C-31623

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration)	Grievant: J. Ponte
)	
between)	Post Office: Bristol CT
)	
The U.S. Postal Service)	Case Number: B11N-4B-C 14238605
)	
and)	Union Number: 1406010020
)	
The National Association of)	DRT Number: 14-314199
Letter Carriers, AFL-CIO)	
)	

Before: Donald J. Barrett, Arbitrator

Appearances:

For the U.S. Postal Service: Mr. Vern Tyler, Labor Relations Specialist

For the National Association of Letter Carriers: Mr. Thomas J. Cronin, II, Executive Vice President

Place of Hearing: Hartford CT

Date of Hearing: November 4, 2014

Award: This grievance is sustained.

Date of Award: November 7, 2014

AWARD SUMMARY

The record as a whole convincingly demonstrates that the Bristol CT Post Office failed to properly, and timely annotate the grievant's attendance record where Family Medical Leave Act (FMLA) should have been noted, and as a result the grievant's request for a transfer may have been negatively influenced. By these actions of the Bristol CT office, it is conceivable the requested office did not make a valid evaluation, pursuant to the Memorandum of Understanding, Re: Transfers.

STATEMENT OF PROCEEDINGS

This matter was presented at hearing on November 4, 2014 at the Hartford CT postal facility, pursuant to the grievance-arbitration provisions of the 2011-2016 Collective Bargaining Agreement, also known as the Contract, or Agreement between the National Association of Letter Carriers, also known as the Union, and the US Postal Service, also known as the Service, or Management.

Counsel for both parties was professional, articulate, and fully prepared to represent their respective positions. The parties were afforded a full, fair, and objective opportunity to be heard, to present evidence, argument, and testimony on their behalf.

Counsel for both parties offered oral Opening and Closing Statements, and at the conclusion of this proceeding the Service provided the arbitrator with one (1) National Award for his consideration. I have thoroughly reviewed this decision and will offer comment within the body of my decision.

The parties did not call any witnesses, allowing their oral presentations, submitted documentation, and the record as a whole to support their respective contentions.

JOINT EXHIBITS

The parties submitted the following exhibits:

Joint 1 – The National Agreement, inclusive of the Joint Contract Administrative Manual. (J-CAM)

Joint 2 – Moving Papers, consisting of Pages 1-95

STIPULATED FACTS NOT IN DISPUTE

The parties so stipulate that J-2, Page 8, Line 16 is accurate.

"Management and Union agree all dates for 2013 should have been recorded FMLA except for 1/27/12, and 2013 UAWOL 5/18/2013, UEAL 2/5/2014."

ISSUE AS FRAMED BY THE PARTIES AT HEARING

"Did management violate Article 2 and/or Article 3 and/or Article 5 and/or Article 10 and/or Article 12 and/or Article 19 of the National Agreement when they refused to grant the grievant a transfer because of "unacceptable attendance record" and if so what shall the remedy be?"

BACKGROUND

The grievant, a city letter carrier at the Bristol CT postal facility for nine (9) years requested a reassignment through the "E-Reassign" process to the postal facility at Virginia Beach VA as a city letter carrier. The grievant's request was denied in a letter dated June 5, 2014, with the reason given for the denial as "...your unacceptable Attendance Record..."

The Union argues, and the Service does not contest that all but three of the dates cited on the PS Form 3972 provided to the Virginia District for consideration of the grievant's attendance record for the years 2012-2014 should have been properly annotated as protected leave pursuant to the Family Medical Leave Act (FMLA), and therefore not considered detrimentally by the Virginia Beach facility.

CONTRACT PROVISIONS CITED

(Most relevant of those cited, as determined by the arbitrator)

"Article 12 Section 6. Transfers"

(Inclusive of MOU – Re: Transfers)

"A. Installation heads will consider requests for transfers submitted by employees from other installations.

B. Providing a written request for a voluntary transfer has been submitted, a written acknowledgement shall be given in a timely manner."

POSITION OF THE PARTIES IN THIS MATTER

"The National Association of Letter Carriers"

The Union argues that the grievant, having submitted a request to transfer from Bristol CT to Virginia Beach VA was unfairly denied the opportunity due to Management's failure to properly list all but three of his absences as FMLA protected leave.

The Union maintains that the grievant followed the proper procedures for seeking a transfer to another geographical area, and met the criteria necessary to transfer, however the supervisor responsible for maintaining the grievant's attendance record was himself in the process of transferring and failed to properly list the grievant's absences as FMLA, thereby giving the false impression to the selecting officials that the grievant had an unreasonable attendance problem.

