

29051

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)	Grievant: Anthony Baldemor
Between)	
)	Post Office: Milpitas, CA
UNITED STATES POSTAL SERVICE,)	
Employer,)	USPS Case No. F06N-4F-D 10106766
-and-)	
)	DRT/NALC Case No. 01-159933
NATIONAL ASSOCIATION OF)	
LETTER CARRIERS AFL-CIO,)	
Union.)	
)	

BEFORE: Claude Dawson Ames

APPEARANCES:

For the Employer: Pamela Ross, Labor Relations Specialist

For the Union: Brian Voigt, Regional Admin. Asst., NALC

Date of Hearing: July 21, 2010

Date of Briefs: August 19, 2010

Date of Award: September 29, 2010

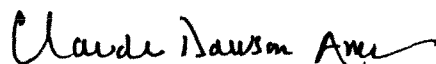
Contract Provisions: Articles 3, 16, 19

Contract Year: 2006-2011

Type of Grievance: Discipline (Discharge)

AWARD SUMMARY

Management did not have just cause to issue a Notice of Removal dated December 14, 2009, to the Grievant for the charges as outlined in the notice. The Grievant is to be returned to work immediately and compensated for all the time he has been off work, less any compensation received, during the period of his removal. Grievant is directed to attend and complete a class on Anger Management through EPA and on his return to duty, shall be counseled on the Joint Statement on Violence in the Workplace, by Management and the Union. Grievant must be led to fully understand that any failure on his part to follow the Joint Statement on Violence in the Workplace will result in his immediate removal from Postal employment. The Union's grievance is sustained.



CLAUDE DAWSON AMES, Arbitrator

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NALC HEADQUARTERS

I.

BACKGROUND

The Grievant, Anthony Baldemor, is a Part-Time Flexible (PTF) Letter Carrier assigned to the Milpitas, California Post Office. The Grievant began working for the Post Office on November 25, 2006. Grievant was issued a Notice of Removal on December 14, 2009 for Unacceptable Conduct while off-duty, which led to his arrest on criminal charges. The Grievant's off-duty conduct and events leading up to his removal are summarized as follows:

On April 27, 2008, the Grievant and two of his associates physically attacked, beat and robbed two other individuals. The physical attack stemmed from an episode of road rage when Grievant, while driving his vehicle, cut in front of the vehicle the two individuals were driving. The record is not clear what transpired in the next few minutes, but the Grievant followed the two to their place of residence. It was at this location that Grievant and his two associates assaulted the two individuals. Both were attacked with fists, belts and metal knuckles and suffered traumatic injuries. The younger individual also had two gold chains stolen from him.

The Grievant was later identified to police as one of the attackers. The police went to the Grievant's home to talk with him. Grievant admitted to being in a scuffle with the other two individuals, but denied striking them. On November 3, 2008 an arrest warrant was issued for the Grievant for three felony charges. Two of the charges were for Assault With a Deadly Weapon and one for Robbery in the Second Degree. On November 22, 2008, the Grievant called in sick and went to speak with an attorney. The attorney advised him to turn himself in, which he did. The Grievant was booked and released on bail.

The Postal Service was notified on January 22, 2009 by the California State Department of Justice of the Grievant's arrest. An investigative interview was conducted with the Grievant on January 28, 2009, but no discipline was issued as a result of the interview.

On August 19, 2009, the Postmaster was notified by the Human Resources Department of Grievant's arrest, which she was already aware of, having received notification from the California State Department of Justice on January 22, 2009. Another investigative interview

was held with the Grievant on August 25, 2009 regarding his arrest, but again no discipline was issued or resulted from this interview.

On October 8, 2009, the Office of Inspector General (OIG) was contacted by Milpitas Management who requested their assistance in investigating the Grievant's arrest of November 22, 2008. On November 2, 2009, the OIG issued their report (ROI) to the Postmaster at the Milpitas Post Office.

On December 10, 2009, Management held another investigative interview with the Grievant. On December 14, 2009, the Grievant was issued the Notice of Removal, charging him with Unacceptable Conduct stemming from his arrest of November 22, 2008. On December 31, 2009, the Union filed a grievance on the Notice of Removal. The parties were unable to settle the grievance and the Union appealed the matter to arbitration on April 1, 2010.

A hearing was held on July 21, 2010 at the Milpitas, CA. Main Post Office. The Postal Service was represented by Pamela Ross, Labor Relations Specialist. The Grievant and Union were represented by Brian Voigt, Regional Administrative Assistant, NALC. The parties agreed to submit post-hearing briefs in lieu of oral closings, which were to be postmarked on, or before August 19, 2010. Upon receipt of both party's briefs, the Arbitrator closed the record on August 24, 2010.

II.

