28422

REGULAR ARBITRATION PANEL

In the Matter of Arbitration	)	
	)	Grievant: Eric Salter
between	)	
	)	Post Office: Norwalk, CT
United States Postal Service	)	
	)	Case No: B06N4BD09222029
and	)	Union No: 09118KM
	)	
National Association of Letter Carriers, AFL-CIO	)	

Before: EILEEN A. CENCI

Appearances:

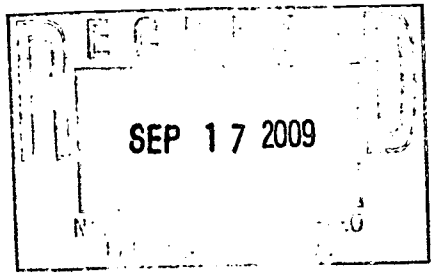
For United States Postal Service: Thomas O'Keeffe

For National Association of Letter Carriers: Vincent Calvanese

Place of Hearing: Norwalk, Connecticut

Date of Hearing: August 3, 2009

AWARD SUMMARY: Management did not have just cause to issue the grievant a Notice of Removal dated 4/10/2009 because the investigation was fatally flawed by the denial of the grievant's *Weingarten* right to be represented by a Union steward at an investigatory interview that could lead to discipline. The grievant is to be reinstated and made whole for all losses he incurred as a result of the removal.



Date of Award: September 3, 2009

Regular Regional Arbitration Panel

Eileen A Cenci

Eileen A. Cenci

OPINION

STATEMENT OF PROCEEDINGS:

This matter was arbitrated pursuant to the grievance and arbitration provisions of a collective bargaining agreement (National Agreement) between the United States Postal Service (Service) and the National Association of Letter Carriers (NALC or Union). A hearing was held before me on August 3, 2009 in Norwalk, Connecticut. The parties appeared and were given a full and fair opportunity to be heard, to present evidence and argument, and to examine and cross-examine witnesses. The parties called witnesses, each of whom testified under oath. At the conclusion of the testimony the parties gave oral closing arguments and the record was then closed.

ISSUE:

The parties agreed to the following issue statement, taken from the Step B decision:

Did management have just cause to issue the grievant a Notice of Removal dated 4/10/2009? If not, what shall the remedy be?

FACTS:

The grievant was a transitional employee who was employed as a letter carrier at the Norwalk Post Office for approximately one year. This grievance concerns a Notice of Removal that was issued to him on April 10, 2009 for Unacceptable Conduct—Falsification of Application for Employment.

The Office of the Inspector General (OIG) initiated an investigation into the grievant's conduct at the request of the Norwalk Postmaster who suspected the grievant of intentionally delaying mail and of having falsified his application for employment.[1] The initial reason the Postmaster contacted the OIG was apparently his suspicion that the grievant had intentionally

[1]Since the Notice of Removal issued to the grievant was based solely upon falsification of his employment application and included no charges concerning delay of mail, I have included limited facts about the alleged delay of mail in this Opinion.

delayed mail. A pre-disciplinary interview (PDI) with the grievant concerning that allegation was held on February 18, 2009 and the grievant was represented by a Union steward during that interview. At some time prior to February 20, 2009 the Postmaster informed the OIG agents that he also suspected the grievant had failed to truthfully answer questions on his employment application about whether he had ever been fired from a job or resigned after being told that he would be fired.

On February 20, 2009 the grievant was informed that OIG special agents wanted to interview him. Prior to going into the meeting the grievant spoke to Keith McLeod, who is branch president and chief steward of the Union. Mr. McLeod told him to ask, at the beginning of the meeting, whether the interview could lead to discipline and if it could, to state that he wanted a union representative.

The grievant went into the interview, which was conducted by Special Agents Seth Maki and Peter Corcoran. According to the grievant's testimony the two inspectors introduced themselves and told him they were doing an investigation into an allegation of improper delay of mail. At the outset of the interview the agents provided the grievant with the Administrative Warning-Duty to Cooperate and had him sign it. This warning informed the grievant that he had a duty to reply to the questions they would ask and that disciplinary proceedings, including dismissal, could be initiated if he refused to answer or failed to reply fully and truthfully. The warning also informed him that his answers and the information gained through his statements could not be used against him in criminal proceedings, except that he could be subject to criminal prosecution for giving false answers during the interview. The grievant asked whether the interview could lead to discipline as he had been instructed to do by Mr. McLeod. Special Agent Maki responded by telling him that the agents were purely fact-finders, that they would prepare a report and turn it over to postal service management, but would have no role in any decision concerning disciplinary action. After receiving that response the grievant proceeded with the interview without requesting a steward.

The interview began with questions about the grievant's alleged delay of mail on February 14, 2009. Later in the interview the special agents asked the grievant whether he'd ever been fired from a job. He responded that he had. He said he had worked for a company that had been contracted by the State of Connecticut to perform vehicle emissions testing and there were two issues that had led to his removal: a cash drawer had been short and he was suspected of stealing a sticker. The grievant admitted that he had not included this information on his application for

employment with the Post Office. He also stated that he had worked for a telephone company and had resigned after being told he was going to be fired.

