

C# 15476

REGULAR ARBITRATION PANEL

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* In The Matter of Arbitration Between *
* * * * *
* UNITED STATES POSTAL SERVICE *
* * * * *
* and *
* * * * *
* NATIONAL ASSOCIATION OF LETTER CARRIERS *
* * * * *
* AFL-CIO *
* * * * *

GRIEVANT
Audree White

POST OFFICE
Cleveland, Ohio

CASE NO.:
USPS:#C90N-4C-D 96010557
GTS:# 10592

BEFORE: Thomas J. DiLauro, Arbitrator

APPEARANCES:

For the Postal Service:

Linda J. Armstrong, Labor
Relations Specialist

For The Union:

Bill Barnes, Administrative Vice
President

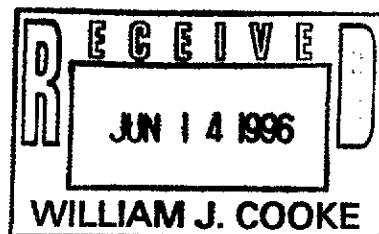
PLACE OF HEARING: Cleveland, Ohio

DATE OF HEARING: May 24, 1996

AWARD:

The grievance is sustained for the reasons stated herein. The grievant is to be reinstated with full backpay and with her seniority unimpaired. Her wage loss is to be offset by any unemployment and/or workmen's compensation she may have been paid and any outside earnings from any other employment she earned during the period she was off. This arbitrator will retain jurisdiction of the case until the foregoing terms of this award have been finalized.

DATE OF AWARD: JUN. 12 1996




Thomas J. DiLauro

BACKGROUND:

By letter dated July 27, 1995, the grievant, Audree F. White, a regular letter carrier, was notified that she would be removed from service on September 5, 1995 for conduct unbecoming a postal employee and possession of a controlled substance on postal property. The letter noted six elements of the grievant's past record which was considered in taking the action. A grievance was filed on August 22, 1995. The Union contended the removal was not for just cause. It noted that the grievant's purse was left in a ladies' restroom for a number of hours and someone could have easily put something in her purse, including someone from the public who was allowed to use the restroom. The Union also claimed that a question existed regarding the grievant's right to representation. The Postal Service contended it had just cause to remove the grievant from service.

The parties stipulated that the grievance was appealed through the various steps of the grievance procedure in a timely and proper fashion. Since the parties could not resolve their differences as the grievance progressed through the grievance procedure, it was appealed to arbitration on January 26, 1996. This arbitrator was selected by the parties to render a final and binding decision. To that end, a hearing was held on May 24, 1996 at which time the parties were given the opportunity to present testimony, exhibits and argument in support of their respective positions. The hearing was declared closed upon the completion of the parties' final oral arguments.

ISSUE:

Did the Postal Service have just cause to discharge the grievant? If not, what is the remedy?

CONTRACT PROVISIONS:

ARTICLE 16 - DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of the 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, alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or 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.

POSTAL SERVICE POSITION:

The Postal Service contended that it had just cause to discharge the grievant for conduct unbecoming a postal employee and possession of a controlled substance on postal property. It presented testimony of witnesses and exhibits to support its position.

The Postal Service pointed to the grievant's testimony regarding the facts of the case. She testified that she reported for work on the morning of June 6, 1995, prepared her route for delivery of the mail, loaded her vehicle, returned to the station, went to the restroom with her purse and then left the restroom without her purse to deliver her route.

Clerk Wendy Wright, Supervisor Sarah Verlie and Manager James Jones testified to one or more of the following facts: Reports were received by management about a purse on the floor in a stall in the ladies restroom. At about 1:15 PM, Clerk Wright retrieved the purse, brought it to the office and gave it to Manager Jones and then she left. Supervisor Verlie and Manager Jones, in their attempt to determine who owned the purse, began to examine its contents. Both of them stated they noticed a small plastic bag filled with a green leafy substance which they suspected to be a controlled substance, namely, marijuana. They testified they removed the plastic bag, a package of "E-Z Wider" brand rolling paper and other contents of the purse in order to locate the identification of the owner. After ascertaining the identity of the grievant, they put the contents back into the purse, called Postal Inspection and told them of their suspicions regarding the contents of the plastic bag.

