REGULAR ARBITRATION PANEL

C#09746

In the Matter of Arbitration	GRIEVANT: L. Wilson
between	
AMERICAN POSTAL WORKERS UNION	POST OFFICE: Oakland, CA
and	
UNITED STATES POSTAL SERVICE	CASE NO. W7C-5E-D 10681

BEFORE: Professor Carlton J. Snow

APPEARANCES: Mr. Johnny C. Bowens

Mr. Edgar Williams

PLACE OF HEARING: 1675 Seventh Street

DATE OF HEARING: April 28, 1989

HEARING CLOSED: June 9, 1989

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the grievant was not discharged for just cause and that the parties' collective bargaining agreement has been violated by management's decision to remove the grievant. But for the Employer's improper decision, the grievant would have continued her employment status. Consequently, she shall be reinstated with back pay and full benefits, minus interim earnings and any other mitigating amount she has received as income since the time of her removal.

The Employer shall explain to the grievant in person and in writing that hers is a "last chance" reinstatement, and she shall sign a document to acknowledge her receipt of this information. Her reinstatement is conditioned on her maintaining a good attendance record for the next twelve months. During the year following this decision, her record of absences and tardiness shall not exceed the average of the facility where she works. If so, she immediately shall be discharged at the discretion of management. At management's discretion, she also immediately may be placed on Restricted Sick Leave.

Her work record shall not be purged of the materials discussed in this decision, and the arbitration decision shall be made a part of her employment file with a copy of the decision furnished to her by the Employer. It shall be made clear to her that her attendance record must improve and that only the requirements of procedural

fairness as incorporated in the contractual concept of just cause are the basis for her conditional reinstatement. The arbitrator shall retain jurisdiction in this matter for ninety days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: 6-28-89

IN THE MATTER OF ARBITRATION	)	
	)	
BETWEEN	)	
	)	
AMERICAN POSTAL WORKERS UNION	)	ANALYSIS AND AWARD
	)	
AND	)	Carlton J. Snow
	)	Arbitrator
UNITED STATES POSTAL SERVICE	)	
(Wilson Grievance)	)	
(Case No. W7C-5E-D 10681)	)	

I. INTRODUCTION

This matter came for hearing pursuant to the 1987 collective bargaining agreement between the parties. A hearing occurred on April 28, 1989 in a conference room of the facility located at 1675 Seventh Street in Oakland, California. Mr. Johnny C. Bowens, Labor Relations Assistant, represented the United States Postal Service. Mr. Edgar Williams, National Business Agent, represented the American Postal Workers Union.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The arbitrator tape-recorded the proceeding as an extension of his personal notes. The advocates fully and fairly represented their respective parties.

The parties stipulated at the hearing that the matter properly had been submitted to arbitration and that there were no challenges to the substantive or procedural

arbitrability of the dispute. The parties authorized the arbitrator to retain jurisdiction for ninety days after the issuance of a report in the matter. The parties chose to submit post-hearing briefs, and the arbitrator officially closed the hearing on June 9, 1989 after receipt of the final brief in the matter. Although both briefs had been filed in a timely manner, one of them was misplaced in a postal facility and not delivered to the arbitrator until June 9.

II. STATEMENT OF THE ISSUE

The parties stipulated that the issue before the arbitrator is as follows:

> Was the grievant discharged for just cause? If not, what is the appropriate remedy?

III. RELEVANT CONTRACTUAL PROVISIONS

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. 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.

IV. STATEMENT OF FACTS

In this case, the grievant has challenged the decision of the Employer to remove her for poor attendance. The grievant received her Notice of Removal on August 18, 1988, and management justified her removal on the basis of (1) irregular attendance/unscheduled absences, and (2) incomplete tours. The Employer provided dates with regard to both charges.

