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REGULAR ARBITRATION

In the Matter of the Arbitration)
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 between)
)
 UNITED STATES POSTAL SERVICE)
)
 and)
)
 NATIONAL ASSOCIATION OF)
 LETTER CARRIERS, AFL-CIO)

Grievant: D. Valdez
Post Office: Laredo, TX
Case No.: G06N-4G-D 08369810/08369580
Union No.: DRT #10-114054/10-114870

BEFORE: I. B. Helburn ARBITRATOR

APPEARANCES:

For the U. S. Postal Service: Tom Strapkovic

For the Union: Javier Bernal

Place of Hearing: Laredo, TX

Date of Hearing: February 20, 2009

- AWARD: 1. The emergency placement of the grievant was not for just cause. She is to be made whole for wages lost.
2. The removal of the grievant was not for just cause. She is to be reinstated to her former position, with a suspension and is to receive back pay and benefits in accordance as set forth in the Opinion and Award.

Date of Award: March 2, 2009

PANEL: Regular Contract and Discipline

Award Summary

The grievant was seen drinking a can of beer in her parked postal vehicle. Article 16.7 was invoked; she was told to report for work the next day for an investigative interview after which Article 16.7 was again invoked. She was removed and the Service failed to consider favorably information that the grievant was an alcoholic and that she had gone to EAP and psychotherapy and was actively involved in the AA 12-step program.

I. B. Helburn

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REGULAR ARBITRATION

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 UNITED STATES POSTAL SERVICE)
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 NATIONAL ASSOCIATION OF LETTER)
 CARRIERS, Branch No. 354)

OPINION AND AWARD

OF THE

ARBITRATOR

USPS Nos. G06N-4G-D 08369810/08369580
 NALC DRT Nos. 10-114054/10-114870
 D. Valdez

APPEARANCES

For the Postal Service:

Tom Strapkovic
 Juan Cerda
 Melizza Gonzalez

Labor Relations Specialist
 Supervisor, Customer service
 204B/Rural Letter Carrier

For the Union:

Javier Bernal
 Miguel A. Martinez
 Maria Sparks
 Olga Ramos
 Barbara E. Ledden
 Diana Valdez

Local Business Agent
 City Carrier
 Steward
 Steward
 Branch President
 Grievant

PERTINENT NATIONAL AGREEMENT PROVISIONS (JX-1)¹

ARTICLE 16 – DISCIPLINE PROCEDURE

Section 1. Principles

Section 5. Suspensions of More Than 14 Days or discharge

Section 7. Emergency Procedures

ARTICLE 17 – REPRESENTATION

Section 2. Appointment of Stewards

Section 3. Rights of Stewards

¹ JX refers to Joint Exhibit.

ARTICLE 19 – HANDBOOKS AND MANUALS

ARTICLE 35 – EMPLOYEE ASSISTANCE PROGRAM

Section 1. Programs

BACKGROUND

This case involves the emergency placement and subsequent removal of Diana Valdez (Valdez or grievant), a City Carrier whose career appointment dates from November 1994. Valdez is an admitted recovering alcoholic. In 2000 an issue arose over whether the grievant was being permitted to attend therapy sessions related to alcohol use. In 2003 an alcohol-related incident resulted in an emergency placement and a subsequent removal, with the removal reduced to a 30-day suspension. Among other things, the reduction in discipline was contingent upon Valdez's participation in the Employee Assistance Program (EAP), which she did for an undetermined period of time. The resolution, signed by the Postmaster, Branch President and Valdez, included the condition that the suspension "will be kept in Ms. Valdez record for two years" (UX-1). Valdez testified that in 2007 she spoke in confidence to Station Manager Armando Villalon, Jr. about returning to counseling, noting that problems had arisen but that she was "not over the edge" at the time.²

On August 14, 2008³ the grievant received upsetting news and turned to alcohol that evening, but went to work the next day after calling in late. There is no dispute that on August 15, while on the clock and in uniform, Valdez was observed by 204B Melizza Gonzalez while the grievant was parked in her assigned postal vehicle, having partially consumed one can of beer, with five unopened cans also in the vehicle, while at lunch. Valdez was driven back to the station and the emergency placement provisions of Article 16.7 were invoked. She was told to return the following day to for an investigative interview. Nobody accused Valdez of being intoxicated and she was not sent for a blood-alcohol test.

