EDMUND SCHEDLER 7/6/82 Won
Art. 2 - Physically Handicapped
Art. 12.1 - Art. 15 Arbitrability
4132 (S1C-3U-D)

REGULAR ARBITRATION **LOCAL ARBITRATION**

IN THE MATTER OF ARBITRATION BETWEEN

THE UNITED STATES POSTAL SERVICE
"Employer"

and the

AMERICAN POSTAL WORKERS UNION
"Union"

C 284

Re: Katherine Morgan - Article 2

S1C-3U-D-4132

APPEARANCES

Advocate for the Employer: Mr. Marcine Love, Labor Relations Representative

Advocate for the Union: Mrs. Barbara Boatman

At an arbitration on July 2, 1982 in Conroe, Texas the Employer and the Union authorized the undersigned to decide whether or not the Employer violated Article 2 of the Agreement in placing Katherine Morgan off the clock for 3 weeks in February 1982. I will relate the events leading up to this grievance as I believe those events occurred.

Preliminary Background Discussion

The Grievant started working for the Employer on December 12, 1981; but the genesis of this grievance began 18 months earlier in June 4, 1980 when the Grievant had neurosurgery for the removal of a benign tumor. Her family physician at the time of the surgery was Dr. R. V. Martin, and the neurosurgeon was Associate Professor Dr. Howard H. Kaufman of The University of Texas Health Science Center at Houston.

Now, as to her employment. In November 1981 the Employer needed additional employees. The Grievant applied for work and received a physical examination from Dr. R. V. Martin on or about December 1, 1981. She went to work on December 12, 1981 and the completed forms of her physical examination were forwarded to the Employer for evaluation. The medical information disclosed, among other things, that the Grievant was 5 feet tall, she weighed 96 pounds, and she had a benign hemangioblastoma removed in June 1980. The medical information was evaluated by

the Employer's medical officer, Dr. Hermida. On December 17, 1981 Dr. Hermida recommended that the Grievant was "unsuitable" because "this brain tumor often recurrs - small size and weight - unable to perform duties requiring 70 lbs. lifting - a poor risk applicant."

On December 31, 1981 the Employer issued a letter of Notification of Medical Unsuitability. The letter stated:

> This office has determined that you are medically unsuitable for employment as a clerk in the United States Postal Service. This determination was made from a review of your medical record and evaluation by our Medical Officer. Your medical history and relative small size, 5' tall and weighing 96 lbs., are not compatible with the strenuous activities required for this position, which includes heavy lifting, pushing, pulling, repetitive stretching and reaching. Under these conditions, postal employment would place your personal health and safety in jeopardy.
>
> You may appeal this determination within 15 calendar days from the date of this letter to the Regional General manager, Employees Relations Division, United States Postal Service, Memphis, Tn 381 66.
>
> Any appeal must be in writing, with a copy to this office. Your appeal letter to the region should include the name of this office.
>
> There is no hearing in the appeal process. You may include additional medical or other relevant information in support of your appeal. The Regional Medical Director will review your files and any additional information you submit and make a determination. The best evidence is the objective medical findings from a board certified specialist in the field that deals with your particular problem, or a current evaluation from the Veterans Administration if you are receiving disability compensation.
>
> I sincerely hope you have or will find suitable employment which is rewarding to you. Thank you for your interest in employment with the Postal Service.

A timely appeal was made to the Southern Regional Office in Memphis. The appeal included a letter from family practice physician, Dr. R. V. Martin and a letter from neurosurgeon Dr. H. H. Kaufman. The last 2 paragraphs of Dr. Martin's letter read as follows:

> As for the patient's relative small size, I am uncertain what your cut off parameters are. Since I have known this patient her weight has always fluctuated between 95 lbs. and 105 lbs. She is an even 5 feet tall. She is an athletic individual, and a regular jogger, often covering 4-5 miles a day on a regular basis. The patient has told me that she has been working at her current post office job for three weeks without any difficulty whatsoever.

> In summary, I ask you to seriously reconsider your employment decision about this individual. Her overall health at this time is excellent, and her prognosis is also excellent. I can recommend her without any reservations what-so-ever, physical or mental.

The 1 paragraph from Dr. Kaufman's letter stated:

> Ms. Kathryn Morgan had a complete removal of a left cerebellar hemangioblastoma on June 4th, 1980. She had no major post-operative problems. The last time I saw her was on October 30, 1980 at which time she was asymptomatic. I judge her to have had a complete removal of a benign tumor and do not expect a recurrence. If I can be of any further help, please let me know.

