

27999

REGULAR ARBITRATION PANEL)

In the Matter of the Arbitration) Grievant: Derrick Nickolson
between) Post Office: Bklyn-East NY
UNITED STATES POSTAL SERVICE) USPS Case No. A06N-4A-D 08326385
and)
NATIONAL ASSOCIATION OF) NALC Case No. 08ND751
LETTER CARRIERS, AFL-CIO)

BEFORE: JOSEPH A. HARRIS

APPEARANCES:

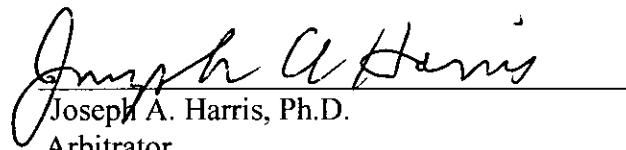
For the U.S. Postal Service: Karen Tomlin
For the NALC: James W. Yates
Place of Hearing: Forbell St., Brooklyn
Dates of Hearing: December 1, 2008
Date of Award: December 28, 2008

AWARD

The grievance is upheld in part. The Service will return the Grievant to work with an unpaid time-served suspension. For two years, the Grievant will be required to submit proper medical documentation to the Service for any absences for which he calls in sick.

PANEL

Regular Regional

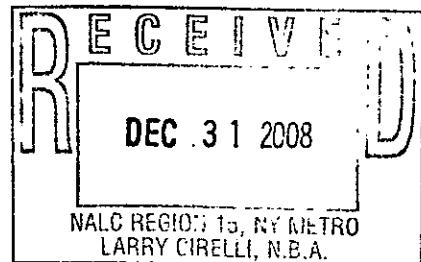


Joseph A. Harris, Ph.D.
Arbitrator

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VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS



STIPULATED STATEMENT OF ISSUE

Did Management have just cause to issue Derrick Nicholson a Notice of Removal, dated July 3, 2008? If not, what shall be the remedy?

EMPLOYEE AND LABOR RELATIONS MANUAL (ELM)

Section 511.4 Unscheduled Absence

Section 511.41 Definition:

Unscheduled absences are any absences from work that are not requested and approved in advance.

Section 511.43 Employee Responsibilities

Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required.

Section 665.4 Attendance

Section 665.41 Requirement of Regular Attendance

Employees are required to be regular in attendance. Failure to be regular in attendance may result in disciplinary action, including removal from the Postal Service.

Section 670 Diversity, Equal Employment Opportunity, and Affirmative Action

Section 671 Diversity Overview

All employees share responsibility for achieving the Postal Service's corporate goals for responding to the voices of the customers, the employee, and the business...

For such efforts to be successful, the Postal Service must manage the diversity of its workforce so as to build an inclusive environment that respects the uniqueness of every individual and encourages the contributions of people from different backgrounds, experiences, and perspective....

Section 672 Federal Legal Requirements for Equal Employment Opportunity and Affirmative Action

Section 672.1 Laws

Equal employment opportunity (EEO) is required by federal law:

- a. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e through 2000e-17, makes it illegal to discriminate in employment on the basis of race, color, religion, sex, or national origin.

* * * *

NATIONAL AGREEMENT

Article 2 Non-Discrimination and Civil Rights

Section 1. Statement of Principle

The Employer and the Union agree that there shall be no discrimination by the Employer or the Union against employees because of race, color, creed, religion, national origin, sex, age, or marital status.

LOCAL MEMORANDUM OF UNDERSTANDING

Item 2 The Establishment of a Regular Work Week of Five Days With Either Fixed or Rotating Days Off

A. All regular carriers will be on a rotating N/S schedule. Reserve, Utility, T-6, Regulars, Routers and Light and Limited Duty Carriers will have Sunday and rotating days off.

C. Carriers will be permitted to swap N/S days mutually with other carriers in the same Utility Group...

STEP 4 DECISION: NC-C-7451/5-MIL-748

(Re: Seventh-Day Adventist church member receiving every Saturday off for religious purposes)

July 21, 1977

The determination of whether to grant an employee's request for LWOP rests with management based on the needs of the service. If local management determines that such leave can be granted without creating an undue hardship on the operation or otherwise cause unequal treatment toward other employees, then such leave may be reasonably granted.

