

C-27061

REGULAR ARBITRATION PANEL

In The Matter of Arbitration

Between

UNITED STATES POSTAL SERVICE,

-and-

NATIONAL ASSOCIATION OF LETTER,
CARRIERS, AFL-CIO.

Grievant: Julius Ribas

Post Office: Encino, CA

USPS Case No. FO1N-4F-D 007035961

DRT/NALC Case No. 01-055475

BEFORE:

Claude Dawson Ames, Arbitrator

APPEARANCES:

For the Postal Service:

Steven W. Marney, Labor Relations Specialist

For the Union:

David G. James, Arbitration Advocate

Place of Hearing:

Encino, CA

Date of Hearing:

March 1, 2007

Date of Brief:

March 15, 2007

Date of Award:

April 17, 2007

Relevant Contract Provision:

Articles 16.1 and 35

Contract Year:

2001-2006

Type of Grievance:

Discipline - Removal

Award Summary

The Agency had just cause to issue Grievant Julius Ribas a Notice of Removal for being under the influence of drugs while on duty. But Grievant shall be given a Last Chance Opportunity consistent with Article 35 to continue his EAP program and postal employment. Terms of the LCA are set forth in the Discussion. The Union's grievance is sustained in part and denied in part.



CLAUDE DAWSON AMES, Arbitrator

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I

BACKGROUND

This case involves an appeal by the Union on behalf of Grievant, Julius Ribas, a 22-year letter carrier at the Encino Post Office who was issued a Notice of Removal on November 21, 2006. The Grievant is charged with "Failure to Follow Instructions/Unacceptable Conduct/Under the Influence of Drugs While on Duty".

The facts giving rise to the Grievant's removal are not in dispute and are stated as follows: On October 23, 2006, Managers at the Encino Post Office observed the Grievant acting strangely while casing his mail. He had just reported for duty, but was not responding coherently to specific instructions that he case only first and second class mail. The Grievant began casing all the mail including third class mail. Grievant continued to case third class mail even after being instructed not to do so. He was acting as if he was under the influence of drugs.

Supervisor David Ochoa first observed the Grievant acting incoherently, laughing and smiling to himself while casing mail. The supervisor immediately notified Station Manager Sanfilippo that Grievant was acting strangely and that there was a problem. Grievant was observed by management and then asked to come to the office for a fact finding interview and to determine if there was a medical problem. Grievant began slurring his words and became non-responsive to their questions. Management decided that Grievant needed medical attention.

Grievant was then transported to a medical facility for an emergency fitness-for-duty examination. Grievant was given a medical examination and complete drug test. The examining physician advised Management that, due to Grievant's difficulty following his directions, he should be sent home pending the drug test results. Grievant was driven home and not allowed to drive by the Station Manager. He was given specific instructions by Station Manager Sanfilippo not to return to work until instructed to do so and to call EAP.

However, Grievant returned shortly to the Station after being dropped off at his residence. When asked why he was there, Grievant responded that he came to pick up his car and things from his locker. Grievant was told that he should not be driving and again was offered a ride home.

Grievant left the facility, then re-entered as he became argumentative. Grievant was finally escorted from the facility and maintenance was called to change the security code.

Drug test results were returned several days later and confirmed management's suspicions. The Grievant was severely impaired when he reported for duty on October 23, 2006. Grievant tested positive for "cocaine metabolite and PCP." The cutoff value for "cocaine metabolites" is 150 ng/ml. Grievant had 2,343 ng/ml in his system. The cutoff value for "PCP" is 25 ng/ml. Grievant had 18,884 ng/ml in his blood stream. After a fact-finding interview and investigation was conducted, the Grievant was issued a Notice of Removal on November 21, 2006. But prior to the Notice of Removal, Grievant voluntarily entered into a EAP drug treatment program which he successfully completed, and where he now attends AA meetings and a twelve step after care program.

A hearing was held on March 1, 2007 at the Encino Post Office. Steven W. Marney, Labor Relations Specialist, represented the Agency. David G. James, Arbitration Advocate, represented Grievant, Julius Ribas, and the NALC. The parties stipulated that the grievance was properly before the Arbitrator. The Agency elected to close orally while the Union chose to submit a written post hearing brief, which was received in a timely manner.

II

ISSUE PRESENTED

The issue stipulated for resolution by the parties is as follows:

Did Management have just cause to issue Mr. Ribas the Notice of Removal dated November 21, 2006, for Failure to Follow Instructions/Unacceptable Conduct/Under the Influence of Drugs While on Duty at the Encino Station of the Van Nuys Post Office?

If not, what is the appropriate remedy?

III

RELEVANT CONTRACT LANGUAGE AND REGULATIONS

ARTICLE 16 - DISCIPLINE PROCEDURE

Section 16.1 Principles

In the administration of this Article, a basis 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 the 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.