Supervisor Morris gathered data used for issuing the Notice of Removal in the case, and she testified that the grievant had a serious problem with tardiness. She stated that she had counseled the grievant several times about the problem, although the grievant's attendance records revealed no entries substantiating any such counseling. While testifying

that she understood the proper procedures for documenting disciplinary discussions with employes, she could offer no explanation with regard to why the grievant's records bore no such indications. Supervisor Morris also stated that the grievant had been tardy on more occasions than those listed in the Notice of Removal. She also indicated that the grievant worked late on many occasions in order to compensate for arriving late. Supervisor Morris stated:

> On many occasions [the grievant] would be late; but if she would, at the time I was trying to help her, I just wouldn't--I wouldn't write her up for that. In other words, she would stay past the end of her tour, and she would make that time up.

For the two dates listed in the Notice of Removal, Supervisor Morris could not recall if the grievant gave any reasons for being tardy, despite the fact that Supervisor Morris was the one who charged the grievant with tardiness on the two days in question.

Supervisor Morris also stated that she had been told the grievant was on Restricted Sick Leave, but she was not sure about the accuracy of this statement. It was her standard operating procedure to gather data necessary for formulating a removal notice without looking further into the data. She testified that she made no further investigation of the grievant's attendance problem beyond gathering and looking at available attendance documents.

The grievant challenged management's description of her attendance record and maintained that it had been improving. In that regard, the parties disagreed about the meaning

of facts presented at the arbitration hearing. When the parties were unable to resolve their differences in the grievance procedure, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Employer:

The Employer contends that the grievant was discharged for just cause based on an unsatisfactory attendance record. Despite attempts by management to help the grievant overcome her problem, her attendance record allegedly did not improve sufficiently to warrant her continued employment.

It is the position of the Employer that the grievant had numerous opportunities to improve her attendance but that she adopted a callous attitude toward her problem, and this allegedly hindered management's efforts to assist her. According to the Employer, the grievant's attendance record was uniformly poor during her tenure as a postal employe. Management ultimately gave the grievant a "last chance" warning, and the grievant allegedly failed to heed this message. Hence, the Employer maintains that there was no alternative but to issue a Removal Notice in this case. Hence, management maintains that the grievance must be denied.

B. The Union:

It is the position of the Union that the Employer did not have just cause for the grievant's removal in this case. According to the Union, the grievant's attendance record improved. Additionally, the Union contends that the Employer failed to use progressive discipline in an effort to correct the grievant's attendance problem in this case. Finally, it is the belief of the Union that the "last chance" agreement on which the Employer has relied in this case is defective. Accordingly, it is the belief of the Union that the grievant must be reinstated.

VI. ANALYSIS

A. The Grievant's Record:

The grievant is far from being a model employe, and a review of her record is disappointing. It, however, does not necessarily support termination. The arbitrator has reconstructed the grievant's record as follows:

June 13, 1984--Warning Letter for irregular attendance.

June 11, 1985--Warning Letter for irregular attendance.

September 4, 1985--Seven day suspension for irregular attendance.

December 27, 1985--Fourteen day suspension for irregular attendance.

April 29, 1986--Fourteen day suspension for irregular attendance.

March 9, 1987--Advance Notice of Removal.

March 25, 1987--Written Last Chance agreement.

July 11-15, 1987--Sick Leave or its equivalent.

August 24, 1987--Sick Leave or its equivalent.

September 18-19, 1987--Sick Leave or its equivalent.

October 8, 1987--Tardy.

October 16, 1987--Sick Leave or its equivalent.

November 20, 1987--Sick Leave or its equivalent.

December 8, 1987--Advance Notice of Remval.

Late December, 1987--Oral Last Chance Agreement.

January 7, 1988--Tardy.

February 16 -17, 1988--Sick leave or its equivalent.

March 1-3, 1988--Sick Leave or its equivalent.

March 7, 1988--Emergency Leave.

April 13, 1988--Emergency Leave.

May 17, 1988--Incomplete Tour.

June 7-8, 1988--Sick Leave or its equivalent.

June 15, 1988--Incomplete Tour.

July 15, 1988-Emergency Leave.

August 6, 1988--Tardy.

August 18, 1988--Notice of Removal.

August 30, 1988--This grievance was filed.