On August 16 Valdez was given an investigative interview by Supervisor Juan Cerda, after which she was again placed off the clock with the emergency placement

² From the arbitrator's hearing notes.

³ All dates are in 2008 unless otherwise noted.

continued. The conduct of the investigative interview is disputed. Cerda testified that he went to the grievant's case and told her that they needed to talk and that she needed representation. He recalled Valdez responding that steward Olga Ramos was not in the building but that Miguel Martinez, Ramos' husband, was available. Martinez confirms that Valdez asked him to go to the meeting with her. Martinez was a trustee of NALC Branch 354 but he was not certified as a steward.

Cerda explained the reason for the meeting and questioned the grievant about her consumption of beer. Martinez voiced the Union's recommendation that the grievant be referred to EAP. Cerda read the emergency placement letter, intending to have Valdez sign it. Martinez recalled that Ramos had not been allowed to attend, that he took notes, which he subsequently misplaced, and that Cerda asked where Valdez had obtained the beer. The grievant asked Cerda if he was going to refer her to EAP since she needed help.

Ramos testified that Valdez had asked for her as her Union representative, but that Cerda denied the request. Maria Sparks, the certified carrier steward in the station, was asked to attend the investigative interview by Villalon, who apparently knew that Martinez was not certified. Cerda and Gonzalez, attending as an observer, remember that the investigative interview began anew when Sparks entered. Both said Sparks took notes. Gonzalez remembered Sparks saying that she would get Martinez's notes later. Martinez and Sparks indicated that Cerda did not start over with the investigative interview when Sparks, who said she had no note pad and took no notes, entered. Sparks arrived about the time Valdez was asked to sign the emergency placement letter. Villalon came in near the end of the interview and said that he would call EAP for the grievant, who was then sent home on continued emergency placement.

On August 28 Valdez was issued a Notice of Removal (NOR) because of Unacceptable Conduct, which referred to her consumption of the beer on August 15. The NOR did not rely on previous discipline, but did note that the August 15 incident was the second documented instance of the grievant's consumption of alcohol while on duty. The NOR stated that the grievant had violated provisions of the ELM, M-41 and EL-814. Cerda testified that the removal reflected the seriousness of the situation and the safety concerns of the Postal Service—concerns over the grievant's ability to drive safely.

Timely grievances were filed protesting both the emergency placement and the removal. The grievance over the emergency placement was imposed primarily because the Postal Service focused on what was believed to be a continuing drinking problem while the Union claimed that once the grievant was brought back to work, the emergency placement was ended and could not be reimposed following the investigative interview. Contentions surrounding the removal are set forth below, as this grievance also was imposed.

There seems to be no dispute with the testimony of Valdez that she contacted EAP on August 16, thereafter went to six sessions and then joined Alcoholics Anonymous (AA), with continuing participation on a daily basis and meetings with her sponsor three times a week. The grievant testified that she is a sponsor herself, has turned her life over to G-d and intends to continue the AA 12-step program regardless of the outcome of her arbitration case. She spoke of herself as a recovering alcoholic who has stopped drinking and who will be in recovery for the rest of her life. In evidence is a February 19, 2009 letter to the Postal Service from Valdez's AA sponsor, who writes, in part, "We have met twice a week (sometimes 3 times) for these five months. Diana has never missed an appointment, has always been on time, and has always been willing to do all the work required of her. Not only has she kept all appointments with me, but Diana has only missed one daily A.A. meeting in the last 5 months" (UX-2).

