BENJAMIN AARON 7/6/83 Lost
Request for Steward Denied
Art. 16.2 - Discussion
Art. 19 - E&LR Manual Sec. 513.37

C# 03769

In the Matter of Arbitration

between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION

Case No. H1T-1E-C 6521
Gary Simpson
Buzzard Bay, Mass.
(Cape Cod Area Local)

APPEARANCES: Steve Furgeson for the Postal Service;
Mike Benner for the Union

DECISION

This grievance arose under and is governed by the 1981-1984 National Agreement (JX-1) between the above-named parties. The undersigned having been mutually selected by the parties to serve as sole arbitrator, a hearing was held on 21 January 1983, in Washington, D. C. Both parties appeared and presented evidence and argument on the following issue, as formulated by the arbitrator with their mutual consent (Tr. 14-15):

> Did the Postal Service violate the terms of the 1981-1984 National Agreement by refusing the grievant's request for a Union steward to be present at discussions between the grievant and his supervisor regarding the grievant's use of sick leave?
>
> If so, what is the appropriate remedy?

A verbatim transcript was made of the arbitration proceedings, and each side filed a post-hearing brief. Upon receipt of both briefs, the arbitrator closed the

record on 7 February 1983.

On the basis of the entire record, the arbitrator makes the following

AWARD

The Postal Service did not violate the terms of the 1981-1984 National Agreement by refusing the grievant's request for a Union steward to be present at discussions between the grievant and his supervisor regarding the grievant's use of sick leave.

The grievance is denied.

Benjamin Aaron
Arbitrator

Los Angeles, California
6 July 1983

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UNITED STATES POSTAL SERVICE Case No. H1T-1E-C 6521

and

AMERICAN POSTAL WORKERS UNION

OPINION

I

Article 16 (Discipline Procedure) of the 1981-1984 National Agreement (JX-1) provides in part:

> Section 2. Discussion
>
> For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable. Following such discussions, there is no prohibition against the supervisor and/or the employee making a personal notation of the date and subject matter for their own personal record(s). However, no notation or other information pertaining to such discussion shall be included in the employee's personnel folder. . . .

Section 513.37(Restricted Sick Leave) of the Employee and Labor Relations Manual (ELM) (JX-3) provides in part:

> .371 Reasons for Restriction. Supervisors (or the official in charge of the installation) who have evidence indicating that an employee is abusing sick leave privileges may place an employee on the restricted sick leave list. In addition, employees may be placed on the restricted sick leave list after their sick leave use has been reviewed on an individual basis and the following

actions have been taken:

a. Establishment of an absence file. . . .

b. Review of the absence file by the immediate supervisor and by higher levels of management.

c. Review of the quarterly listings, furnished by the PDC, of LWOP and sick leave used by employees. (No minimum sick leave balance is established below which the employee's sick leave record is automatically considered unsatisfactory.)

d. Supervisor's discussion of absence record with the employee.

e. Review of the subsequent quarterly listing. If listing indicates no improvement, the supervisor is to discuss the matter with the employee to include advice that if next listing shows no improvement, employee will be placed on restricted sick leave.

On or about 27 July 1981, Leonard F. Higney, Superintending Engineer at the Buzzards Bay, Massachusetts, Post Office, had a discussion with Gary Simpson, the grievant, concerning the latter's use of sick leave, which Higney considered to be excessive. During this discussion, Higney sought to persuade Simpson to use his sick leave more sparingly, so that a balance would be available to him in emergencies. Higney also offered to accommodate Simpson's work schedule to make it easier for him to visit the VA hospital on his own time. Higney testified that at this meeting Simpson neither asked that a steward be present nor inquired whether the discussion might lead to discipline.

During the next quarter, Simpson's sick leave usage improved slightly, and Higney did not discuss the matter with

him. Simpson's sick leave balance remained low, however, and Higney held another discussion with him on 2 February 1982, covering the period from 3 October 1981 through 8 January 1982. This time, Higney testified, Simpson asked whether the discussion would lead to disciplinary action. Higney said no. Simpson then asked for a steward, and Higney denied the request; instead, he read to Simpson Article 16, Section 2 of the National Agreement, and reiterated that the discussion could not lead to discipline. The discussion then continued, with Higney again asking Simpson to try to improve his sick leave record and making the same suggestions he had offered at the previous meeting. At the conclusion of the discussion, Simpson asked to see a steward, which Higney allowed him to do.

Higney again considered Simpson's use of sick leave in the ensuing quarter - - 9 January through 31 March 1982 - - to have been excessive. Accordingly, he held a third discussion with Simpson on 19 April 1982. Higney testified that this was a "repeat performance" of the previous meeting: Simpson asked if the discussion was discipline or could lead to discipline; Higney replied in the negative; Simpson asked for a steward; and Higney denied the request and read Simpson Article 16, Section 2 of the National Agreement. After the discussion had concluded, Simpson again asked for and was permitted to see a steward.

Simpson was not disciplined, nor was he placed on

restricted sick leave. As Higney explained: "If the discussions on sick leave are not consecutive, the three quarters. . .you cannot place a man on restricted sick leave" (Tr. 42).

Shortly thereafter, a grievance was filed on Simpson's behalf and processed through the steps of the grievance procedure to arbitration (JX-2). On 14 May 1982, the Union filed unfair labor practice charges against the Buzzards Bay Post Office with the Regional Office of the National Labor Relations Board (JX-5), alleging in part:

> Since on or about 2-2-82, Management at the Buzzards Bay Post Office, through its Officers, Agents, and Representatives, has refused Employee requests for Union Representation at discussions held by the Supervisors with the Employees, where both the Employee and Supervisor believe and state that discipline can and will result from said discussions.