On January 23, 1982 the Grievant was placed off the clock and she remained off the clock through February 14, 1982. While the Grievant was off the clock her appeal was moving through the Southern Regional Office. On 2-5-1982 Dr. Thomas N. Little made a recommendation on the appeal. In the recommendation he summarized the medical facts and he recommended that the Grievant was "suitable" to be an LSM operator. The last 3 sentences of his recommendation read as follows:

> BASED ON THE MEDICAL DATA ALONE I CAN FIND NO REASON TO RECOMMEND MEDICAL UNSUITABILITY. THERE ARE NO HEIGHT AND WEIGHT CHARTS TO REFER TO TO PREDICT ABILITY TO PERFORM A JOB. I KNOW OF NO POSTAL POLICY THAT ADDRESSES A BONA FIDE OCCUPATIONAL DISQUALIFICATION BASED ON HEIGHT OR WEIGHT.

When the Conroe Post Office received Dr. Little's recommendation, the Grievant was promptly called and she returned to work on February 15, 1982.

The Union seeks two objectives in this arbitration:

1. The Grievant should be made whole for the 3 weeks she was placed off the clock.
2. All documents pertaining to this personnel action must be removed from the Grievant's personnel file.

The 1981-84 National Agreement contains the following:

> ARTICLE 2
> NON-DISCRIMINATION AND CIVIL RIGHTS
>
> Section 1. Statement of Principle
>
> The Employer and the Unions agree that there shall be no discrimination by the Employer or the Unions against employees because of race, color, creed, religion, national origin, sex, age, or marital status or because of physical handicap with respect to

a position the duties of which can be performed efficiently by an individual with such physical handicap without danger to the health or safety of the physically handicapped person or to others.

Section 3. Grievances

Grievances arising under this Article may be filed at Step 2 of the grievance procedure within fourteen (14) days of when the employee or the Union has first learned or may reasonable have been expected to have learned of the alleged discrimination, unless filed directly at the national level, in which case the provisions of this Agreement for initiating grievances at that level shall apply.

ARTICLE 12
PRINCIPLES OF SENIORITY, POSTING AND REASSIGNMENTS

Section 1. Probationary Period

A. The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its 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. If the Employer intends to separate an employee during the probationary period for scheme failure, the employee shall be given at least seven (7) days advance notice of such intent to separate the employee. If the employee qualifies on the scheme within the notice period, the employee will not be separated for prior scheme failure.

C. When an employee completes the probationary period seniority will be computed in accordance with this Agreement as of the initial day of full-time or part-time employment.

D. When an employee who is separated from the Postal Service for any reason is re-hired, the employee shall serve a new probationary period. If the separation was due to disability, the employee's seniority shall be established in accordance with Section 2, if applicable.

The Employer's Position

The Employer maintained that to work the Grievant with a known medical disability exposed the Employer to liability claim in the event the Grievant became injured or disabled due to the medical disability. The Employer maintained that management acted conservatively in placing the Grievant off the clock until the medical disagreement was resolved. Furthermore, the placing of the Grievant off the clock was a consistent practice in the Conroe Post Office, that any employee with a questionable medical fitness was placed off the clock until the questions

involved were resolved. Thus, there was a sound business reason for the action taken.

The Employer argued that a threshold question to be answered on this grievance was whether or not the grievance was arbitrable and the Employer maintained that the grievance was not arbitrable. The Employer maintained that the Grievant was a probationary employee for 90 days following her date of employment on December 12, 1981; that her probationary period did not end until March 11, 1982; and as a probationary employee, the Grievant did not have access to the grievance procedure. The Grievant had no contractual right to grieve, therefore the grievance was not arbitrable.

The Union's Position

The Union contended this grievance was arbitrable because the exclusion of a probationary employee from the grievance procedure in Article 12 applied to a discharge of a probationary employee. The Union argued that discharged grievances were arbitrated under the terms of Article 16, but the Grievant was not discharged. Hence Article 16 did not apply and Article 12 Section 1 did not apply. The Union pointed out this grievance was filed as a violation of Article 2 and that Article 12 Section 1 did not exclude a probationary employee form grieving a violation of Article 2.

On the merits, the Union maintained that management had the option of keeping the Grievant on the clock until a recommendation was received from the Southern Regional Office. The Union pointed out that the Grievant quit the job she held prior to going to work for the Employer, that placing her off the clock caused her to lose 3 weeks earnings, and that the Grievant should not have to lose 3 weeks pay over a disagreement between the Employer's medical officers.

Opinion

In this grievance the parties agreed that the Grievant was a good employee and that she was not involved in any misconduct. Furthermore, in my opinion, the Grievant was placed off the clock for 3 weeks solely because there was a valid

difference of opinion by medical authorities as to whether or not the Grievant was suitable for employment as a clerk. The Employer challenged the arbitrability of this grievance under Article 12 and that threshold question must be answered before considering the merits of the grievance. If the answer to the question of arbitrability is "No, the grievance is not arbitrable," then there will be no reason for considering the merits.