When the Postal Inspectors arrived, they removed the contents from the purse and proceeded to conduct a field test of the substance in the plastic bag. Their test revealed that the substance was marijuana. The Inspectors then waited for the grievant to return from her route so that they

could interview her. When the Inspectors began to question her, she stated she desired union representation. Supervisor Verlie left the office and located Assistant Shop Steward Ron Prizner who was brought to the office to represent the grievant. After being informed by the Postal Inspectors as to why his presence was required, Mr. Prizner stated he was not trained or qualified to handle such a situation and informed them that he could not allow them to interview the grievant. The Postal Service contended that the foregoing facts were gleaned from the testimony of the Postal Inspectors, Supervisor Verlie, the grievant and Mr. Prizner.

The Postal Service noted that the disagreement regarding the events occurred at this point. The Union argued that the evidence presented by the Postal Service was circumstantial. However, the Postal Service maintained that the evidence was established in fact and substantiated. The Investigative Memorandum (IM) contains a complete report of the events which occurred. Postal Inspector D.F. Cislo described how he removed a small plastic "zip-lock" bag from the pocket of the grievant's purse, along with a pack of "E-Z Wider" brand rolling papers. He stated that the Becton-Reagent field test for marijuana revealed a positive presence of marijuana weighing approximately one and one-half grams. When the grievant entered the office and asked if her money was still in the purse, Inspector Cislo's replied that "that was not all that was in her purse". This reply caused her to state that "it is not mine" even though the marijuana and rolling papers had been returned to her purse and were not in sight.

Mr. Cislo also noted that the grievant stated she was aware of the items in her purse and that a friend, whom she refused to identify, had bought them and placed them in her purse.

The grievant also testified that she was provided with a copy of the IM on June 29, 1995 by Manager James Jones who asked her to highlight any discrepancies in the report. She was accompanied by Shop Steward Joseph Piasecki. She never highlighted any discrepancy nor did she state any specific objections to the contents of the report. The grievant testified she attended other hearings regarding her removal notice and, during a telephone interview in an unemployment compensation hearing, under oath, she did not claim any inaccuracy in the contents of the IM.

The Postal Service argued that the grievant acknowledged the marijuana belonged to a friend. Her contention that she felt pressured and badgered by the Postal Inspectors and made that statement because she wanted them to leave her alone is hindsight. The fact is that the grievant was surprised to find her purse and its contents had been discovered by Management and Postal Inspectors. She could not think of a valid excuse or defense when confronted and blurted-out the truth. She is now trying to change her story. The Postal Service contended that the evidence and testimony of record established no speculation on its part.

With regard to the Union's due process violation argument, the Postal Service claimed there was no previous argument that harmful procedural

error occurred during the investigation or in the issuance of the notice of removal. The Union's claim of a violation of the grievant's "Weingarten" rights to union representation was never raised prior to the arbitration hearing. Despite that fact, Ron Prizner, who testified that he was an assistant steward for three years, was brought to the office to represent the grievant. Whether or not he ever filed a grievance or was ever involved with an investigation of this magnitude with Postal Inspectors does not matter. In fact, the grievant stated she was aware of Mr. Prizner's designation as a union steward and so was everyone else in the facility.

The Postal Service also noted that the Union erred in raising a violation of "Weingarten" rights in that the ruling in that case does not apply to federal sector employment. The federal statute affording similar Weingarten type rights (5 U.S.C. § 7114) states that not only must the appellant show that the agency erred in denying a request for union representation during an interview by Postal Inspectors but also must show that it was a harmful error, i.e., that it caused substantial harm or prejudice to his or her rights. The grievant in the case was not only offered the rights described in the federal statute but the Postal Inspectors went above and beyond their obligation under the law by allowing her to pick and chose who her representative would be. Furthermore, the grievant failed to raise any due process violation arguments either during the pre-disciplinary interview on June 29, 1995 or when she was issued the removal notice on July 27, 1995.