This is an intolerable record, and the chronology makes clear that the Employer could have terminated the grievant on a number of occasions. But management did not terminate her. Twice the Employer issued her a Notice of Removal.

Twice the Employer agreed to "last chance" agreements, and twice the Employer did not enforce either of the two "last chance" agreements. She immediately should have been removed after violating the terms of the first last chance agreement.

B. Evidence About the "Last Chance: Agreements:

Supervisor Morris testified about the "last chance" agreement associated with the first Notice of Removal issued to the grievant in March of 1987. She maintained that the grievant had received a "last chance" agreement, but she could not find a copy of it in the record. She never saw it. Nor could she say the terms it had contained. She, nevertheless, assumed the existence of the agreement because she had "heard" that one had been negotiated before the grievant.

It, then, was startling to hear Supervisor Morris testify that the grievant had not "lived up" to this agreement, and she based her judgment on a lack of improvement in the grievant's attendance record. She testified as follows:

> My judgment [that the grievant failed to conform to the "last chance" agreement] was based on, well, if she had an agreement, 'we'll just try to honor some portions of this agreement,' but what I'm saying to you is that, if she had one, from what I could see, no matter what the agreement was, she did not improve.

Despite the fact that Supervisor Morris never saw the alleged "last chance" agreement, nor knew its date or terms, she maintained that the grievant's attendance record from March,

1987 to August, 1988 did not conform with this agreement which she never saw.

It, then, was most unsettling when, on redirect examination, Supervisor Morris testified that, in fact, she had seen the "last chance" agreement associated with the Removal Notice of March, 1987 and, in fact, had used it in the decision making process for issuing the third Removal Notice, about which there is a dispute in this case.

It was Supervisor Tillman, a relief supervisor, who gathered data for the grievant's Notice of Removal in March of 1987. Although she could not recall the dates, she testified that the grievant had received two verbal "last chance" agreements after her first Notice of Removal. She conceded that such "last chance" agreements customarily are reduced to writing, but she maintained that she verbally approved the two agreements in this case. She also maintained that she counseled the grievant on several occasions about her attendance problem, but there is no documentation to substantiate her assertion.

It was Supervisor Talley who issued the grievant a third Notice of Removal. She testified that she made no investigation into the grievant's attendance problem. In explaining why she signed the Notice of Removal, she explained without further elaboration that it was "part of my job."

The Superintendent of Mails, Reuben Love, testified about a "last chance" agreement made in response to the grievant's second Notice of Removal in December of 1987. He believed the "last chance" agreement had been made in January of 1988.

He did not believe the arrangement had been reduced to writing. It was his understanding that another transaction had been entered into between the parties with another supervisor in March or April of 1988. He, however, had been involved with only two "last chance" agreements, one with regard to the March, 1987 Removal Notice and one with regard to the Notice of Removal in December 1987.

The Union representative with whom these "last chance" agreements had been negotiated allegedly was Ms. Etta Bailey, Director of the Clerk Craft. She testified that she never reached any understandings with the Employer concerning this grievant. Acknowledging that she had negotiated a number of "last chance" agreements, she vigorously maintained that she always required such agreements to be reduced to writing. According to Supervisor Tillman, a verbal"last chance" agreement for the grievant in this case had been reached in negotiation with Ms. Bailey. Superintendent Love also maintained that Ms. Bailey had been involved with a verbal "last chance" agreement.

The grievant was equally unable to help with regard to the "last chance" agreements as well as other disputed facts in the case. She maintained, for example, that there were no notations in her file about verbal counselings with regard to attendance because none ever occurred. She insisted that neither Supervisor Morris nor Tillman talked with her about her attendance. She did admit that Superintendent Love spoke with her about her attendance problem and did so when he

removed her from her position as a "204-B" supervisory position. She maintained without rebuttal that Supervisor Talley, who issued the disputed Notice of Removal, had been her supervisor for one day only.

The grievant maintained that she knew nothing of any "last chance" agreement negotiated after her March, 1987 Notice of Removal. According to the grievant, her Shop Steward told her only that the penalty had been reduced from a removal to a thirty-day suspension. She also contended that she never had been placed on Restricted Sick Leave.

