCUSSION

The parties have asked this Arbitrator to review the positions of the parties on the procedural issues and will discuss each issue separately.

The Postal Service is correct on the analysis of the requirement necessary in the Notice of Proposed Removal. The Merit Systems Protection Board is governed by rules established by the United States Congress and is incorporated by reference into the National Collective Bargaining Agreement between the parties. The rules governing when it will exercise jurisdiction are specifically outlined in the applicable laws. The Notice of *Proposed* Removal while leading to a *possible* removal is not the removal. Rights, such as those in the Veterans Preference Act, that attach to the removal do not attach to the Notice of Proposed Removal. The rights attaching to the Notice of Proposed Removal are those allowed in the Grievance-Arbitration procedures and other rights outlined in the letter of January 13, 2003. The letter issued to the Carrier Perkins, in that respect, is adequate and has not violated any provision of the National Collective Bargaining Agreement.

The Union complains that the failure of Postal Service to permit the Carrier Perkins to consult with his Union Representative before questioning is a violation of his rights under *Weingarten*. This allegation is more significant. Management makes two arguments regarding this argument. Management does not dispute that this happened. It asks that Arbitrator consider this omission harmless error under the principles stated in *Cornelius v. Neff*, supra. The U.S. Supreme Court in a 1975 case announced the right of employees to have present a union representative during investigatory interviews. *NLRB v. Weingarten, Inc.* 420 U.S. 251, 88 LRRM 2689).

These rights have become known as the *Weingarten* rights. Employees have *Weingarten* rights only during investigatory interviews. An investigatory interview occurs when a supervisor questions an

employee to obtain information that could be used as a basis for discipline or asks an employee to defend his or her conduct. If an employee has a reasonable belief that discipline or other adverse consequences may result from what he or she says, the employee has the right to request union representation. Management is not required to inform the employee of his/her *Weingarten* rights; it is the employee's responsibility to know and request. The Supreme Court, however, clearly acknowledges a representative's right to help and counsel workers during the interview. The Supreme Court has also ruled that during an investigatory interview management must inform the union representative of the subject of the interrogation. Management must also allow the representative to speak privately with the employee before the interview. During the questioning, the representative can interrupt to clarify a question or to object to confusing or intimidating tactics. While the interview is in progress the representative cannot tell the employee what to say but he may advise them on how to answer a question.

This a logical extension to *Weingarten* Rights. The rights to have a union representative present would be of no value if they did not permit the Grievant to consult with the representative. The purpose of the representative is to protect the employee's rights. If the employee has not been advised of his rights, there is no protection.

Therefore, the failure to be afforded this right is potentially dangerously harmful. Without the opportunity to consult with a representative before questioning, a Grievant could possibly make statements adverse to his interest, without his knowledge that he need not speak. Effective representation is critical. It is most critical, in circumstances of potential removal as the Grievant faced.

The Postal Service notes that the Service did not deny the right, but by an independent and separate entity, the United States Postal Inspectors. The United States Postal Inspectors are not under the jurisdiction of any authority of the United States Postal Service. As such, these inspectors were not "employers" as contemplated by the *Weingarten* requirements. Even if *Weingarten* required the United States Postal Service to permit Carrier Perkins to speak with his union representative, the United States Postal Inspectors were not.

The Arbitrator finds this distinction forced and inaccurate. While the Postal Inspectors are a separate entity, at the time of November 13, 2002 investigations, they were gathering information

that could be potentially, and in fact was used in a discipline of the Grievant. They were standing in the shoes of the employer. As such, they must be willing to follow all safeguards that would apply to the employer. Those safeguards included permitting the Grievant to meet privately with the union representative. The Postal Inspectors were clearly acting in part for the United States Postal Service. The information gathered was used by the United State Postal Service and other agencies. Because they were standing in the shoes of the Agency, they must follow the procedures employed by the Agency. The Postal Inspectors failed to do so in a critical respect. For that reason, the discipline cannot stand.

AWARD

Because of the actions of the Postal Inspectors in the conduction of the investigation, the claim of procedural due process has sufficient merit to be sustained. Accordingly, the Arbitrator will sustain the grievance.



JO ANN NIXON

Arbitrator

New Iberia, Louisiana

October 2, 2003