ARTICLE 35 - EMPLOYEE ASSISTANCE PROGRAM

The employer and the Union express strong support for programs of self-help. The Employer shall provide and maintain a program which shall encompass the education, identification, referral, guidance and follow-up of those employees afflicted by the disease of alcoholism and/or drug abuse. When an employee is referred to the EAP by the Employer, the EAP staff will have a reasonable period of time to evaluate the employee's progress in the program. This program of labor-management cooperation shall support the continuation of the EAP for alcohol, drug abuse, and other family and/or personal problems at the current level.

An employee's voluntary participation in the EAP for assistance with alcohol and/or drug abuse will be considered favorably in disciplinary action proceedings.

IV

POSITION OF THE PARTIES

A. Agency's Position

Management contends that there is no dispute between the parties that Mr. Ribas acted as charged in the Notice of Removal, dated November 21, 2006. Therefore, the burden of proof has shifted to the Union to prove that there are overwhelming mitigating circumstances or contractual violations sufficient enough to overturn the discipline issued to Mr. Ribas for his egregious behavior on October 23, 2006. Behavior which standing alone is so egregious that progressive discipline is not required in these circumstances. Management contends that the union has failed to meet that burden of proof in this case. The local union in this regard puts forward only two arguments: (1) that the discipline in question is punitive and not corrective in violation of Article 16, and (2) that the Grievant's voluntary participation in the EAP program was not considered favorably in the

disciplinary process in violation of Article 35. Management reviewed both arguments and found that Grievant's conduct was so egregious as to merit removal even after considering favorably Grievant's participation in the EAP program. This was the Grievant's second participation and he continues to violate postal rules and regulations. Just cause does exist to remove the Grievant as charged.

B. Union's Position:

The Union contends that Management has failed to consider favorably the Grievant's voluntary participation in the EAP in this discipline. The Grievant voluntarily went to EAP on his own to seek counsel in regards to his drug illness. The Grievant is currently taking steps to correct and deal with his illness of drug addiction. He has already started attending EAP sessions with a certified EAP counselor. The Grievant entered into EAP prior to this discipline being issued. He has enrolled in a structured rehabilitation program at Aurora (Charter Oak) Behavioral Health Care. He enrolled in this structured program on November 6, 2006 prior to discipline being issued. He is routinely tested for drugs in this program and has supplied the union with his drug tests, including 2/28/07, which show that he has tested negative for drugs since enrolling in the EAP program. These same drug tests have been shared with Management. The Grievant will continue to provide test results to the Union and local Management as he continues his treatment.

V.

DISCUSSION

The evidence record indicates that on October 23, 2006, Grievant was observed by Supervisor David Ochoa and Manager Sanfilippo acting strangely and believed to have been physically impaired when he reported to work. A subsequent emergency fitness-for-duty examination, including drug/alcohol testing, revealed that Grievant tested positive for "cocaine metabolite and PCP." Grievant was found to far exceed the cutoff values for cocaine metabolite which is 150 ng/ml, and for "PCP," which is 25 ng/ml. Grievant's drug test results showed he had 2,343 ng/ml of cocaine and 18,884 ng/ml of "PCP" in his system. Both of the drugs found in Grievant's blood while on duty were illegal.

The evidence further supports Management's subsequent action in removing the Grievant from the premises with instructions not to come back to work until instructed to do so. But Grievant clearly failed to adhere to these instructions and returned to the premises, not once, but three (3) times, while still severely impaired by cocaine and PCP. Management acted appropriately in its response by taking action to prevent the Grievant from operating his vehicle; but more so, in preventing the Grievant from operating a postal vehicle. Grievant was clearly a danger to himself and to others due to his severe drug impairment

Postal rules and regulations (ELM Section 665.16) state: "Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the Postal Service." And, ELM Section 665.25 states: "The Postal Service will not tolerate the sale, possession, or use of illegal drugs, or the abuse of legal drugs, while on duty or on postal premises. Employees found to have been engaged in these activities are subject to discipline, including removal and/or criminal prosecution where appropriate."

There is no dispute that, as a long-term employee, Grievant was well aware of the Agency's rules and regulations regarding the illegal use of drugs and being severely impaired while on duty. Grievant not only jeopardized his own safety by reporting to work severely impaired under the influence of drugs, but also the public's safety and the Agency's liability, if allowed to operate a postal vehicle while in his state of impairment. Notwithstanding the Grievant's belief that he could operate a vehicle safely, he clearly demonstrated a disregard for his safety and the safety of others in doing so. The Grievant's then existing state of mind was consistent with his severe drug impairment requiring appropriate action by local management.