The Supreme Court of the United States in United Steelworkers of America v. American Manufacturing Company, 34 LA 559-561 and in United Steelworkers of America v. Warrior and Gulf Navigation, 34 LA 561-568 laid down the foundation for questions of arbitrability. Generally, the courts decide questions of arbitrability, but when arbitrators are appointed to decide those issues the arbitrator must use the standards applied by the courts. In the American Manufacturing law suit the Court wrote:

> The function of the court is very limited when parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgement, when it was his judgement and all that it connotes that was bargained for.
>
> The courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. * * *

In the Warrior and Gulf Navigation law suit the Supreme Court wrote:

> Apart from matters that the parties specifically exclude, all questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions of the collective agreement. The grievance procedure is, in other words, a part of the continuous collective bargaining process. * * *

Thus the 1st question is to decide whether or not a grievance exists. Article 15 Section 1 defines a grievance as a "difference, disagreement, or complaint between the parties related to wages, hours, and conditions of employment." The grievance

form submitted at Step 2 stated:

> Grievant was discharged in January 22, 1982 - was re-instated on February 15, 1982 under Article 2. Attached are papers which are included in Grievant's appeal & EEO.

and in the corrective action requested the form stated:

> Employee was working 10 hr. days, 6 days a week. Employee requests all pay for 3 weeks before she was re-instated.
>
> Also that all papers regarding this discharge be removed from her personnel file.

In my opinion there was clearly a difference, disagreement, or complaint between the parties that related to wages, hours, and conditions of employment and I find that under the terms of the 1981-84 National Agreement a valid grievance exists.

Now, as to whether or not the Article 12 of the 1981-84 National Agreement specifically excludes the Grievant from access to the grievance procedure. There is no doubt that from December 12, 1981 to March 11, 1982 the Grievant was a probationary employee and all actions taken by the Employer in this grievance occurred while the Grievant was a probationary employee. Furthermore, the Grievant was never separated or discharged from her position even though she was off the clock. This is so because the PS Form 50 that was completed on March 6, 1982 showed that the Grievant entered service on December 12, 1981. Although she was off the clock for 3 weeks, I deem that she was on the rolls and considered an employee of the U. S. Postal Service. It is not an uncommon personnel procedure in the U. S. Postal Service for an employee to be off the clock but still an employee; and that is what happened to the Grievant.

The relevant language in Article 12 Section 1 states "the Employer shall have the right to separate from its 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." In my opinion, that sentence permits the Employer to discharge an employee during the employee's probationary period and the employee has no contractual right to grieve the discharge. However, the Grievant was not discharged, therefore, I find that the exclusion of Article 12

Section 1 does not apply and this grievance is arbitrable on its merits.

Article 2 Section 1 provides, inter alia, that there shall be no discrimination by the Employer or the Union against an employee because of physical handicap with respect to a position the duties of which can be performed efficiently without danger to the health or safety of the physically handicapped employee or to others. The parties agrees the Grievant performed her duties efficiently, so the last remaining question is whether or not there was any danger to the Grievant or others if she was allowed to work. In my opinion, there was very little, if any, danger. I believe there was little danger because the Grievant's physician did not indicate any danger on the pre-employment medical examination. Dr. Martin obviously knew about the Grievant's medical history because he mentioned the benign tumor in his medical report. Dr. Martin had a personal observation of the Grievant when he examined her on 12-1-1981, he was the Grievant's physician before and after her neurosurgery, and I believe his knowledge and observation of the situation was superior to any other medical opinion. That is the reason why I believe there was substantially no danger presented by allowing the Grievant to continue working until the Southern Regional Office reached a decision. The Grievant could perform her job efficiently and she presented no danger to herself or others; therefore I find that the Employer violated Article 2 of the National Agreement by placing the Grievant off the clock for 3 weeks.

The 2nd request by the Union was to have all documents relating from the personnel action removed from the Grievant's personnel file. The Employer pointed out that only the U. S. Postal Service Form 2485 and the letter from the Regional Medical Officer was in the Grievant's personnel file. In my opinion, the Grievant will not be injured by those documents remaining in her file. I believe that there may be occasions when management may need to know if she has relevant medical limitations and it would be a mistake to withhold that information should the need to know arise.

Award

After a careful consideration of all the evidence and upon the foregoing findings of fact I find:

1. This grievance is arbitrable.
2. The Employer violated Article 2 Section 1 of the National Agreement by placing Katherine Elizabeth Morgan off the clock for 3 weeks in January and February 1982.

The Employer will immediately offer to make Katherine Elizabeth Morgan whole for the wages she lost for being placed off the clock for 3 weeks.

Edmund W. Schedler, Jr., Arbitrator
July 6, 1982