The Union maintains that the Service violated the grievant's rights under the provisions of the FMLA, and that Virginia Beach was complicitous because they received information from another supervisor at Bristol CT on May 23, 2014, thirteen days previous to their written denial of the transfer request that the grievant's absences had been improperly marked as non-FMLA, yet they continued to deny the grievant a fair, full, and valid evaluation.

The Union requests that the grievant be granted an immediate transfer to the Virginia Beach facility, as requested.

"The US Postal Service"

The Service argues that the grievant had an obligation to insure that his absences were recorded using the correct FMLA case numbers to support his requests, and that it is not entirely the fault of the supervisor.

The Service argues further that it is most conceivable that the supervisor had to revise the grievant's PS Form 3972, Attendance Record when it was apparent to the call in center that the grievant had previously failed to submit the required documentation in support of FMLA within the specific time allowed to do so, and that they inadvertently failed to correct the PS Form 3972 after receiving the supporting documentation.

The Service maintains that the grievant's failure to follow established procedures for requesting and obtaining FMLA directly contributed to the inconsistencies that developed in his attendance record.

The Service maintains further that the decision to accept, or reject the grievant's request for transfer rests almost completely with the Virginia Beach office, and as such the Bristol CT office cannot entertain the Union's requested remedy, and therefore the grievance should be denied.

OPINION

This arbitrator, no stranger to grievances related to transfer requests has stated in the past, and bears repeating once again the obvious conundrum facing one party; in this case officials in Connecticut who must attempt to defend a decision made by postal officials in Virginia. The Agreement is specific that an aggrieved employee must file their grievance with the employee's immediate supervisor. (See Article 15.2) In matters unique as a transfer grievance, the employee's immediate supervisor may seek guidance from the officials denying the transfer request in preparation for his/her response to the aggrieved employee, and/or Union. Any such effort is not reflected in the instant matter, however the Service does argue, with some validity that the employee contributed to the delay in providing FMLA coverage because of the delay in providing notice, and/or documentation in support of his request. (See J-2, Pages 46, 47) However, the Service is in agreement with the Union that, with the exception of three (3) absences (January 27, 2012, May 18, 2013 and February 5, 2014) all other absences cited on the grievant's PS Form 3972, and reviewed by the Virginia Beach officials were FMLA covered, even though the 3972, when reviewed by Virginia Beach did not annotate them as such. The Service and Union agree further that they notified Virginia officials on May 23, 2014 that the subject absences were FMLA covered, previous to the denial letter dated June 5, 2014. The Service and Union further agree that the grievant is a good worker, and the Bristol office would not object to his transfer. However, as stated above the matter cannot be resolved locally. Counsel for the Service does not have the authority to impose a settlement, or enact a resolution on behalf of another postal area, even if he wanted to do so. Be that fair, or not the parties in their wisdom provide the vehicle to ultimately move the dispute between and beyond the geographical areas, through the arbitration process.

The parties charge the arbitrator with determining the validity of the charges made in the grievance, the response to the grievance, and a remedy if appropriate, and to do so across those geographical boundaries of districts and areas. As stated, in the instant matter before me, the parties share much agreement; however the Service at the Connecticut Valley District even if willing cannot make a unilateral decision on behalf of another district. The parties do not place such restrictions upon the arbitrator.

In support of this position, the Service provided a national award issued by Arbitrator Richard Mittenthal that has provided guidance to arbitrators for many years for its wisdom, and insight. In relevant part, the arbitrator states, "Arbitrators have an extremely large measure of discretion in determining how a contract violation should be remedied.

They can and should consider the nature of the wrong done, the damage (or lack thereof) to the employees, the practical impact of the remedy sought, the nature of the bargaining relationship, and other such matters." (See President of APWU, H1C-NA-C 97, 1989)

In the instant matter before me, the Service agrees with the Union that the Bristol Post office violated the Agreement by failing to properly annotate the grievant's attendance record in a timely fashion, and that failure may have contributed to Virginia Beach not accepting the grievant for a transfer, due to an unfair evaluation. (See Article 12.6 & MOU, Re: Transfers 1.D, J-2, Pages 38-40) With that acknowledgement by the parties (of the first part, Connecticut), the arbitrator accepts that there has been a violation of the Agreement, and now must address the remedy.

In the same Mittenthal decision cited above, the esteemed arbitrator also states, regarding remedy, "....the purpose of a remedy is to place the employees (and Management) in the position they would have been in had there been no contract violation. The remedy serves to restore the status quo ante." However, in the instant matter, what would be, or would have been the "status quo ante" if Virginia Beach had in their possession timely the PS Form 3972 that annotated protected FMLA leave for the grievant? If the parties agree there has been a violation of the Agreement, as they have done here locally, is it inherently fair to just place the grievant into the same position he was in previous to the denial without some form of redress? I think not.