STIPULATIONS

The parties agreed to the following stipulations:

1. If the NALC Formal A representative testified, she would testify to what was in the Step-B file.
2. The Grievant's off-duty conduct is a matter of public record, conduct engaged in did in fact occur.

III.
ISSUES PRESENTED

The issue(s) presented by the parties for resolution are as follows:

Did Management have just cause to issue the Grievant, Anthony Baldemor, a Notice of Removal for Unacceptable Conduct, dated December 14, 2009?

If not, what is the appropriate remedy?

IV.
RELEVANT CONTRACTUAL PROVISIONS

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:

- 3.1 To direct employees in the performance of official duties;
- 3.2 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;
- 3.3 To maintain the efficiency of the operations entrusted to it;
- 3.4 To determine the methods, means and personnel by which such operations are to be conducted.

ARTICLE 16—DISCIPLINARY PROCEDURES

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 and alcohol), incompetence, 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.

Section 7: Emergency Procedures

An employee may be immediately placed in an off duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to

self or others. The employee shall remain on the rolls (non-pay status) until disposition the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance.

ARTICLE 19—HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21. Timekeepers Instruction.

EMPLOYEE AND LABOR RELATIONS MANUAL

665 Postal Service Standards of Conduct

665.16 Behavior and Personal Habits

Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of good character and reputation. The Federal Standards of Ethical Conduct referenced in 662.1 also contain regulations governing the off-duty behavior of postal employees. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct prejudicial to the Postal Service. Conviction for a violation of any criminal statute may be grounds for disciplinary action against an employee, including removal of the employee, in addition to any other penalty imposed pursuant to statute. Employees are expected to maintain harmonious working relationships and not to do anything that would contribute to an unpleasant working environment.

V.

POSITIONS OF THE PARTIES

A. Employers Position:

The Employer argues that there was just cause to discharge the Grievant and the evidence presented has shown that Grievant acted as charged in this matter. The Grievant committed a heinous and unprovoked crime. It was the Grievant who ran innocent people off the road, then followed them home and attacked and physically beat the victims with metal knuckles. The Grievant was required to make restitution in the amount of \$4900.00 as a result of his actions.

The Grievant lied to Management and to the police, when questioned on May 21, 2008. When asked by the police if he was involved, he lied twice, stating that he pulled to the shoulder when a black truck behind him flashed their high beams. The Grievant also lied when he told the police that the victims instigated the incident. The Grievant cannot be trusted and did not take initial responsibility for his actions.

The Employer argues that the Grievant's behavior violated the Joint Statement on Violence in the Workplace and he cannot be trusted since he could snap at any moment in the workplace, based on his behavior with total strangers. While the Grievant has not violated any of the tenants in the workplace, the Postal Service cannot take the chance that the Grievant may launch an unprovoked attack on a co-worker.

The Grievant is a short tenured employee with just three (3) years of Postal Service. At the beginning of his career, the Grievant was put on notice through his training, that all employees are expected to conduct themselves in a manner that would reflect favorably upon the Postal Service. The Grievant failed to adhere to this principle.

The Notice of Removal was issued for just cause and no other remedy is appropriate. The Grievant acted as charged and removal is the appropriate level of discipline and it was properly issued. The Postal Service therefore requests that this grievance be denied.

In support of their position, the Employer submitted awards from the following Arbitrators: Braverman, Case Numbers, C06N-4C-D 10038851 and CO6N-4C-D 09264672; Cohen, Case Number, JO6N-4J-D 09235485.

B. Union's Position:

The Union argues that the Postal Service has failed to establish that the removal of the Grievant was for just cause. The Grievant and two of his associates were involved in an altercation on April 27, 2008. On November 22, 2008, the Grievant turned himself into the police on advice from his attorney. The Grievant called in requesting sick leave for his absence on November 22, 2008.

The Employer was officially notified in January 2009 of the Grievant's arrest and the charges filed against him. Management conducted an investigative interview with the Grievant on January 28, 2009. However Management, now knowing that Grievant was arrested, allowed him

to continue working until May 2009. There was no discipline issued to the Grievant until May 5, 2009, when they placed him on an indefinite suspension after his arraignment in Santa Clara Superior Court on April 6, 2009. Management left the Grievant in this status and took no further disciplinary action.

On August 19, 2009, the Postmaster received a letter from the Human Resources Department, informing them of the Grievant's arrest. But Management had already been informed of this by the California Department of Justice in January 2009. Shortly after receiving this letter from Human Resources, Management contacted the Grievant and scheduled another investigative interview with him for August 29, 2009. The same questions were asked during this interview that were asked during the January 28, 2009, investigative interview. The Grievant responded, giving the same answers that he did in the January 28, 2009 investigative interview. Again there was no discipline issued as a result of this interview.