However, all requests for leave on Saturday should be treated on an equal basis as has been the case at this facility [Fond Du Lac, WI].

USPS POLICY STATEMENT RE: RELIGIOUS ACCOMMODATION

(William F. Bolger)

November 25, 1981

A fundamental part of the Postal Service Equal Employment Opportunity is that discrimination based on religion is prohibited. Further, the Postal Service is committed to making reasonable accommodations of employees' and applicants' religious needs with respect to regular schedules, scheduling of tests, training, interviewing, etc., on employees' and applicants' Sabbath or religious holidays. In this regard, managers must be particularly conscious of days on which employees, because of their religious beliefs, may be prohibited from working or required to attend religious services. Methods

of accommodating which are consistent with any applicable collective bargaining agreements and our operating requirements must be attempted.

STEP 4 DECISION: H7N-1N-C 23241
May 5, 1992

The issue in this grievance is whether management violated the National Agreement by posting and awarding a letter carrier position with Saturday as the regular day off in an otherwise rotating schedule.

During the discussion, it was mutually agreed that the following constitutes full agreement of this agreement:

- 1. The parties agree that reasonable accommodation of an individual's religious beliefs does not include acts violative of the National Agreement and/or provisions of a local memorandum of understanding.**

* * * *

FACTS AND BACKGROUND

The Service issued a Notice of Removal, dated July 3, 2008, to the Grievant, Full-Time Regular Letter Carrier Derrick Nicholson, for "failure to be regular in attendance/absenteeism." The Grievant, who had 14 years of Service, had not reported to work as scheduled 17 times within a four month period ending June 2008, missing a total of 152 hours. The Service marked him AWOL on three of those occasions. The Grievant worked at the East New York Station in Brooklyn, NY.

The Parties stipulated at the Arbitration that the dates, hours, and types of leaves on the Notice of Removal (NOR) were accurate. They also stipulated that the dates, amounts of discipline, and charges in the Past Elements represent the final outcome of the charges.

The Service charged that the Grievant violated Sections 511.41 (Unscheduled Absences), 511.43 (Employee Responsibilities), and 655.41 (Requirement of Regular Attendance). The NOR listed three Past Elements it "considered in deciding" to issue the NOR:

Feb. 6, 2007	21-day Suspension	Failure to Follow Instructions/Failure to Deliver Route in a Timely Fashion
Feb. 9, 2006	Letter of Warning	Failure to Follow Instructions/Failure to Properly Perform Your Duties

The Parties met at Step A and Step B in a timely fashion. In the Step B Impasse Decision, the Union argued that Management's intended discipline (removal) was too severe for an employee who had over 14 years of seniority and "no prior past elements of discipline relating to attendance issues." It asked that the NOR be modified to a "discussion" and that the Grievant be returned to duty with full back pay.

In the Step B Impasse decision, the Service made several arguments. First, it argued that although the Parties had agreed on January 25, 2008 (Step B Decision Re: A01N4AC08078312 about Mr. Nicholson's earlier attempt to be accorded a permanent schedule with Saturday as a day off) that "Management is prohibited from making a permanent change from rotating to fixed days to accommodate religious belief," he refused to accept the decision and continued to refuse to work on Saturdays. Second, it argued that the Grievant "was made fully aware that his attendance was unacceptable" through counseling and several Pre-Disciplinary Interviews. Third, it argued that the Grievant "remains defiant...he has absented himself from work on Saturdays for religious reasons...every Saturday since late February....His [personal] statement is full of unproven invective." Fourth, it stated that a 1977 Step 4 decision "makes it clear that all requests for leave on Saturday should be treated on an equal basis." And it added: "Accommodating the grievant [with leave on Saturdays] would not be fair to the other letter carriers in the office." Fifth, it contended: "the argument for accommodation for religious belief was made and rejected by both sides [in the previous Step B agreement cited above]."

SUMMARY OF KEY TESTIMONY

The Service presented two witnesses: Michael McGuire, Supervisor of Customer Service at the East New York office, and Verlane Gooding, Acting Manager of the East New York office.