That said, and again we face the complexity of such transfer grievances, should Virginia Beach be penalized for a violation by Bristol, CT? Arbitrators have long hesitated to substitute their judgment for "decision makers", i.e. Management so long as Management's decision is reasonable, and has a "rational foundation of fact", and is not shown to be arbitrary, capricious, or unreasonable. (See also Arbitrator Klein in M. Hopkins, Co6N-4C-C 10323937 – 2010025, Coshocton, OH, 2011) Yet on the other hand, Bristol CT and Virginia Beach VA remain one and the same US Postal Service, and the error of one must not completely absolve the other of responsibility.

The Memorandum of Understanding between the parties regarding "Transfers" states in relevant part, (Section 1.D) "Managers will give full consideration to the work, attendance, and safety records of all employees who are considered for reassignment." "Both the gaining and losing installation head must be fair in their evaluations. Evaluations must be valid and to the point, with unsatisfactory work records accurately documented. "

I am not convinced by the record before me that, based on Bristol's failure to properly annotate the grievant's attendance record, the Virginia Beach officials were given the fair evaluation required by the potential losing installation, and therefore may not have had the opportunity to give full consideration, and to make a fair and full evaluation of the grievant's attendance record as a whole before making their decision. The notice of denial to the grievant by the Richmond HR Generalist dated June 5, 2014 appears to lack the full hearing required by any request to transfer that is established well within the parties Agreement, and unlimited arbitral decisions. That may, or may not be the result of the grievant's attendance record being listed initially without the FMLA protected leave annotated. The record does not give answer satisfactorily to that question. However, given the facts that are before me, I find it fair and just that Virginia Beach now give review to the grievant's record, and full consideration to his request for a transfer pursuant to each relevant provision of the Agreement, MOU's, handbooks and manuals related to requests for transfers outside the employees geographical area. It would be presumptuous on the part of the arbitrator to render judgment at this time regarding Virginia Beach's full and complete evaluation of the grievant's entire record, inclusive of the newly annotated FMLA protected leave without giving them the opportunity to do so, and to respond to the grievant, and the parties to this matter pursuant to the dictates of the Agreement with the decision made after doing so.

The occasion to request a transfer to another geographical area can be very stressful. The undertaking of the considerable evaluation made by an office in determining who best meets the agreed upon criteria for selection can also be taxing. Both parties, it is hoped undertake such endeavors with the best of intentions, and while one side may seek the arbitrator's intervention, the other party may find it intrusive. That is understandable and appreciated. However, the parties submit, sometimes reluctantly to this process also with the best intentions, and it remains the hope of the arbitrator to, as Justice William Douglas observed "...bring his informed judgment to bear in order to reach a fair solution... (in) formulating remedies." (See United Steelworkers of America v. Enterprise Car & Wheel Co., 363 U.S. 593, 597 (1960)

It remains my experience that the parties, when given the opportunity will always work together to resolve their disputes, and that even when unable to do so, accept and work together to implement the decision of their appointed arbiter. I am confident that will be the result in this matter as well.

AWARD

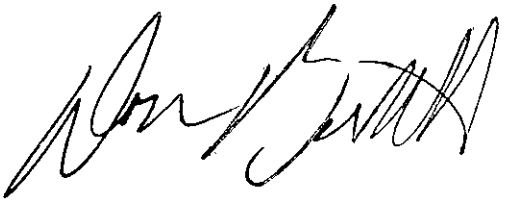
The Virginia Beach Post Office shall, no later than fifteen (15) days from the date of this award undertake a new, full and valid evaluation of the grievant's request for transfer, inclusive of all relevant information giving rise to this grievance, pursuant to the dictates of the Agreement, and parts thereof, and shall communicate directly with the parties counsel in this matter regarding the acquisition of all supporting documentation needed to make such an evaluation.

Further, the Virginia Beach Post Office shall complete their evaluation of the grievant's request and respond to the grievant, with copy to the parties counsel in this matter no later than 25 days from the date of this award. The evaluation/consideration of the grievant's request, and response to such should be full, complete, and accurately documented.

The Service's counsel in this matter is directed to immediately notify his colleague(s) in the Richmond District of this decision and share with them this award, as well as any/all information they may request/need to assist them in complying with such award within the time frame outlined.

At the request of the parties, the arbitrator shall retain jurisdiction over all matters related to this grievance, and any matters resultant of this award for a period of forty five (45) days.

Respectfully Submitted,



Donald J. Barrett, Arbitrator

Date Nov. 7, 14