On October 10, 2009, the Labor Relations office contacted the OIG office and requested their assistance in conducting an investigation into the Grievant's off-duty conduct on April 27, 2008. The Inspectors Report of Investigation (ROI), dated November 2, 2009, was completed and forwarded to the Postmaster of the Milpitas Post Office. However, Management waited another month to conduct yet another investigative interview, on December 10, 2009, to find out what they had already known for more than thirteen (13) months. On December 14, 2009, the Postal Service finally issued the Grievant a Notice of Removal.

The Union contends that the Postal service has no reasonable explanation why they waited for over thirteen (13) months to issue the Grievant the Notice of Removal. They had the necessary information in November 2008 to further investigate the situation to determine if the Grievant's off-duty conduct warranted his removal at that time. To wait for over thirteen (13) months to issue the removal was punitive on Management's part.

The Union contends that the Postal Service has failed to establish a 'nexus' to the Grievant's employment and his off-duty conduct, since there was no adverse impact or effect on the Service. There was no news report of the incident on television or radio. There were also no newspaper articles of the Grievant's off-duty conduct and no adverse impact shown by the Service. The Union contends that the Grievant's off-duty conduct was nothing more than a fight.

The Union argues that the Grievant's removal was not for just cause and requests the Arbitrator sustain the grievance, rescind the removal and immediately reinstate the Grievant and make him whole for all lost wages and benefits.

In support of their position the Union submitted awards from the following Arbitrators: Dolson, Case Number C1C-4A-D 31551; Holly, Case Number NC-S-10799 D; Krimsly, Case Number NC-E 8274 D.

VI.

DECISION

The Grievant is charged with Unacceptable Conduct, stemming from off-duty misconduct not directly involving the Postal Service, which means that the Employer has to establish a 'nexus' or connection between Grievants' off-duty conduct and Postal employment to warrant his removal. The Employer has to show that it was harmed as a result of the Grievant's off-duty misconduct and that harm is rationally related to the Employer's business. This can be accomplished in a number of ways, but generally the Employer has to establish that there was an adverse impact to their business through some type of publicity, where the Grievant was identified as an employee of the Postal Service. This type of publicity presents a negative public image of the Postal Service as condoning an employee's' behavior and in most cases would support removal of the offending employee.

Where there is no publicity surrounding an employee's off-duty misconduct, the Employer may be able to establish a direct 'nexus' to their business operations if the off-duty misconduct involves theft or fraud, and the employee has some type of fiduciary responsibilities with his employer. A criminal conviction of this nature would indicate that employee could no longer be trusted with those fiduciary responsibilities and in most cases would support the removal of the offending employee. Basically, where the off-duty misconduct involves a criminal conviction jeopardizing the Employer's business and public image, or where the Employer can prove that the employee's off-duty misconduct is detrimental to the company or adversely effects its' operations, discipline, including removal, may be appropriate. But in such cases the burden of proof rests with entirely the Employer to demonstrate that a nexus exists between the employee's' off-duty misconduct and the employer's business operation that justifies removal.

In this instant case, Management has failed to establish a 'nexus' between Grievant's off-duty misconduct and its' business operations, or to demonstrate the Grievant's off-duty misconduct had an adverse impact on the Postal Service image. There is no evidence that Grievant was either in his official Postal uniform when the misconduct occurred or that he was driving a Postal vehicle. While Management had a legitimate concern due to the physical nature of physical violence and the carry over effect into the workplace, they failed to demonstrate sufficient 'nexus' between Grievant's off-duty misconduct and his job performance. Further, Management has failed to demonstrate any history of physical violence or threats by the Grievant against any fellow employee or Management personnel, while employed at the Milpitas Post Office

Management characterized the Grievant's off-duty misconduct as a heinous crime, yet when initially notified of the crime, did allow the Grievant to continue working. The Supervisor testified that she did not want the Grievant back in the workplace because he may snap and attack a co-worker. However, if this was a concern it did not present itself until some thirteen (13) months later when the Grievant was finally issued a Notice of Removal. Management was officially notified on January 22, 2009 by the California State Department of Justice, of the Grievant's arrest and merely conducted an investigative interview with the Grievant, but issued no discipline. They allowed the Grievant to continue working until May 5, 2009. Also, there was nothing in the Grievant's history to indicate that he had previously exhibited this type of behavior, nor did Management present testimony from any of his co-workers attesting to the fact they were now afraid to work with the Grievant based on his off-duty misconduct.

Management was also very untimely in disciplining the Grievant for his off-duty misconduct. The Grievant's off-duty misconduct occurred on April 27, 2008. On November 3, 2008 an arrest warrant was issued for the Grievant on three felony charges. Two of the charges were for Assault With a Deadly Weapon and one for Robbery in the Second Degree. On November 22, 2008, the Grievant called in sick and went to speak with an attorney. The attorney advised him to turn himself in, which he did. The Grievant was booked and released on bail.