Mr. McGuire, who issued the NOR and was the Grievant's immediate supervisor since the end of 2006, testified without contradiction that at each of the three PDI's that he conducted, the Grievant would say "the 4th Commandment" to explain why he had not attended work on Saturdays (Sabbath) and on religious holidays that occurred on week days. He also testified that the Grievant called in to request an absence most, but not all, of the time. Thus, the three

AWOL's occurred when the Grievant failed to call in advance. Mr. McGuire stated that the Grievant had never requested a change of permanent schedule, that he (Mr. McGuire) was not aware that the Sabbath is a religious holiday, and that he was not aware of the Postal Service's non-discrimination policy regarding religion and that the Civil Rights Act requires accommodation for religious practices.

Ms. Gooding, who concurred the NOR, testified that when the Grievant was absent, it was necessary to use over-time (OT) or to call other stations for a replacement carrier. She testified that she approved some of the Grievant's absences because when the Grievant calls in (to ERMS, Interactive Voice Recognition (IVR) System/Enterprise Resource Management System), a Form 3971 is automatically generated unless the Grievant has no more allowable absences.

Ms. Gooding testified that she tried to help the Grievant by giving him the opportunity to change his tour. However, when the Step B Team ruled against that action on January 25, 2008, she stopped making that accommodation. She also stated that although she told the Grievant he could request to change his craft (to try to get a schedule that did not include Saturday), he did not follow up on her suggestion. As well, he did not request other employees to swap their days off for his own Saturday tours. She noted that she currently is not accommodating any employees with Saturdays off.

On cross-examination, Ms. Gooding agreed that if a letter carrier asks for Annual Leave on a Saturday and other scheduled carriers are not off work, she can approve the Annual Leave. She also agreed that she became aware during the Arbitration Hearing of the document entitled "Policy Statement" that sets out the Postal Policy requiring Management to try to accommodate employees' religious practices.

Derrick Nicholson testified that the issue about not working on Saturdays had begun more than one year before he received the NOR. He explained that it had become an issue because he had been saved, and he wanted to follow his religion (Yahweh), which has Saturday as its Sabbath. He stated that after the Service stopped accommodating him at the end of 2007 , he was not informed that he could somehow continue to get Saturdays off. On cross-examination, he agreed that although his church had sent Management a letter in August 2007 listing a number of possible ways the Service could accommodate his religious needs, he had not put in a request for a change in craft.

DISCUSSION AND FINDINGS

On one level, this is a straightforward case about “failure to be regular in attendance/absenteeism.” Management contends, and the Union admits, that the Grievant had too many absences. Management says the Grievant’s attendance and his attitude toward his responsibility to be regular in attendance were egregious and merit removal. It also says that since his previous discipline was a 21-day suspension, according to the principles of progressive discipline Management has the right to remove him for the next violation of rules. The Union, on the other hand, says that since he has 14 years of seniority – and since his previous discipline was unrelated to attendance – removal is too harsh a punishment. It notes that discipline is supposed to be corrective, and it asks the Arbitrator to reduce the penalty.

On another level, this case is about the Grievant’s claim that he missed work 17 times in four months because of his religious beliefs and his accompanying claim that when the Service did not accommodate his request to not work on Saturdays and religious holidays, it violated the Civil Rights Act of 1964 (federal law), Postal Service policy on attempting to accommodate religious practices, the National Agreement (and associated Step 4 decisions), and the Local Memorandum of Understanding.

The Union concedes that Management does not have the right to accommodate the Grievant by providing him with a permanent schedule that does not include working on Saturdays. The Step B decision of January 25, 2008, which both Management and Union signed, and which resolved a claim by Mr. Nicholson, bears quoting:

There are national level settlements that address this level of management changing an employee who is on a rotating schedule to a fixed day off schedule to accommodate religious beliefs. Management is prohibited from making a permanent change from rotating to fixed days of to accommodate religious belief. These national level awards are binding. *Management may not assign an employee to a fixed schedule with Saturdays off for religious reasons, where the local memo provides for rotating days off.* **National Arbitrator Aaron, January 25, 1984, NCE 11359.** *The parties agree that reasonable accommodation of an individual's religious beliefs does not include acts violative of the National Agreement and/or provisions of the local memorandum of understanding.* **May 5, 1992, H7N-1N-C 23241.** Awarding the grievant a fixed schedule would violate the terms of the Local Memorandum of Understanding that establishes rotating days off. The Step 4 Settlement, July 21, 1977, NCC 7451, cited below, makes it clear that all requests for leave on Saturday should be treated on an equal basis. Accommodating the grievant would not be fair to the other letter carriers in the

office. There is no evidence of religious discrimination... (**Bold** and *italic* faces are in the original quotation.)

