C - 24356

REGULAR ARBITRATION PANEL

United States Postal Service	**USPS # E01N-4E-D 03075651**
Vs	**NALC # IT0306BJ**
National Association of Letters Carriers, AFL-CIO	**Lester Addison, Grievant**

Arbitrator: T. Zane Reeves, Ph.D.

APPEARANCES:

USPS: Paul Neumann
Labor Relations Specialist
Denver, CO

NALC: Linda Wishon
Representative
Denver, CO

Location: DISC Arvada, CO

Date: May 14, 2003

Type of issue: Discipline/grievability

Contract provisions: Art. 15; 16.9: JCAM

Relevant contract: 2001-2006

Date of Award: June 8, 2003

Award Summary

The Grievance was found timely and arbitration was determined to be the proper jurisdiction for a hearing on the merits of the case.

T. Zane Reeves

T. Zane Reeves, Ph.D.
Arbitrator

STATEMENT OF THE ISSUE

Whether the grievance is arbitral in accordance with the provisions set forth under Articles 15 and 16 of the National Agreement?

Management bifurcated this case and requested that the arbitrator accept the issue by addressing the issue of jurisdiction and arbitrability. The Arbitrator agreed to determine proper jurisdiction and, if arbitral, convene a hearing on the merits of the matter as a disciplinary grievance.

RELEVANT PROVISIONS

Article 15.1 A grievance is defined as a dispute, difference, disagreement, or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of the employee of the Union, which involves the interpretation, application of, or compliance with provisions of the Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Article 15.2 (a) Any employee who feels aggrieved must discuss the grievance with the employee's supervisor within fourteen (14) days of the date on which the employee first learned or may reasonably have been expected to have learned of its cause. This constitutes the informal filing date...

Article 15.3 (B) The failure of the employee or the union in Informal Step A, or the union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance. However, if the Employer or Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.

Article 16.9 Section 9. Veteran's Preference

A preference eligible veteran is not hereunder deprived of whatever rights of appeal are applicable under the Veterans' Preference Act. If the employee appeals under the Veterans' Preference Act, however, the time limits for appeal to arbitration and the normal contractual arbitration scheduling procedures are not delayed as a consequence of that appeal; if there is no MSPB appeal pending as of the date the arbitration has been scheduled by the parties, the grievant waives access to the grievance-arbitration procedure beyond Step B.

UNION'S POSITION

The Union argues that the grievance is both timely filed and within proper jurisdiction of the arbitrator:

Timeliness. The Union argues that the grievance for Lester Addison is properly grievable because it was filed within the fourteen (14) day deadline following the Postmaster's Letter of Decision. The Union asserts timeliness is not counted from the Postmaster's Notice of Proposed Removal on November 21, 2002. Rather, timeliness is construed from the Letter of Decision dated December 28, 2002, which informed Grievant Addison that the Postmaster had decided to remove him. Thus, the union and Grievant were in compliance with time limits indicated in Article 15.2 of the National Agreement. The Agreement does not specify that a grievance cannot be tied to a Letter of Decision or that it must be linked to a Notice of Proposed Removal. Therefore, the Union argues that the Arbitrator, applying commonly accepted rules of interpretation, cannot assume that the parties intended to say anything other than what was stated in contract language. Therefore, because it is not prohibited, a final letter of decision may be grieved.

Proper jurisdiction. The Grievant is a military veteran and the Postal Service is required to provide a Preference Eligible Veteran (PEV) additional rights and privileges not extended to non-veterans. One of these rights is that a PEV may file a grievance on a Notice of Proposed Removal. This right is in addition to grievance rights enjoyed by all employees, who are entitled to file a grievance regarding any dispute concerning working conditions. Therefore, the Union asserts that a VEP is not compelled to file a grievance on a Proposed Removal, nor does he or she abrogate the right to file a grievance on any other action concerning working conditions, i.e. a final Letter of Decision for removal.

Secondly, the Union contends that a grievant has a right to a simultaneous appeal to arbitration as well as to the Merit Systems Protection Board (MSPB). In the instant matter, the MSPB declined to hear the case on its merits. Thus, the Union asserts that the Grievant is entitled to seek an arbitration hearing on the merits.

EMPLOYER'S POSITION

The Postal Service argues that the grievance was not timely filed and arbitration is not a proper jurisdiction to consider the merits. Therefore, for both reasons, the Postal Service contends that the grievance is non-arbitral.

Timeliness. The Grievant was issued a Notice of Proposed Removal on November 21, 2002 and was informed of his right to file a grievance with the MSPB within fourteen

(14) days. Postal management asserts that the grievance is untimely because the union failed to grieve within the specified 14-day time limit, as proscribed in Article 15.2 (a). The Grievant, as a VEP received a Notice of Proposed Removal, which notified him of a ten (10) day deadline to respond to the Postmaster. The Grievant failed to respond and filed an appeal with the MSPB. The Grievant subsequently received a Notice of Removal from the Postal Service on December 28, 2002. Thus, the Postal Service asserts that the Union should have filed a grievance on, or before December 5, 2002. Instead, the union waited until January 11, 2003 to file a grievance, some 51 days following the Notice of Proposed Removal.

The MSPB issued an acknowledgement letter on January 28, 2003. In the meantime, the Grievant also filed a grievance through his NALC representative, which through the grievance/arbitration process with the arbitration scheduled by the parties on March 17, 2003.