The Grievant was given an investigative interview on November 25, 2008 for his absence on November 22, 2008. There is some dispute as to what was said during this investigative interview. The Grievant alleges that he informed Management of the circumstances surrounding

his absence on that day, while Management maintains that the Grievant never informed them of his arrest. The investigative notes from that interview, which was part of the Union's request for information, was not made a part of the file. Therefore, it is unknown what was said during the interview and said by whom. Management then issued the Grievant discipline only for his absence of November 22, 2008. No action was taken at that time regarding his off-duty conduct.

On January 22, 2009, the Postal Service received a letter from the State of California, Department of Justice indicating that the Grievant had been arrested for the charges as noted earlier. A second investigative interview was held with the Grievant on January 28, 2009. The crux of the interview centered on Managements' insistence that the Grievant had lied to them during the investigative interview of November 25, 2008. Management insisted that the Grievant never disclosed that he had been arrested. The notes from the investigative interview indicated Management never questioned Grievant about the circumstances surrounding his arrest, or the charges pending against him. There is nothing in the record to suggest that the Postal Service notified the OIG's office at this time of the Grievant's arrest and requested their assistance. There was no discipline issued as a result of this interview. The Grievant, as stated earlier, was allowed to continue working until May 5, 2009, when they placed him on an indefinite suspension.

On August 19, 2009, the Milpitas Postmaster was notified by the Human Resources Department of the Grievant's arrest, which they were already aware of, having received notification from the California State Department of Justice on January 22, 2009. Another investigative interview (3rd) was held with the Grievant on August 25, 2009, regarding his arrest, but again no discipline resulted from this interview. The notes from the investigative interview were nearly identical to those from the January 28, 2009 investigative interview. It appears there was no new information gleaned from the Grievant and any information that was obtained were those facts already known by Management.

On October 8, 2009, the Office of Inspector General (OIG) was finally contacted and their assistance requested in investigating the Grievant's arrest of November 22, 2008. On November 2, 2009, the OIG issued their report to the Postmaster of the Milpitas Post Office. On December 10, 2009, another investigative interview (4th) was held with the Grievant. On December 14, 2009, the Grievant was issued the Notice of Removal, charging him with Unacceptable Conduct stemming from his arrest of November 22, 2008.

The removal was some thirteen (13) months after the Grievant's arrest and notice to Management. If Management knew of the Grievant's arrest in November 2008, as the Grievant alleges, and wanted to preserve the integrity of its case, then the OIG office should have been contacted immediately and their assistance requested in investigating the matter. Grievant then should have been placed on Emergency Placement or Indefinite Suspension. Management was certainly aware of the Grievant's arrest on January 22, 2009, having been previously notified by the State of California Department of Justice. Yet they still failed to take any available action and allowed the Grievant to continue working. A timely investigation could have ensued from this point and timely discipline issued, however Management continued wasting time.

The Milpitas Post Office was notified by their HR Department on August 19 of the Grievant's arrest, a fact they were already aware of due to the January 22, 2009 notification from the California Department of Justice. Yet, they hold another investigative interview on a matter they had already investigated. Again on December 10, 2009, a month after receiving the OIG report, they held yet another investigative interview with the Grievant and finally issued the removal. Management failed to timely discipline the Grievant and wasted time needlessly investigating a record that had already been fully developed by the police, District Attorney and the Superior Court.

The Postal Service took the position that the Grievant had committed an offense which might be the subject of discipline. This was off-duty misconduct, occurring on April 27, 2008, with the Grievant's arrest on November 22, 2008. Management had enough facts available in January 2009, to take some form of disciplinary action and/or initiate an OIG investigation. However, they chose to do neither, but continued with unnecessary investigative interviews and no resultant action. It was not until some thirteen (13) months later that the Grievant was issued a removal notice, which was very untimely. Due process requires that a pending charge against an employee be resolved as expeditiously as possible, and not kept pending, for an inordinate amount of time.

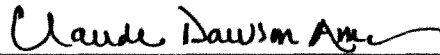
Management has failed to support their burden in establishing just cause for the removal of the Grievant for the charges, as outlined in the Notice of Removal dated December 14, 2009. After careful consideration of all the facts in this case the Arbitrator finds for the Union and sustains the grievance.

AWARD

Management did not have just cause to issue the Notice of Removal dated December 14, 2009, to the Grievant for the charges as outlined in the Notice. The Grievant is to be returned to work immediately and compensated for all the time he has been off work, less any compensation received, during the period of his removal. The Grievant is directed to attend, through EAP, a class on Anger Management and on his return to duty, counseled by Management/Union on the Joint Statement on Violence in the Workplace. Grievant must be led to fully understand that any failure to follow the Joint Statement on Violence in the Workplace while on Postal premises will result in his immediate removal from further Postal employment. The Union's grievance is sustained.

September 29, 2010

Respectfully submitted;



CLAUDE DAWSON AMES, Arbitrator