The Postal Service has rules posted at the Station in question regarding its drug policy and the consequences of violating that policy. That fact was verified by both Supervisor Verlie and Manager Jones. The grievant denies any awareness of such postings but admitted she had the opportunity to become aware of such rules, regulations and policies because she was given that information when she was hired. The Postal Service noted that contained in the material she received were the provisions of the ELM including Section 661 Code of Ethical Conduct; 661.53 Unacceptable Conduct; 661.55 Illegal Drug Use; 666.2 Behavior and Personal Habits, and 666.86 Disciplinary Action.

The Postal Service further noted that the grievant's removal notice contained a record of her past elements which reveals violations of different postal rules. It shows that she was subject to progressive discipline so that she could be given the opportunity to become a productive and effective employee. The removal was in keeping with the Postal Service's policy of progressive discipline but, as stated by Supervisor Baillis, even if the grievant had no prior discipline record, the charges were so serious and the grievant's conduct so egregious that it could not be tolerated and she still would have been removed from service without any past element.

The Postal Service argued that the foregoing testimony and exhibits provide clear and convincing evidence that the grievant engaged in conduct unbecoming a postal employee and possession of a controlled substance on postal property. Such conduct and action cannot be tolerated. The Postal

Service asserts it had just cause and, that being the case, only it has the right to determine what the appropriate punishment should be. It asked that the removal of the grievant be upheld and deny the grievance as being without merit.

UNION POSITION:

The Union contended that the two charges cited by the Postal Service have not been proven. At no time did the grievant admit having knowledge of the alleged controlled substance found in her purse. The grievant testified that the only reason she agreed to speak with the Postal Inspectors was because she wanted to get the matter over with and get home to her son. She contended that the Postal Inspectors intimidated and badgered her. Her testimony and contentions were corroborated by Assistant Shop Steward Ron Prizner who stated that the Inspectors, especially Mr. Cislo, were rude, abrasive and pushy in their questioning of the grievant and in their dealings with him.

The Union maintained that management's stories were inconsistent and inconclusive. They were not sure if the grievant's purse was open or closed and whether a patron was escorted or unescorted while using the women's restroom. Also, the Postal Inspectors could not agree if they continued questioning the grievant while waiting for Branch 40 President Robert Harrigan to appear to represent the grievant. Furthermore, Supervisor Jones claimed he discussed the IM and the removal of the

grievant on June 27, 1995 but that testimony was refuted by the grievant. She testified that Mr. Jones did not discuss the IM or the removal notice. He simply handed the IM to her and told her to review it and he would get back to her, which he never did.

The Union also noted the Postal Service's contention that the grievant acted surprised when she walked into the office and was confronted by the Postal Inspectors. The Postal Service claimed that the element of surprise did not give her the opportunity to consider her answers and she admitted the marijuana was bought by a friend and placed into her purse. The Union argued that the grievant was not surprised by what occurred in the office because Clerk Wright told the grievant she had found her purse and that it was in the office before the grievant entered the office.

The Postal Service's contention that no mention was ever made of the grievant's "Weingarten" rights is clearly erroneous. In its Step 3 appeal, the Union contended that there was a question of the grievant's rights under the contract with regard to representation. The Union presented a Step 4 decision which indicates that the parties, at that level, agreed that, under the Weingarten rule, the Employer must provide union representation to the employee during the course of an investigatory meeting where the employee requests such representation and the employee reasonably believes that discussions during the meeting might lead to disciplinary action. The grievant did not ask for a choice of

representatives; the assistant shop steward, who felt he was not adequate to the task of representing her, asked the Postal Inspectors and was granted the right to have the grievant represented by Branch President Robert Harrigan. The Postal Service chose to allow the Branch President to represent the grievant. Therefore, the Inspectors should have discontinued their questioning until he got to the office but they did not. They continued to badger the grievant and questioned her not only about the background of the case but also about the facts of the case.

Finally, there is the question of the grievant's unattended purse. Manager Jones testified that he received reports of an unattended purse in the ladies restroom beginning at about 9:30 AM and that it was not until almost 1:30 PM that such purse was brought to his office. None of the witnesses involved could testify that the purse had not been tampered with while it was in the restroom. The Postal Service has presented no evidence to substantiate that the grievant had any knowledge of the substance which appeared in her purse.