After the OIG report had been completed and transmitted to the Norwalk Post Office, Acting Manager of Customer Services Kevin Hogan scheduled a PDI with the grievant concerning the charges that he had falsified his application for employment. The grievant was represented by Union steward McLeod at that meeting. When questioned, the grievant admitted that he had been fired from a previous job.

On PS Form 2591, his application for employment by the Postal Service, the grievant answered "no" to the questions, "Have you ever been fired from any job for any reason?" and "Have you ever quit a job after being notified that you would be fired?" He signed a certification on the same form that all statements he had made on the application were true, complete and correct to the best of his knowledge and belief. Form 2591 also includes a statement that a false or dishonest answer to any question in the application may be grounds for dismissal as well as criminal penalties.

Mr. Hogan issued a Notice of Removal to the grievant on April 10, 2009 for Unacceptable Conduct—Falsification of Application for Employment. Postmaster Robert Pilkington provided review and concurrence. A grievance was filed but was not resolved by the parties. During the grievance process the Union claimed disparate treatment of the grievant as well as denial of his *Weingarten* rights.[2] As evidence of disparate treatment the Union introduced a document from 1979 showing that a Notice of Removal was issued to carrier at the Westport Post Office for falsification of his employment application. The matter was ultimately resolved with a penalty short of removal since the individual was subsequently employed by the Postal Service for many years and retired as an Acting Postmaster/Officer in Charge.

CONTRACT:

Article 16 Discipline Procedure

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in

[2] Employees' *Weingarten* rights were established in the case *NLRB v. J. Weingarten*, 95 S. Ct. 959 (1975) and have been incorporated into the JCAM. Federal courts have extended *Weingarten* rights to cover Inspection Service interrogations.

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 and alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations.

MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES POSTAL SERVICE AND NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

Re: Transitional Employees—Additional Provisions

Article 16

...

Transitional employees may otherwise be removed for just cause and any such removal will be subject to the grievance-arbitration procedure, provided the employee has completed ninety (90) work days, or has been employed for 120 calendar days, whichever comes first. Further, in any such grievance, the concept of progressive discipline will not apply. The issue will be whether the employee is guilty of the charge against him or her. Where the employee is found guilty, the arbitrator shall not have the authority to modify the discharge...

JOINT CONTRACT ADMINISTRATION MANUAL (JCAM)

Page 17.6

Weingarten Rights

Federal labor law, in what is know as the *Weingarten* rule, gives each employee the right to representation during any *investigatory interview which he or she reasonably believes may lead to discipline. (NLRB v. J. Weingarten, U.S. Supreme Court, 1975)*

The *Weingarten* rule does not apply to other types of meetings, such as:

- **Discussions.** Article 16.2 provides that "for minor offenses by an employee...discussions...shall be held in private between the employee and the supervisor. Such discussions are not discipline and are not grievable." So an employee does not have *Weingarten* representation rights during an official discussion. See National Arbitrator Aaron, HIT-1E-C 6521, January 6, 1983, C-03769
- Employees do not have the right to union representation during fitness-for-duty physical examinations.

The *Weingarten* rule applies only when the meeting is an *investigatory interview*—when management is searching for facts and trying to determine the employee's guilt or decide whether or not to impose discipline. The rule does not apply when management calls in a carrier for the purpose of issuing disciplinary action—for example, handing the carrier a letter of warning.

An employee has *Weingarten* representation rights only where he or she *reasonably believes* that discipline could result from the investigatory interview. Whether or not an employee's belief is "reasonable" depends on the circumstances of each case. Some cases are obvious, such as when a

supervisor asks an employee whether he discarded deliverable mail.

The steward cannot exercise *Weingarten* rights on the employee's behalf. And unlike "*Miranda* rights," which involve criminal investigations, the employer is not required to inform the employee of the *Weingarten* right to representation.

Employees also have the right under *Weingarten* to a pre-interview consultation with a steward. Federal Courts have extended this right to pre-meeting consultations to cover Inspection Service interrogations. (*U.S. Postal Service v. NLRB,* D. C. Cir. 1992, M-01092).

In a *Weingarten* interview the employee has the right to a steward's *assistance*—not just a silent presence. The employer would violate the employee's *Weingarten* rights if it refused to allow the representative to speak or tried to restrict the steward to the role of a passive observer.

Although ELM Section 666.6 requires all postal employees to cooperate with postal investigations, the carrier still has the right under *Weingarten* to have a steward present before answering questions in this situation. The carrier may respond that he or she will answer questions once a steward is provided.

POSITIONS OF THE PARTIES:

UNITED STATES POSTAL SERVICE

The Service maintains that just cause for the removal of the grievant has been established. The grievant admitted that he falsified his employment application during his interview with two OIG special agents and again during a PDI at which he was represented by a Union steward.

The grievant was not denied his *Weingarten* rights. When he inquired whether the interview with OIG agents could lead to discipline they responded honestly by telling him that their role was a fact-finding one and that they do not make decisions about discipline. The grievant did not request a union steward and management has no obligation to provide a steward if an employee does not request one.