Barbara Ledden, Branch President and Formal Step A designee, testified that Valdez had personally apologized to her for the embarrassment she had caused. In Ledden's view, the grievant shows renewed confidence and self-awareness and is committed to recovery.

Once imposed, the grievances were consolidated for a hearing and assigned to the undersigned regular panel arbitrator. The grievances were heard in Laredo, TX on February 20, 2009. The parties stipulated that both grievances were properly before the arbitrator. Witnesses were sequestered, affirmed before testifying and made available for cross examination. The grievant was present throughout the hearing and testified in her own behalf. Documentary as well as testimonial evidence was received. The parties waived post-hearing briefs in favor of oral argument and agreed to submit prior awards

no later than February 27, 2009. These were actually received on February 27, 2009, at which time the record was closed.

ISSUES

The stipulated issues are:

1. Was the emergency placement of the grievant for just cause and if not, what is the appropriate remedy?
2. Was the removal of the grievant for just cause and if not, what is the appropriate remedy?

POSTAL SERVICE POSITION

Concentrating on the removal, the Postal Service asserts that just cause existed and thus the grievance should be denied. There was no *Weingarten* violation because Valdez asked for Martinez as her representative for the investigative interview and that request was granted. Even though the Postal Service did not rely on prior discipline, the grievant has a past history with alcohol and there is no reassurance that she will not repeat errant conduct in the future. While her current work at recovery is admirable, the Postal Service should not be required to take another chance on her. If she is reinstated, it should be without back pay. Five supporting regular panel awards were submitted.

UNION POSITION

Also concentrating on the removal, the Union insists that the action was without just cause and asks that the grievance be sustained and that Valdez be reinstated and made whole in all ways, to include interest on back pay. While the testimony was contradictory, the Union believes that the grievant's *Weingarten* rights were violated when she was not allowed to have Ramos as her representative. The 2003 discipline cannot be considered. However, since then the grievant went for five years without a problem. Even intoxication does not necessarily result in removal and there is no evidence that the grievant was intoxicated. Valdez has admitted that she is an alcoholic and has taken and is taking steps to recover. The Postal Service has not given her the

favorable consideration that is due for having addressed her problem. Five supporting regular panel awards were submitted.

DISCUSSION

The Emergency Placement

This grievance is sustained. Article 16.7 allows the Postal Service to place an employee in a non-duty, non-pay status "where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others" (JX-1). The grievant's conduct on August 15 justified the emergency placement for that day. She was observed drinking from a can of beer while in her postal vehicle, with five more unopened cans in her possession. There was no way of knowing if she had consumed additional alcohol before being observed or exactly what condition Valdez was in when she was observed. She had clearly violated the prohibition against drinking while on duty and had acted unsafely by violating the law of the State of Texas against having an open container of alcohol in her vehicle. The emergency placement was appropriate to protect the grievant and the public from possible harm.

However, the following day presents a very different story. Valdez was told to return to work and was placed on the clock. When Cerda came to get her for the investigative interview, she was at her case. There is no evidence of alcohol on her breath on August 16; there is no evidence of illogical or unusual behavior that should have created concern on August 16. In other words, there is no evidence that Valdez was incapable of working safely and efficiently on August 16, even if the Postal Service elected to take her off the street and have her spend her tour casing mail and doing other duties as assigned. At that point the emergency no longer existed and thus the renewed placement of Valdez in a non-pay, non-duty status following the investigative interview was a violation of Article 16.7. The November 2005 edition of the parties JCAM points to case no. S7N-3S-D 33025 (1991) in which Regional Arbitrator Johnson ruled that when an employee is placed on emergency suspension and told to return the next day,

continued emergency placement could not be justified without the occurrence of a new incident.