The above refers to a genuine, if misguided, attempt by Management to provide permanent accommodation to the Grievant. However, the Union contends that Management did not make adequate attempts to provide week-to-week or temporary accommodation to the Grievant. I note that the USPS's 1981 "Policy Statement" states, in part: "Methods of accommodating which are consistent with any applicable collective bargaining agreements and our operating requirements must be attempted." Thus, contrary to the stated understanding of SCS McGuire, the Service must attempt to accommodate religious practices. While Ms. Gooding stated she did not know about the "Policy Statement," the evidence indicates she made at least one genuine attempt to accommodate the Grievant's religious practices.

At this point, it seems useful to summarize the law and one prominent regional arbitration award as to what constitutes "reasonable accommodation." In 1977, in Trans-World Airlines v. Hardison, the U.S. Supreme Court interpreted the "religious accommodation" requirement in Section 2000e(j) of the Civil Rights Act of 1964. (Quoted in Arbitrator Carlton J. Snow, Case No. W1N-5D-D 30932; 1985) Arbitrator Snow interpreted the Hardison decision, explaining six (6) "discernable elements" of the "obligation to make religious accommodation." Arbitrator Jo Ann Nixon, in 2004, (Case No. G01N-4G-D03042565) summarized the six elements as:

1. Not only principles but observance of religious practices are to be observed.
2. This accommodation does not extend to the imposition of an undue hardship on the employer's business.
3. There is no obligation to violate the seniority system established by the employer and the employee.
4. Anything more than a de minimus cost would be defined as undue hardship.
5. The employee must give notice of his needs for the accommodation.
6. There must be mutuality.

In our case, the Grievant certainly gave notice of his needs for accommodation (No. 5). His church leadership sent a letter to the Postal Service on August 5, 2007, suggesting six possible ways for the Service to accommodate the Grievant. Ms. Gooding received the letter. The letter suggested:

1. Change to a shift or department that does not operate on Friday night or Saturday.

2. Swap shifts with other employees.
3. Work on Sunday or holidays in place of Saturday.
4. Work a flexible schedule so that I can leave the job on Friday afternoon-minutes before sundown. (Fill in the time needed, depending on distance from home.)
5. Make a temporary accommodation while a permanent one is being arranged. This could entail a temporary assignment to another job or the use of a portion of my annual leave.
6. Examine some other plan that you might suggest as a solution.

It is necessary to examine the six proposals made by the Grievant, through his church, and the Service's responses to them. As will be seen below, the Service acted properly on each one.

No. 1: The Grievant did not apply for a transfer to another craft; there is no mention in the record, and there was no testimony that he asked for a change to another "department." A change in "shift" that does not operate on Friday night or Saturday violates the LMOU, as described above. Therefore, there is no way the Service could have responded positively to suggestion No. 1.

No. 2: Swapping shifts with other employees requires that other employees, on a voluntary basis, agree to swap their shifts. There was no testimony or other evidence that the Grievant asked other employees to swap shifts, and there was no charge, and no testimony or other evidence that Management placed roadblocks in the Grievant's way, prevented him from making such requests, or did not facilitate his desire to obtain swaps.

No. 3: Work on Sunday or other holidays in lieu of working on Saturday. This suggestion violates the LMOU, which provides for rotating days off.

No. 4: Flexible schedule for Fridays. There was no charge and no evidence that the Grievant was prevented from leaving a few minutes early on Fridays. None of the absences cited in the NOR involved leaving early on Fridays.

No. 5: "Temporary accommodation while a permanent one is being arranged." The Service attempted to make a permanent change in the Grievant's schedule, as explained above, but that violated the LMOU. The Service testified that temporarily allowing the Grievant off on Saturdays would harm the interests of other employees.

No. 6: Other ideas? No other ideas were raised at the Arbitration.