Jurisdiction. Thus, the Grievant's MSPB appeal was still pending as of the date of the arbitration scheduling. Subsequently, the Grievant's MSPB case was dismissed without prejudice on April 28, 2003. The MSPB Administrative Judge ruled that the Grievant was entitled to refile his appeal with the Board if, because of procedural matters, the Arbitrator denies the request for arbitration of the removal action. If, however, the arbitrator accepts the appellant's request for arbitration and holds a hearing on the merits, then the appellant/grievant may not refile with the Board. The Agency holds that Article 16.9 obligated the Grievant to either have his appeal considered by the MSPB, or

considered through the grievance/arbitration process. He cannot have "two bites of the apple."

DISCUSSION AND FINDINGS OF FACT

The "facts" in this matter are not in dispute and can be largely stipulated. However, interpretation of the facts is in dispute and it falls upon the arbitrator to perform the fact-finding role. Issues of timeliness and jurisdiction are considered by the preponderance of evidence and application of commonly accepted rules of interpretation applied by arbitrators and fact finders.

Timeliness. The timeliness issue is inextricably tied to the arbitrator's decision regarding which document is being grieved. Is it the Notice of Proposed Removal issued on November 21, 2002 or is it the Letter of Final Decision received by the Grievant on December 27, 2002? If the former is the mandatory grievable action, then clearly the Union missed the deadline of fourteen (14) days for grievability. If, however as the Union argues, the grievable act is the Letter of Final Decision, then the grievance filed on January 5, 2003 falls within the aforementioned deadline for grievability.

The Arbitrator must conclude that the Union met the timeliness criterion for the following reasons:

- The Notice of Proposed Removal is not an ***action*** taken by management. It is a notification of a *contemplated* action in the future that may or may not occur. It is a proposal, not a *fait accompli*. One might ask what the remedy for the Grievant is if no action has yet been implemented. In order to grieve, there must first be a loss. It is the final decision to discharge an employee that is grievable with the remedy of reinstatement, not the proposed discharge. Besides, the proposed discharge could be changed to a suspension or some other lesser disciplinary penalty. The fact that the Grievant elected not to respond to the Notice of Proposed Removal is his right and not relevant. It may be that he was advised not to reveal his legal defense or evidence in a preliminary meeting and elected to do so in a full evidentiary hearing that would be afforded in an arbitration hearing.

- It is an accepted principle in arbitration that it was not the intent of negotiators in a collective bargaining agreement to violate Federal Law and there can be no intended conflict between law and provisions of an Agreement. In the instant matter, the Grievant is a PEV and entitled to veterans' protections to grieve any dispute with the Postmaster regarding working conditions, including a Notice of Proposed Removal. Because he is a postal employee included within the bargaining unit, the Grievant also is entitled by Articles 15 and 16 to grieve a Letter of Decision.

- Nowhere in the Agreement or in legislation is a VEP required to grieve either the Proposed Notice or the Final Decision; the inference is that the Grievant has discretion to choose either action as a grievance appeal.

Jurisdiction. The language in JCAM is clear and unambiguous regarding a VEP employee's right to file an appeal for removal and a suspension of more than fourteen (14) days to the MSPB as well as grieve to arbitration simultaneously. However, the parties are in agreement that the primary objective is "that as employee should receive a hearing on the merits of an adverse action" (JCAM, 16-11). Thus, an employee should receive a hearing, but the VEP is not entitled to two hearings, one in arbitration and before MSPB.

In the instant matter, the Grievant did not receive a hearing on the merits before the MSPB, following its dismissal without prejudice. He is therefore able to pursue an arbitration hearing on the merits. Specifically:

> **The parties agree that the union will be permitted to** reactivate an employee's previously waived right to an **arbitration hearing if that employee's appeal to the MSPB** did not result in a decision on the merits of the adverse **action, or the employee withdraws the MSPB appeal prior** to the decision on the merits being made. (JCAM, 16-11).

The Postal Service will not be required to defend its removal for alleged just cause in two separate forums and the employee will be given his opportunity to present evidence in his own defense.

Arbitral Precedence

Arbitrators previously have considered the issue of timeliness and jurisdiction for VEP employees and the overwhelming number of awards supports the decision to grant an arbitration hearing to the Grievant in the instant matter.

Deciding not to file a grievance on a proposed removal, one that is being considered, does not constitute a waiver of an employee's right to subsequently grieve the final decision for removal:

- Arbitrator Nicholas Duda (G94N-4G-D 00022123) agreed that a "proposal" to take a future action cannot constitute a grievable action because there has been no harm and therefore no grievable action. He notes that "the union fulfilled its contractual obligation when it filed a grievance on the Notice of Decision in a timely manner."
- **Arbitrator Raymond Brittan (D9N-4D-D 96079916) stresses that a VEP is entitled to a final decision letter and not when the Notice of** Proposed Removal is initially issued.
- Arbitrator Coffey (#3164) held that a grievance filed five days following a Final Decision and 34 days after the Proposed Decision was still eligible for an arbitration hearing.
- Arbitrator Michael McGown (#22909) considered a timeliness issue when management asserted that the grievance was untimely because it was filed within the 14-day time limit for the Letter of Decision but 17 days following the Notice of Proposed Removal; Arbitrator McGown ruled that the arbitration was timely filed.

There are a number of other arbitration decisions that support the claim that the decision to grieve a Final Notice rather than a Letter of Proposed Removal is proper and reasonable to a prudent person using common sense. It is clearly the intent of the parties to the Agreement that postal employees, especially those who

are veterans eligible should receive an arbitration hearing on the merits for any adverse action, should they choose to grieve in a timely manner.

AWARD

Having heard argument and weighed the evidence, the Arbitrator has considered the grievance to be timely and properly arbitral. Arbitration on the merits of the issue should be scheduled as soon as feasible.