The Removal

The Union's Weingarten Challenge

The Supreme Court spoke to an employee's right to Union representation in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 88 LRRM 2689 (1975). The right is nicely summarized in The Common Law of the Workplace: The Views of Arbitrators, 2d edition, Theodore J. St. Antoine, ed, BNA, 2005 at page 211: "An employee is entitled, on request, to have a union representative present at meetings or interviews with the employer whenever the meeting or interview is one that the employee reasonably believes may lead to discipline or discharge." *Weingarten* does not require that the employer make the employee aware of these rights or that the employer necessarily agree to the employee's choice of representative in all cases.

In Valdez's case, Cerda was clear in his instructions to the grievant that she needed Union representation for the investigative interview and in his explanation of the reason for the meeting. While Ramos testified that Cerda refused to allow her to serve as Valdez's representative, that testimony is not persuasive for two reasons. First, Ramos did not explain how she knew about the alleged refusal. Second, the grievant did not state that a request for Ramos was refused. It is a matter of record that Valdez requested Martinez to accompany her to the interview and that the request was granted. The fact that Martinez was a trustee and not a certified steward does not eliminate the fact that the Postal Service granted the grievant's request for representation and in so doing fulfilled the obligation set forth in *Weingarten*. Whether or not Cerda began the interview anew when Sparks, who was a certified steward, entered the room is irrelevant. The grievant's *Weingarten* rights were not violated.

The Merits

For reasons noted below, the removal was not for just cause. While the Postal Service obviously considered Valdez to have a continuing problem with the abuse of alcohol, the record at the time of the removal is not so clear. The evidence establishes that the grievant worked for the Postal Service under a career appointment for 14 years, that in 2000 and 2003 she sought counseling to deal with alcohol-related issues. In 2003

she was suspended for a work-related alcohol issue, with no indication that a vehicle was involved. There is nothing in the record to establish any alcohol-related, job-related errant behavior between the 2003 incident and the consumption of alcohol on August 15. The NOR did not rely on any previous discipline. While Valdez clearly violated postal regulations and State of Texas law by having an open container of alcohol in her postal vehicle on August 15, the Postal Service cannot show that she was legally under the influence at the time. Based on these facts alone, omitting for the moment consideration of Valdez's acknowledgement of her disease and treatment, the grievant's longevity, lack of prior discipline and the nature of her offense argue for corrective discipline short of removal, even considering the 2003 incident.

The conclusion that corrective discipline would have been appropriate and justified is strengthened upon consideration of the prior awards submitted by the Postal Service, as each of these cases is easily distinguished from that of Valdez. In case no. B01N-4B-D 03182538 (Wooters, 2003), the arbitrator denied the grievance of a City Carrier who had been removed because he had operated a postal vehicle while under the influence (DUI) of alcohol and without a valid driver's license, had been previously guilty of driving under the influence and who did not admit that he had a drinking problem and thus was not a candidate for rehabilitation. The facts in Valdez's case do not include DUI convictions, evidence of an invalid license or denial of a problem with alcohol.

In case no. J01N-4J-D 07233437 (V. Cohen, 2008), a removal grievance was denied in a case where the Chicago City Carrier had twice been drinking on duty, was off of his assigned route, had failed to safeguard the mail, had been AWOL and had not testified credibly. The errant behavior in this case is far more extensive and serious than in Valdez's case. While both Valdez and this grievant were involved with AA, removal is fully understandable in light of the record in the Chicago case.

In case no H90N-4H-D 950008763 (Lurie, 1995) the arbitrator denied the grievance of a City Carrier who had been removed based on four charges, including "falsification of official documents and providing false information in an official matter" and improper conduct because of drinking. In denying the grievance, Arbitrator Lurie emphasized the falsification—behavior that overwhelmingly brings removal.

Also easily distinguished from the Valdez case are cases numbered B00M-1B-D 07048466 and 07099871 (LaLonde, 2008). These cases, an emergency placement and removal, arose out of an incident where a Mail Handler was found drinking while on duty and in possession of cocaine and marijuana. The grievant, away from her assignment without permission, also falsified information. Valdez's misbehavior pales in comparison. Denial of the Mail Handler's grievance should surprise nobody.