The Union contended that the Postal Service failed to produce sufficient evidence to show that it had just cause to remove the grievant from service. It asked that the grievance be sustained and that the grievant be returned to work and that she be made whole for all loss of earnings.

OPINION:

The parties are to be commended on their excellent presentations of obviously well prepared cases in support of their respective positions.

Management's advocate, in her closing argument, contended that the Postal Service had presented clear and convincing proof that the Postal Service had just cause to remove the grievant on the grounds of conduct unbecoming a postal employee and possession of a controlled substance on postal property. Arbitrators have stated that the standard to be applied in a case such as this (possession of marijuana while on the job) should be the clear and convincing evidence standard, that is, proof less than beyond a reasonable doubt but more than the ordinary prima facie case and preponderance test. (Utility Trailer Mfg. 83 LA 680 [Richman, 1984]). They noted that this standard constitutes a more rational accommodation between the employee's interest in a fair proceeding against the practicalities of assembling evidence to support the discipline imposed. [Chase Bag Co., 88 LA 441 (Strasshofer, 1986); Kennecott Copper Corp., 73 LA 1066 (Mewhinney, 1979); Armour-Dial, Inc. 76 LA 96 (Aaron, 1981); General Tel. Co., 73 LA 531, (Richman, 1979)]. The crux of the instant case is a rational determination between the grievant's interest in a fair proceeding and the practicalities, on the Postal Service's part, of assembling evidence to support the discipline imposed.

The facts are that the grievant left her purse in the ladies rest room on the morning of June 6, 1995. Manager James Jones testified that he was aware that a purse had been left in the ladies restroom at around 9:30 AM on that morning as a result of employees' reports. He noted that it was not until about 1:30 PM that the purse was finally brought to his office by Clerk Wendy Wright. It was around this time that a bag, containing a leafy green substance, was discovered by Mr. Jones while looking through the contents of the purse in an attempt to ascertain who owned the purse. This discovery led Mr. Jones to telephone Postal Inspection which sent Postal Inspectors Doug Cislo and Craig Austin to investigate the matter and determine the events which had occurred. When the grievant arrived back at the Station, she was told to report to Mr. Jones' office where her purse and the two Postal Inspectors were located. When she entered the room, she asked if her money was still in the purse. Inspector Cislo commented that that was not all that was in it. He alleged that, even though the marijuana and rolling papers were in the purse and out of the grievant's sight, she stated "it's not mine" on two occasions. When he asked her to be seated so that they could talk to her about the contents of her purse, he withdrew the marijuana and rolling papers from her purse and placed them on the desk. At that point, she asked for union representation.

Supervisor Verlie left the room to find a shop steward and, by the Postal Inspectors' own testimony, they began to ask her questions relating to "personal matters". They claimed they did not ask her anything about

the specifics of the case. When union representation appeared, in the person of Assistant Shop Steward Ron Prizner, he was advised by the Postal Inspectors of the reason for their being there. Mr. Prizner immediately proclaimed he was neither trained nor qualified to advise or represent her in such a serious matter. The grievant testified that Inspector Cislo and Mr. Prizner engaged in a heated debate about Mr. Prizner representing her. She stated Inspector Cislo's attitude and demeanor was rude and intimidating and all that she wanted to do was get the matter over with so she said she would make a statement. Mr. Prizner protested; however, Mr. Cislo began to question her. Mr. Prizner's unrefuted testimony was that during this period of time he was on the telephone attempting to contact a higher union official to represent the grievant. When the Inspectors would not cease their questioning, Mr. Prizner told her not to answer any more questions. The Inspectors agreed to wait for another union official but, in the interim, they continued to ask her what they called personal questions. The interview ended after the grievant's new representative, Local President Robert Harrigan, appeared with her in the office and she claimed she did not know anything about the marijuana and rolling papers or how they got into her purse.