"Last chance" reinstatements can provide management with an effective tool for attempting to salvage a recalcitrant employe. It is a useful device in a variety of situations, and the flexibility inherent in "last chance" agreements allows management to draft an agreement that responds to the specific problems faced by the parties in a particular case. By conditioning reinstatement on attaining satisfactory goals, the Employer has an opportunity to monitor an employe's progress with precision, and it is reasonable for management to conclude that, if an employe will not respond when a Damocles sword hangs above his or her head, the individual will not respond in more normal circumstances. Hence, removal probably would be justified.

If, however, a "last chance" agreement is to be used, it must be used properly. It must be closely monitored. By not enforcing a "last chance" agreement, management lulls an employe into a false sense of security. If management does

not follow through with its stated intent, an employe is led to believe that he or she only thought a sword hung above the individual's head but that management really intends to continue its lenient policies. Then, the individual relies on the expectation of leniency, and considerable ambiguity is injected into attempts by management later to rely on the "last chance" agreement after an intervening period of leniency when none was supposed to exist. Additionally, "last chance" agreements must meet certain requirements. For example, the terms of the agreement must be clear and unmistakable. The agreement needs to incorporate specific performance requirements. There must be objective proof that the terms have been communicated by management to the employe. It is the duty of management, not the union, to explain these terms to the employe.

C. Application to this Dispute:

Applying the principles to the matter at hand demonstrates that management in this particular case failed to use the "last chance" agreements properly. The agreements did not include specific performance requirements. The Employer failed to be able to prove that clear and unmistakable terms of the agreement had been communicated to the grievant. Consider, for example, the "last chance" agreement of March 25, 1987 involving the grievant in this case. It stated:

> Pursuant to our discussion on March 25, 1987 the above captioned case was mutually settled at Step I without prejudice to either parties [sic] position and without precedent in the following manner:
>
> > The Advance Notice of Discharge dated March 9, 1987, shall be reduced to a Thirty Calendar Day Suspension.
> >
> > The notification requirements and appeal rights established by Articles 15 and 16.5 of the National Agreement are hereby waived. The suspension will begin on April 9, 1987 at 7:00 a.m. The grievant shall return to duty on May 9, 1987 at 7:00 a.m.
> >
> > The grievant is reminded that this settlement constitutes a last chance agreement and that satisfactory conduct is expected and required.
> >
> > The grievant is hereby warned that failure to meet that requirement will result in his [sic; the grievant is a woman] removal from the Postal Service.
>
> The above constitutes the entire settlement agreement in this case. The parties agree that this settlement will not be cited in any hearing related to another employee.
>
> To acknowledge the settlement agreed to, please sign and return the original and one copy to this office. Keep two signed copies attached for your records.

This agreement was signed by individuals who played no part in this arbitration proceeding, and there was no indication that the grievant knew anything at all about the "last chance" agreement.

Moreover, the Employer did not enforce the alleged "last chance" agreement of March 25, 1987. Even if one argues that the grievant had constructive knowledge of the agreement because a Union representative signed it, there was no enforcement; and that fact has undermined the right of management to

rely on the "last chance" agreements as adequate notice to the grievant of the consequences of her poor attendance. Despite her failures after transacting the "last chance" agreements, management failed to communicate to the grievant that her attendance was unsatisfactory.

D. A Potpourri of Defects:

Without regard to the issues involving the "last chance" agreements, the disciplinary procedure followed by the Employer in this case involved other miscellaneous defects, causing the decision making process that led to the grievant's Letter of Removal to be faulty.

It is "black letter" law in arbitration that an employer must conduct an adequate investigation before drawing conclusions about a grievant. It is especially important in a case involving an employe's removal carefully to gather all relevant documentary evidence. (See, for example, A.O. Smith Corp., 66-1 ARB 8025 (1965); Goss Company, 52 LA 201 (1969); and Aerosol Techniques, Inc., 48 LA 1278 (1967)). As one arbitrator has aptly observed, "While this arbitrator does not believe that all the complexities of due process that exist in judicial proceedings are equally applicable in arbitration matters, certain 'basic notions of fairness or due process' must be followed." (See, Flintkote Company, 59 LA 329, 330 (1972)).

