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Regular Arbitration Panel

In the Matter of the Arbitration

between

United States Postal Service

and

National Association of Letter Carriers,
AFL-CIO

Grievant: Burns

Post Office: Ft. Lauderdale, FL

USPS Case No: H06N-4H-D 08321690

NALC Case No. F08776

09-110668

Before: Roberta J. Bahakel, Arbitrator

Appearances:

For the U.S. Postal Service:

Ms. Lori Costa

For the Union:

Ms. Tammy Cadwell

Place of Hearing:

Ft. Lauderdale, FL

Date of Hearing:

January 22, 2009

Date of Award:

February 18, 2009

JUDITH R. WILLOUGHBY, NALC
National Business Agent

Relevant Contract Provision:

Article 16

Contract Year:

2006 - 2011

FEB 23 2009

Type of Grievance:

Discipline

Region 9
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Award Summary:

The Grievant was issued a Notice of Removal for Improper Disposition of Mail. The Union raised procedural arguments regarding Management's processing of the discipline. Based on the testimony and evidence presented the Union's procedural arguments are upheld and the discipline is set aside. The Grievant is to be returned to work with back pay.

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VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS


Roberta J. Bahakel

BACKGROUND

The Grievant, Ms. Burns, is a letter carrier in Ft. Lauderdale, Florida. In April of 2008 a customer on the Grievant's route called the Office of Inspector General (OIG) because of a missing package and a package that arrived approximately one month late. OIG Agent Nieves originally went out to the customer's home to discuss the customer's concerns about the possible theft of mail, but while he was speaking with the customer she also told him that the Grievant had been throwing parcels onto the lawn and gave him a copy of a home security surveillance video. This video shows the Grievant, on several different occasions in early April of 2008, pulling into the customer's driveway and tossing, from her vehicle, packages into the yard then backing out of the driveway and continuing her route. The video also shows some occasions when the Grievant got out of her vehicle and placed parcels on the lawn before returning to her route. On none of these occasions did the Grievant attempt to deliver the parcels to the door of the customer or try to determine if anyone was home. After seeing this video, Nieves set up a surveillance of the Grievant for July 30, 2008. On that day the Grievant was observed taking approximately five packages from her vehicle and stacking them beside a recreational vehicle at the customer's residence. No attempt was made by the Grievant to deliver the packages to the door of the customer's residence. On July 31, 2008 Nieves interviewed the Grievant and showed her the two videos. The Grievant originally denied throwing packages onto any customer's lawn but when shown the surveillance video stated that the customer has dogs and that she didn't know where the dogs were, so she left the parcels on the lawn. The only investigative report issued by the OIG as to this matter was in regard to the improper disposition of the mail as it related to the throwing of packages onto the customer's lawn. The OIG determined that there was nothing to sustain its original investigation into mail theft and that aspect of the investigation was dropped. Based on the videos and the OIG investigation the Grievant was issued a Notice of Removal on August 15, 2008 for Unacceptable Conduct Due to Improper Disposition of Mail. As a result the Union filed the subject grievance.

ISSUE

Did Management have just cause to issue the grievant a notice of removal?

CONTRACT PROVISIONS

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

Section 2. Grievance Procedure Steps

Step 1:

...

(b) In any such discussion the supervisor shall have authority to settle the grievance. The steward or other Union representative likewise shall have authority to settle or withdraw the grievance in whole or in part. No resolution reached as a result of such discussion shall be a precedent for any purpose.

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.

...

Section 8. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

DISCUSSION

I have reviewed the testimony and evidence presented at the hearing and considered the closing arguments of the parties. No issue of arbitrability was raised at the hearing, therefore this matter is properly before me for decision. Management contends that it had just cause to issue the Grievant a notice of removal in that the Grievant's actions were such an egregious violation of the duties and responsibilities of letter carriers that progressive discipline was not required and removal was the proper action.

The Union raises several issues. First the Union contends that the discipline was untimely issued and must be set aside. The Union argues that the customer complained to Management about the Grievant throwing packages in April of 2008, yet nothing was said to the Grievant until July 30, 2008 and the notice of removal was not issued until August 15, 2008. A review of the evidence presented shows that in April of 2008 the customer called the OIG directly in regard to her problems with her mail and that Management at the station was not aware of the investigation into the Grievant's actions until July 30, 2008. The Union also infers that Management was aware of the Grievant's improper conduct prior to July of 2008 in that the customer had called the station several times to complain about her mail delivery as far back as 2007. The evidence presented showed that the customer's prior problems which she reported to the station dealt with credit card bills being taken out of her mailbox and packages that were never delivered. Prior Management looked into these complaints, and the prior manager, Ms. Wilson, testified that she spoke to the Grievant when there was a missing package, but nothing was said to the Grievant about her method of delivery because none of the complaints prior to April of 2008 dealt with the Grievant throwing packages into the yard. July 30, 2008, the day Agent Nieves came to the station and interviewed the Grievant, was the first day that Management was aware of the Grievant's actions in throwing the parcels into the customer's yard. Based on the evidence presented, I find that the discipline was issued in a timely manner.