At the Arbitration, Ms. Gooding testified that she stopped accommodating the Grievant after he filed the instant grievance – but she denied that her action was retaliatory. This coincides with the position taken by the Step B decision letter of January 25, 2008 which repeated the language of the Step 4 decision of July 21, 1977 (see above): “All requests for leave on Saturday should be treated on an equal basis.” The B decision letter added its own language: “Accommodating the grievant would not be fair to the other letter carriers in the office.”

On cross-examination of Ms. Gooding, it became apparent that, on occasion, letter carriers are allowed Annual Leave (AL) on Saturdays. Thus, Ms. Gooding apparently allowed a carrier AL to attend a wedding. That is different, however, from regularly allowing an employee to use AL or sick days to avoid working on Saturdays.

The Supreme Court ruled in Hardison that undue hardship for an employer (regarding religious accommodation) is anything more than de minimus hardship. Clearly, the Supreme Court considered employers to have less responsibility to accommodate religious beliefs and practices than to accommodate physical or mental limitations. The US Postal Service set the bar higher for itself when it wrote in its “Policy Statement”: “Methods of accommodating which are consistent with any applicable collective bargaining agreements and our operating requirements must be attempted.”

The applicable test is that set by the “Policy Statement.”

Based on the above, it is clear that the Grievant asked for unreasonable accommodation when, on a regular basis (or week-by-week), he asked the Service to allow him not to work on Saturdays. If the Service were to grant his regular requests, it would, on an ad hoc basis, be accommodating his requests at the expense of other carriers. It would be, on a piecemeal basis, de facto changing his schedule to a fixed rather than rotating schedule. Additionally, it would, on occasion, cause the Service to pay overtime and/or to summon carriers from other offices. These costs are not de minimus.

I also note that the Grievant claims the right to be absent from work on religious holidays other than the Sabbath (Saturdays). The Service should try to accommodate these irregular requests, but it cannot do so at the expense of other employees. If the Service cannot accommodate such a request, the Grievant must attend work. Certainly, the Service needs adequate lead time to try to accommodate such requests; there is no evidence that the Grievant ever provided the Service with any lead time at all. Among the 17 absences (19 days) listed in

the NOR, six (6) were on weekdays, and, according to the Grievant, all of the 17 absences were to allow him to practice his religion.

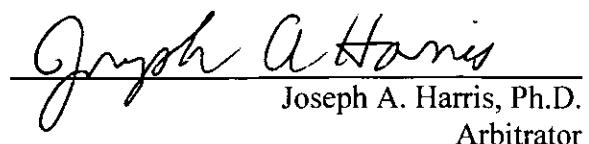
The Grievant seems to be quite serious about his religious beliefs and practices. However, the seriousness of his beliefs does not give him the right to flout the attendance rules set by the US Postal Service. Nowhere in the National Agreement or in the LMOU is there justification for unilateral decisions by employees to call in sick when in fact they are attending religious services. In the instant case, the Grievant received multiple warnings from Management, but he ignored them.

I note that on three occasions, the Grievant did not call in to advise the Service that he would be absent; the Service responded by marking him AWOL. While I agree that he certainly violated the rule on calling in, there is little doubt that the Service did not expect him to be at work.

The Union asks that I reduce the discipline from removal to a lesser penalty since the Grievant's previous disciplinary elements were unrelated to attendance. I am somewhat sympathetic to that view, and I am also moved by the fact the Grievant's absenteeism was not the result of a desire to avoid work or other similar unacceptable reasons. However, I am unwilling for the Grievant to repeat his practice of calling in sick when he actually is engaged in religious pursuits. Therefore, I am reducing the removal to an unpaid time-served suspension, with the understanding that for the first two years after he returns to work, the Grievant will be required to submit proper medical documentation to the Service for any absences for which he calls in "sick." The Grievant is warned by this Arbitrator that he must obey the Service's attendance rules in the future or face prompt dismissal.

AWARD

The grievance is upheld in part. The Service will return the Grievant to work with an unpaid time-served suspension. For two years, the Grievant will be required to submit proper medical documentation to the Service for any absences for which he calls in sick.



Joseph A. Harris, Ph.D.
Arbitrator