The Postal Service contended that the Weingarten case (National Labor Relations Board v. Weingarten, 420 U.S. 251 [1975]) does not apply to federal sector employment; however, the Postal Service's submission of a Merit Systems Protection Board case states that the provisions of 5

U.S.C. §7114 afford Weingarten type rights to Federal employees. The foregoing statute provides that a representative of an appropriate bargaining unit shall be given the opportunity to be present at an examination of an employee in connection with an investigation if the employee believes the examination may result in disciplinary action and the employee requests representation.

Inspector Cislo testified he was aware of the procedure to follow during an investigatory interview when an employee asks for union representation. He acknowledged that in such case he could either grant the request, discontinue the interview or offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. In fact, Inspector Cislo granted the grievant's request on two separate occasions for union representation. On both occasions, he admitted that he continued to question the grievant while awaiting for the union representatives to arrive. He stated that he only asks questions relating to personal matters. He claimed that a six page form had to be completed and he was attempting to complete the form while he waited for union representation to arrive. Inspector Cislo claims he did not ask her any questions pertaining to aspects of the case. The reason rights have been established under the Weingarten case or under 5 U.S.C. §7114 are to protect any employees from stating or agreeing to something in an investigatory interview which could incriminate them and result in disciplinary action against them. Therefore, once union

representation is requested and granted, all questioning should cease until such representation arrives.

The circumstances of this case are illustrative of why the foregoing should occur. The grievant's purse was left unattended in the ladies restroom on June 6, 1995 for about four hours. During that time, a number of postal employees and at least one member of the public used the facility. Under such circumstance, anyone could have placed something in the grievant's purse. When the grievant came to the office looking for her purse, she was confronted by two Postal Inspectors and a supervisor. She admitted to making the statement "that's not mine" but denied ever stating that she was aware of the items in her purse (marijuana and rolling paper) because a friend had brought them and put them in her purse. The first statement was verified by Supervisor Verlie but the second statement was made, allegedly, during the time the assistant shop steward was attempting to call the local union president to represent the grievant. However, the fact that the Inspectors admitted they questioned the grievant, after her request for union representation had been granted, when no union representative was present taints the evidence which the Postal Service contends was clear and convincing.

The charges of conduct unbecoming a postal employee and possession of a controlled substance on postal property were brought by the Postal Service based upon the circumstantial evidence that the substance was, in fact, found in the grievant's purse. The use of

circumstantial evidence does not eliminate in any sense the requirement that there must be clear and convincing evidence to establish that the offense was committed; mere suspicion is not enough to establish wrong doing. [Reed Roller Bit Co., 29 LA 604 (Herbert 1957), Enterprise & Century Undergarment Co., 24 LA 63 (Donnelly, 1955)]. The fact that the grievant's purse was left unattended in a public area for about four hours conceivably could have been how the substance got into her purse and, thus, does not establish by itself that the grievant was guilty of the charges brought against her by the Postal Service. The Postal Service's reliance on statements allegedly made during the Postal Inspector's interview with the grievant is the "evidence" the Postal Service points to as proving the grievant was guilty. The fact that such "evidence" has been found to be tainted due to the Postal Inspector's questioning of the grievant when union representatives were not present makes the evidence producing the chain of circumstances pointing to guilt weak and inconclusive and no probability of fact may be inferred from the combined circumstances. [South Penn Oil Co., 29 LA 718 (Herbert, 1957)]. Consequently, the grievance must be sustained.

It should be noted that the Postal Service advocate presented a masterful case in defense of the action taken. The fact that the Postal Inspectors' actions during the investigation impinged on the grievant's interest and right to a fair proceeding was something over which she had

no control and prejudiced an otherwise convincing case on behalf of the Postal Service.

AWARD:

The grievance is sustained for the reasons stated herein. The grievant is to be reinstated with full backpay and with her seniority unimpaired. Her wage loss is to be offset by any unemployment and/or workmen's compensation she may have been paid and any outside earnings from any other employment she earned during the period she was off. This arbitrator will retain jurisdiction of the case until the foregoing terms of this award have been finalized.



Thomas J. DiLauro
Arbitrator

JUN. 12 1995