Finally, case no. J01N-4J-D 07220631 (Bierig, 2007) involved the discharge of a City Carrier who was found drinking on duty twice after carriers were explicitly warned that they would be observed, who was unwilling to voluntarily attend rehabilitation, who had gone to the EAP three times in the past without positive results and who characterized himself as a functioning alcoholic. The Postal Service and the arbitrator saw nothing to be gained by lesser discipline because the carrier showed himself to be a risky subject for rehabilitation.

Valdez's case cannot be considered the equal of any of the five noted above. And, the case for her reinstatement becomes even more compelling when her reaction to the events of August 15 is considered. In case no. W4N-5R-D 35514 (1987) Arbitrator William Eaton thoughtfully set forth four requirements for considering whether alcoholism ought to be considered as a mitigating circumstance in a removal case: 1) the evidence must be convincing that an employee is an alcoholic and accepts that fact; 2) there must be convincing evidence that the employee has undertaken counseling and treatment and has a reasonable prospect of being successful; 3) the Postal Service has been told of the employee's disease of alcoholism and of the employee's treatment and has had time to evaluate the validity of the claim and the prospects for recovery; and 4) there is nexus (relationship) between the alcoholism and the conduct charged so that success in treatment may clear up the work-related deficiencies.

Regarding the first requirement, I find Valdez's testimony, including her admission that she is a recovering alcoholic and will be for the rest of her life, credible and compelling. Her testimony was weighed against a consideration that there will always be some alcoholics and drug abusers who are con artists and who will say what they believe will be most helpful to their case whether true or not. The grievant is not such an individual. The letter from her AA sponsor is a strong indication that Valdez not

only is "talking the talk" but also that she is "walking the walk" and is sincere about confronting her disease.

Valdez has demonstrated that she has met the second requirement. She called EAP on August 16, went to six sessions and continues with AA. She testified that not only does she have an AA sponsor, she is serving as a sponsor as well. Ledden's testimony that Valdez apologized personally for her behavior and now shows renewed confidence and self-awareness supports the conclusion that the grievant not only has gone to counseling but also that she has benefited from that counseling.

The third requirement is that there has been communication with the Postal Service about the grievant's alcoholism and treatment and that the Service has had an opportunity to consider the claim of alcoholism and the prospects for recovery. Certainly the Postal Service knew that the August 15 incident was not the first, as the NOR refers to it as the second documented instance of alcohol consumption while on duty. Thus the grievant's statement during the investigative interview that she had a problem, while falling short of admitting to being an alcoholic, was an indication that Valdez knew she needed help. She asked to be sent to EAP and near the end of the meeting, Villalon said that he would call EAP. Thus immediately after the incident, the Postal Service had some preliminary knowledge that the grievant would take steps to address her use of alcohol. Villalon and Ledden met at the Formal A grievance step. Villalon's extensive written response denying the grievance confirms Ledden's written statement that he was told that Valdez "is attending and/or undergoing EAP Meetings, AA Meetings, Psycho Therapy Sessions, is being evaluated for a Rehabilitation Program and has a Sponsor for help and support as needed" (JX-3, p. 17). Villalon also noted, based on the grievant's history and previous EAP attendance, his conclusion that she was "not a likely candidate for rehabilitation and that she would must seriously pose a serious safety and risk liability to herself, the United states Postal Service and its customers" (JX-3, p. 18). Villalon's conclusion aside, it is clear that he had information that the grievant was taking steps beyond EAP to address her problem. The Step B Impasse decision on November 5 shows that the Postal Service was told of the grievant's disease of alcoholism. This was 2 ½ months past the incident. The evident supports a conclusion that the Postal Service had information about Valdez's alcoholism and about her treatment. While it can be said

that treatment can never be considered as an absolute guarantee of a cure for the disease of alcoholism, the Postal Service had enough information to at least allow a preliminary judgment about whether the grievant's attempt at rehabilitation this time was quantitatively and qualitatively different from previous attempts so that a successful outcome was more likely. In other words, this requirement was met.