The Union also contends that Management violated the Grievant's due process rights when it improperly processed the grievance. The Union argues that the discipline was issued by the station manager, Mr. Jones, and not by the Grievant's supervisor, Mr. Lizak. The

evidence showed that Jones conducted the investigation and issued the discipline because all of the supervisors in his office were associate supervisors who had recently completed the Associate Supervisor Program and had not yet been trained to do removal cases. Jones testified that without training a removal action was more complex than supervisor Lizak could handle at that time. Article 16.8 states "It is *normally* the responsibility of the immediate supervisor to initiate disciplinary action". "Normally" means that in the usual course of business the supervisor will be the one to issue discipline. But, there are instances where other managers can and will issue discipline to an employee. In this instance the discipline was issued by manager Jones and was concurred in by a higher official as required by Article 16.8. Under the circumstances here I cannot find that the fact that the discipline was issued by Mr. Jones violates the contract between the parties.

Next the Union contends that supervisor Lizak did not have authority to settle the grievance at informal step A because the discipline was issued by Mr. Jones, a higher level manager, and also that it was improper for Jones to also act as the formal step A representative for Management because of his involvement in the discipline. The evidence revealed that in this case Jones not only issued the discipline for the Grievant but also met with the OIG agent, conducted the investigative interview and requested the discipline. The testimony from supervisor Lizak showed that he saw the videos, read the grievance worksheet given to him at informal step A, and discussed the case with the steward. He testified that he had been a carrier prior to becoming a supervisor and that the Grievant's actions were not the proper way to deliver a package and he felt that her actions hurt the image of the postal service. After considering these factors he denied the grievance. He also testified that he felt that he had the authority to resolve the grievance at informal A if he wanted to do so. Jones also testified that he felt that Lizak could have settled the grievance. The request for discipline signed by Mr. Jones was concurred in by the Manager of Customer Service Operations and the Officer in Charge of the installation. To believe that a new supervisor who did not have enough experience to compile a request for a removal would have the authority to overturn a request for discipline from his manager and his manager's two superiors is reaching. The testimony showed that Jones requested the discipline because Lizak was not yet ready to prepare a removal. I cannot find,

under the circumstances that existed at the time the informal step A was held, that supervisor Lizak had the authority required by the contract to settle the grievance at informal step A.

In addition, the fact that manager Jones was the management official requesting the discipline, investigating the discipline and acting as the reviewer of the discipline at formal A goes against the expressed intent of the parties as set out in Articles 15 and 16 to provide a fair review of any discipline issued. Management contends that the discipline should stand because it was concurred with by higher management officials and because it is an established practice in the city of Fort Lauderdale, where the Grievant is a letter carrier, that Formal step A grievance meetings are held between the Union's Formal A designee and the Station Manager of the facility in which the grievance arose. Management also contends that the manager has the authority to resolve any grievance presented to him. While this may be the case, when a manager has been the only management official involved in the investigation and issuance of discipline, that official should not also be the reviewing official in the grievance process. Here, a different manager than Jones should have reviewed the discipline. The dispute resolution process jointly set up by the parties anticipates that different management officials will independently review the discipline at each level, thereby constituting due process. Where the same management official imposes the discipline and then sits in judgement of the correctness of that discipline, there is a violation of the due process rights that were established by the parties.

The due process arguments raised at the hearing must be resolved before deciding the merits of a discipline case. The parties have mutually agreed to a process by which they will handle their grievances and which provides a fair review of discipline that has been issued. When that process is violated, as it was here by the supervisor not having the authority to settle the grievance at informal step A and by manager Jones being the only management official to be involved in the issuance and review of the discipline at step A, the discipline must be set aside. Based on this determination there is no need to address the merits of the case.

DECISION

For the above stated reasons, the grievance is upheld and the discipline is set aside. The grievant is to be returned to work with full back pay and no loss of seniority or other benefits. No award is made for any overtime the Grievant might have worked during the time she was off the clock. I will retain jurisdiction only as to the calculation of remedy for a period of 60 days.

Done this 18th day of February, 2009.

Respectfully submitted,

A handwritten signature in cursive script, reading "Roberta J. Bahakel". The signature is written in dark ink and is positioned above the printed name and title.

Roberta J. Bahakel,
Arbitrator