Supervisor Morris testified that she did not know whether the grievant was on Restricted Sick Leave; yet, she analyzed the grievant's file as though the grievant had been given that designation. She also testified that she did not read all of the "last chance" agreements, but she, at the same time, analyzed the grievant's file as though she were in violation of that agreement. Her reliance on unproven assumptions in both cases was critical to the decision making process.

Second, it would appear that inappropriate information was used in deciding to remove the grievant. Supervisor Morris testified that the grievant had a serious problem with tardiness, but the problem was not reflected by the grievant's attendance records because she had been permitted to work late in order to compensate for coming in late. It is a violation of the grievant's due process rights to consider instances of tardiness not documented in the grievant's records as a basis for disciplining her because no one warned her of the possible consequences. Supervisor Morris also believed the grievant to have been on Restricted Sick Leave, but no one produced documentation to prove it. Both Supervisors Morris and Tillman testified that they counseled the grievant about her attendance problem, but the grievant's work record failed to contain any entries substantiating such counseling. Considering such improper information in the decision making process was prejudicial to the grievant.

It also is important to highlight the fact that management made no attempt to compare the grievant's attendance

records before and after the "last chance" agreements in order to determine whether or not she had made any improvement in her record. A cursory inspection of the grievant's attendance records shows that the grievant was absent from duty on seventeen occasions and tardy on three occasions in 1987. Through August of 1988, she was absent from duty on eight occasions, tardy on three, and had incomplete tours on two. The data support a plausible argument that the grievant's attendance record improved. That her record was unsatisfactory misses the point. What is important is that Supervisor Morris maintained the grievant's attendance record did not improve from March of 1987 to August of 1988. She steadfastly held to this position while also admitting she never had seen the December of 1987 "last chance" agreement. As a result, her decision could not have been based on a factual comparison of attendance records for relevant time periods, and this caused her decision to be faulty and arbitrary.

Nor may the Employer rely on its alleged record of progressive discipline. The unenforced "last chance" agreements undermined attempts at progressive discipline. As the Elkouris have observed, "Lax enforcement of rules may lead employees reasonably to believe that the conduct in question is sanctioned by management." (See, How Arbitration Works, 3d ed. 643 (BNA Books: 1973). A desired effect of progressive discipline is to gain an employe's attention and to forewarn the individual about the consequences of continued misconduct. The actions of management in this case did not

have this effect. Instead, it led the grievant to rely on a policy of leniency. It is recognized that the grievant's attendance record in this case is poor and unacceptable. At the same time, she has a right to receive due process and procedural fairness. Because these basic rights have been violated, it must be concluded that the removal was without just cause.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the grievant was not discharged for just cause and that the parties' collective bargaining agreement has been violated by management's decision to remove the grievant. But for the Employer's improper decision, the grievant would have continued her employment status. Consequently, she shall be reinstated with back pay and full benefits, minus interim earnings and any other mitigating amount she has received as income since the time of her removal.

The Employer shall explain to the grievant in person and in writing that hers is a "last chance" reinstatement, and she shall sign a document to acknowledge her receipt of this information. Her reinstatement is conditioned on her maintaining a good attendance record for the next twelve months. During the year following this decision, her record of absences and tardiness shall not exceed the average of the facility where she works. If so, she immediately shall be discharged at the discretion of management. At management's discretion, she also immediately may be placed on Restricted Sick Leave.

Her work record shall not be purged of the materials discussed in this decision, and the arbitration decision shall be made a part of her employment file with a copy of the decision furnished to her by the Employer. It shall be made clear to her that her attendance record must improve and that only the requirements of procedural

fairness as incorporated in the contractual concept of just cause are the basis for her conditional reinstatement. The arbitrator shall retain jurisdiction in this matter for ninety days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: 6-28-89