Fourth, there is an obvious connection between Valdez's behavior on August 15 and her alcoholism. Thus there is a very strong likelihood her continuation on the path she has taken will end her drinking in any situation, let alone on duty.

Each of the four requirements specified by Arbitrator Eaton has been met. In Article 35.1 of the National Agreement the parties have agreed that "An employee's voluntary participation in the EAP for assistance with alcohol and/or drug abuse will be considered favorably in disciplinary action hearings" (JX-1). I agree with other arbitrators who have written that this language does not entitle every employee who seeks assistance for alcoholism or drug abuse to reinstatement. The cases submitted by the Postal Service amply support the proposition that some alcohol-related behavior is so serious as to counterbalance all mitigation of a removal. But Valdez does not present such a case. The language of Article 35 required the Postal Service to favorably consider her post-August 15 attempts at treatment. That means that treatment and any information that could be gleaned about any positive effects of that treatment should have put on a hypothetical scale and weighed against the negative aspects of the case. Instead, what appears to have happened is that the Postal Service made a determination that because the grievant's past EAP participation did not bring lasting success, she could not possibly be successful in confronting and overcoming her alcoholism this time. The Postal Service bears the burden of proof in this case. If, in fact, there was any consideration of the possibility that a combination of EAP, psychotherapy and continuing intensive AA participation might result in a different, more positive outcome than before there is no evidence of such consideration.

This is not a case where the grievant's behavior was so unredeeming as to override all possible elements of mitigation. Valdez has taken the absolutely critical step of admitting that she is an alcoholic and acknowledging that she will be a recovering alcoholic, assuming all goes well, for the rest of her life. The evidence to date both in the

form of her own testimony and oral and written testimony of others is that she is responding well to treatment.

The Postal Service had sufficient information to consider Valdez to have the disease of alcoholism and to consider favorably her treatment in EAP and the AA 12-step program, but did not do so, thus violating Article 35.1. Possibly as a result of this violation, the grievant's violation of regulations was met with removal rather than with lesser, corrective discipline. The Postal Service acted punitively rather than correctively and thus violated Article 16.1.

The Appropriate Remedies

The remedy for the emergency placement from August 16 until the effective date of the grievant's removal is straightforward. She is to be made whole in all ways, including the payment of interest on back pay at the Federal Judgment Rate.

The remedy for the unjustified removal is not so straightforward and is, in fact, a judgment call. While Valdez now has an impressive story of ongoing recovery to tell, her violation of postal regulations on August 15 was very serious and merits significant discipline. At the time of the removal, the Postal Service had no reason to be confident that the grievant would not be a threat to her own safety and that of others if reinstated. However, the steps of the grievance procedure provided information that was not positively evaluated and which should have been. At that point the Service might have made a determination that the grievant was addressing her alcoholism in a more serious and productive way than she had in the past and that, while there cannot be absolute guarantees, the likelihood that she would be a productive employee was good. With this in mind, Valdez is to be reinstated to her former position. The period from the effective date of her removal until the November 5 Step 2 impasse decision is to be considered a disciplinary suspension without pay. The grievant is to be made whole for lost wages, including interest at the Federal Judgment rate, from November 6, 2008 until the date of her return to the active payroll. If the grievant has earned income during the make-whole period, that income shall reduce the Postal Service's back pay liability. She is to be made whole for lost seniority and other benefits beginning with the effective date of her removal.

AWARD

1. The emergency placement of the grievant was not for just cause. She is to be made whole for money lost in accordance with the remedy set forth above.

2. The removal of the grievant was not for just cause. She is to be reinstated to her former position, with the removal reduced to a suspension, and she is to receive back pay and benefits in accordance with specific instructions set forth above.

A handwritten signature in black ink, appearing to read "I. B. Helburn", with a horizontal line underneath the signature.

I. B. Helburn, Arbitrator

March 2, 2009
Austin, Texas