The Agency maintains that Grievant has not shown or adequately demonstrated remorse for his conduct in exposing both the Postal Service and the public to such intolerable risk of danger. Given the extreme levels of illegal drugs ingested by the Grievant, the Postal Service argues that its removal action should be sustained. According to the Agency, Grievant was previously referred to EAP for a similar drug problem and is now asking for another chance after he has failed to conform his behavior, to Postal standards.

The Union disagrees, arguing that Grievant has changed and is sincere in his determination to regain his employment and turn his life around. According to the Union, Grievant suffered a relapse during his earlier EAP treatment and was clean for four (4) years before experiencing severe family problems. When asked if he was back on drugs by Station Manager Sanfilippo, Grievant was just too embarrassed to admit that he was using again or ask for assistance. Since being off work, the Grievant entered a chemical dependency drug program at Charter Oak Behavioral Health Care on November 6, 2006, and has attended four days a week from 6:00 p.m. to 9:00 p.m. Grievant successfully completed the program on January 10, 2007, and now attends an aftercare program. All at his own expense.

Grievant testified in his own behalf and indicated that his personal life has improved tremendously and that he is not the same person he was before. He has a support group and attends a twelve-step after care program. He has not used alcohol or drugs since November 2006 when he entered into the treatment program and he continues to test negative for both drugs. His last drug/alcohol test was February 28, 2007, in which he tested negative. Grievant indicates that he loves his job and, if given another opportunity, he can become a productive employee.

After a careful review of the evidence record, the Arbitrator finds that Management did have just cause to issue Grievant a Notice of Removal as charged. The Grievant did fail to follow instructions and reported to work under the influence of illegal drugs. The Agency has shown a clear violation of its workplace rules and regulations by this employee. And as stated by Regional Arbitrator Gentile (Case No. W8N-5B-D-4441)," an employee need not be granted enumerable opportunities to effect the correction of the problem. The standards of just cause and reasonableness do not require such forbearing on an indefinite basis." Although the Arbitrator concurs with the general sentiments expressed by Arbitrator Gentile, he finds the instant case clearly distinguishable and Grievant deserving of a last chance opportunity consistent with his favorable treatment and considerable progress.

This case is governed in large part, by Article 35 of the parties' National Agreement, where the Employer and Union equally expressed strong support for employee' programs of self-help.

The parties recognize that employees afflicted with the disease of alcoholism and/or drug abuse should be treated and actively encouraged to seek help. An employees' voluntarily participation in a recognized EAP for assistance with alcohol and/or drug abuse will be considered favorably in disciplinary action proceedings. Notwithstanding the Agency's reservations about whether the Grievant has demonstrated sufficient remorse to be entitled to reinstatement, under Article 35, the evidence record indicates that Grievant has taken the positive initiative while off work to address his drug abuse problem. On November 6, 2006, he voluntarily entered a chemical dependency program four days a week, from 6:00 to 9:00 p.m., and successfully completed the program on January 10, 2007. He is currently in an after care program and has tested negative from November to February 28, 2007 for alcohol and drugs. The Grievant understands that the burden and responsibility rest with him to remain drug free and continue to correct his behavior. He has indicated his willingness to do so.

Last Chance Agreement:

In light of these continuing and positive self-help initiatives undertaken by the Grievant and consistent with Article 35, the Arbitrator finds that the Grievant should be given favorable consideration in the form of a Last Chance Opportunity at his job and personal rehabilitation. Accordingly, the Grievant is ordered placed on a Last Chance Agreement as follows:

1. The parties are to meet and confer to agree upon the terms of the Last Chance Agreement (LCA).
2. The LCA should include a verifiable requirement that Grievant continue, for a period of one year, a weekly chemical dependency after care program at Aurora Charter Oak Behavioral Health Care.
3. The LCA should also include a verifiable requirement by Grievant to submit and undergo a weekly drug test as a condition of continued employment for a period of one year. Both the cost of the after care chemical dependency program and weekly drug testing shall be borne by the Grievant.
4. Violation of any verifiable drug after care of testing requirement will result in the

Grievant's removal from Postal employment.

5. The Grievant is required to offer a formal apology upon his return to work to Station Manager Sanfilippo and Supervisor's Ochoa and Abbinanti for his inappropriate and unprofessional conduct towards them.
6. The Arbitrator shall retain jurisdiction over this case for sixty (60) days to resolve any questions regarding implementation of the Last Chance Agreement.

AWARD

1. The Agency had just cause to issue Grievant a Notice of Removal as charged. However, the Grievant is to be given a Last Chance Agreement, in lieu of removal, consistent with Article 35.
2. If Grievant successfully completes his LCA, his removal will be converted to a long-term suspension.
3. Grievant is conditionally reinstated to his former position with full seniority, but no entitlement to any back pay.
4. The Union's grievance is sustained in part and denied in part.

Respectfully submitted,

Dated: April 17, 2007



CLAUDE DAWSON AMES, Arbitrator