On 16 June 1982, the Regional Board deferred further proceedings on this charge in accordance with the policy enunciated by the Board in NLRB v. Dubo Manufacturing Corp., 142 N.L.R.B. 431 (1963) (Deferral pending outcome of arbitration involving the same issue as that involved in the unfair labor practice).

II

On the issue whether Higney's second and third discussions with Simpson could have led to discipline, the Union contends that Higney told Kevin McAdams, Simpson's steward, that the discussions he had had with Simpson "could lead to

disciplinary action down the road." Higney (who was the only witness at the arbitration hearing) testified that McAdams had asked him that question, and that he had replied: "I guess it could, if you consider restricted sick leave disciplinary action" (Tr. 62). Nevertheless, as previously indicated, no such action was taken nor were the discussions ever made a part of any official record.

The Union also asserts that the discussions on attendance held pursuant to Section 513.371 of the ELM were not of the type contemplated by Article 16, Section 2 and, moreover, that the latter provision was never intended as a waiver of it rights under "External law," including the Supreme Court's decision in NLRB v. Weingarten, Inc., 420 U.S. 251 (1975), that an employee's resistance to interrogation in the absence of a union representative at an investigatory interview "in which the risk of discipline reasonably inheres is within the protective ambit" of section 7 of the NLRA, and that the employer's denial of the employee's request violates section 8(a)(1) of the NLRA.

By way of reply to the Union's first argument, the Postal Service cites its letter dated 24 November 1978 (EX-6) to representatives of the Postal Workers, the Mail Handlers, and the Letter Carriers, calling their attention to the elimination from the old Section 513.371 of the ELM of any reference to "counselling" and the substitution of the word

"discussion," in order to make that section consistent with the new Article 16, Section 2 of the National Agreement.

To rebut the Union's claim that Article 16, Section 2 of the 1981-1984 National Agreement did not constitute a waiver of its rights under the Weingarten decision, the Postal Service cites a 1976 Advice Memorandum issued by the Office of General Counsel of the NLRB recommending dismissal of charges brought by the National Association of Letter Carriers, that under the 1975-1978 National Agreement,

> It was concluded that the denials by the Postal Service of the request for Union representation at the counsellings involved herein did not constitute violations of the Act inasmuch as the Union (in its collective bargaining agreement with the Service) was deemed to have waived any such right that may otherwise have been available to the employee unit.

The Office of General Counsel has continued to adhere to this position.

The Postal Service also cites several court and arbitration decisions supporting its argument that even in the absence of a waiver, "Weingarten rights" do not arise unless the employee reasonably believes that he may be disciplined as a result of an investigatory interview.

III

The language of Article 16, Section 2 of the National Agreement, quoted above , states categorically that discussions of the type here involved "are not considered discipline and are not grievable." Also, the record makes it

clear that the language of Section 513.371 of the ELM was amended to conform with Article 16, Section 2 for the specific purpose of removing any suggestion that the discussions therein referred to are disciplinary in nature. The mere possibility that an employee may be placed on restricted sick leave at some future time is outside the scope of Article 16, Section 2; in any case, no such action was taken in this case.

The foregoing reasons are sufficient to dispose of the grievance under the terms of the National Agreement. However, because the NLRB will not defer to an arbitrator's award if the facts giving rise to a grievance have also been made the basis of an unfair labor practice charge, and if the arbitrator does not also deal specifically with that charge, I must, albeit reluctantly, address the issue whether the Postal Service denied Simpson the right to Union representation to which he was allegedly entitled under the Weingarten decision. In doing so I rely upon the General Counsel's Advice Memoranda, previously referred to, in concluding that, even assuming the alleged right of representation to exist, it was waived by the Union when it agreed to Article 16, Section 2.

In addition, I think it clear that by its terms, Weingarten does not apply in this case. The discussions between Higney and Simpson were not, in my judgment, "investigatory interviews in which the risk of discipline reasonably inheres"; the facts were known, and the discussions were for

the purpose of suggesting alternative ways for Simpson to visit the VA hospital without using his sick leave. Moreover, Simpson's alleged concern that these discussions were disciplinary in nature, or might lead to discipline, was unwarranted. The criterion for having a steward present is not, as stated in McAdams letter of 4 June 1982 to John Howarth, management's Step 2 designee (JX-2), "what is in the mind of the Employee." Rather, it is whether the employee reasonably believed that the discussion might lead to discipline. The test is objective, not subjective; and in this case, Simpson's concern was objectively unreasonable.

As previously indicated, Higney did tell McAdams that Simpson's use of sick leave could lead to his being placed on restricted sick leave "down the road"; but I consider that statement, standing alone, to be insufficient evidence that at the time of the discussions in question, Simpson could reasonably have believed he was in danger of being disciplined. The Union was offered the opportunity to continue the arbitration at a later date and to call Simpson and McAdams, both of whom were unavoidably absent on the day of the hearing, to testify further as to conversations with Higney. The Union decided that this would be unnecessary, from which I infer that the two employees could have added nothing material to the record.

On the basis of the foregoing, I conclude that by denying

Simpson's request for a steward the Postal Service did not violate Article 16, Section 2, or any other provision of the National Agreement; and further, that under the National Labor Relations Act, as I understand it, the Union has waived the right of bargaining-unit employees to have a Union representative present at discussions held pursuant to Article 16, Section 2 and ELM Section 513.371, and that, in any case, such discussions are not "investigative interviews" of a type creating a reasonable fear that they may lead to discipline, within the meaning of the Supreme Court's decision in NLRB v. Weingarten, Inc.

Benjamin Aaron
Arbitrator