There is no credible evidence of disparate treatment. The case cited by the Union occurred approximately thirty years ago at a different post office. Disparate treatment can only be proven when two individuals who work for the same supervisor and commit the same offense are treated differently. That is not the case here.

Since the grievant was a transitional employee the arbitrator has no authority to modify the penalty imposed by management.

The Service asks that the grievance be denied in its entirety.

NATIONAL ASSOCIATION OF LETTER CARRIERS

The Union argues that just cause for the removal is lacking. The grievant was deprived of his *Weingarten* right to be represented by a Union steward at the meeting with OIG agents. The grievant attempted to exercise his *Weingarten* rights by asking whether the meeting could lead to discipline, as instructed by his Union president. The answer he was given, that the OIG has nothing to do with discipline, was non-responsive and evasive. It led the grievant, who was a relatively new employee and not well-versed in his contractual rights, to falsely assume that the meeting could not result in discipline. As a result, the grievant spoke to the agents without exercising the right to ask for a steward, even though he had clearly intended to invoke that right in any interview that could result in discipline. The denial of the grievant's *Weingarten* rights was a fatal procedural flaw.

Just cause for the removal is also lacking because the penalty of removal has not been consistently imposed for the offense of falsifying an employment application.

The Union asks that the grievance be sustained and that the grievant be reinstated and made whole for all losses he sustained as a result of his removal.

DISCUSSION:

As part of its burden of proving just cause to remove the grievant the Postal Service must show that it conducted a full and fair investigation during which the grievant was afforded due process, including his *Weingarten* right to Union representation during an investigatory interview that the grievant reasonably believed could lead to discipline. In this case the Union has argued that the grievant's *Weingarten* rights were denied during the investigatory interview conducted by OIG agents on February 20, 2009 because the grievant was given a misleading response when he asked whether the interview could lead to disciplinary action. I agree with the Union's position and find that in the circumstances of this case the grievant made an attempt to exercise his *Weingarten* right to Union representation, which was thwarted and effectively denied.

Before he went into the February 20, 2009 meeting with OIG agents the grievant consulted with the President of his local union to ask what he should do. He was told to ask, at the beginning of the interview, whether the meeting could lead to disciplinary action and if the answer was "yes", to say that he wanted to invoke his right to have a Union representative at the meeting. The advice made sense since the law, which has been incorporated into the JCAM, allows employees to invoke

their right to be represented by a Union steward only at investigatory meetings that can lead to discipline. The grievant, rather than the steward, would therefore have to invoke his rights under *Weingarten* and would have no right to do so unless there was reason to believe that the interview could lead to discipline.

The grievant asked whether the interview could lead to discipline, as instructed by Mr. McLeod, but received an answer that was technically correct yet unresponsive to his question. The grievant had asked not whether OIG agents had the authority to impose discipline but whether the meeting could lead to discipline. It is reasonable to infer that the purpose of the grievant's question was clear to the interviewers. OIG special agents are well trained and thoroughly familiar with the rights of employees during investigatory interviews. The two special agents had informed the grievant of the Administrative Warning-Duty to Cooperate and had him sign it at the outset of the interview. They must have understood that by asking whether the interview could lead to discipline the grievant was attempting to determine whether he had the right to be represented by a Union steward so that he could invoke that right if entitled to do so. Whether intentionally or not, the agents responded to the grievant in a manner that was not fully informative and had the effect of falsely reassuring him that the interview would not lead to discipline. The answer also avoided giving the grievant a basis for claiming his *Weingarten* rights. The grievant was not initially informed that the interview could lead to discipline and could only have established his right to Union representation by asking a follow-up or clarifying question.

It is true that management is not required to inform employees of their right to request a steward and may proceed with an investigatory interview if an employee fails to invoke or waives his right to Union representation. The grievant did not make a clear and unequivocal request for a steward at the February 20, 2009 interview. Nonetheless, in the circumstances of this case, I cannot conclude that the grievant waived his *Weingarten* rights. The evidence shows that he attempted to invoke those rights by asking whether the interview could lead to discipline and discontinued his effort only when the response he received led him to mistakenly conclude that the interview would not lead to discipline and that he had no right to Union representation.

Experienced managers, employees, OIG agents and arbitrators know full well that interviews with OIG special agents can and often do lead to discipline and that an employee has the right to request the presence of a Union steward at such meetings. A more experienced employee than the

grievant might have insisted upon his right to Union representation or asked enough follow-up questions to elicit the response that management could impose discipline on the basis of his answers to interview questions. The grievant, however, was a relatively new employee and did not vigorously pursue the matter when he received a somewhat ambiguous answer to his question about whether the interview could lead to discipline. The grievant's initial question about whether the interview could lead to discipline was nonetheless a recognizable, if somewhat clumsy attempt to exercise rights guaranteed by the contract.

It cannot be assumed that the denial of the grievant's *Weingarten* rights was harmless error. The grievant did have an obligation to answer questions truthfully during the interview and it could be argued that he would have given the same incriminating answers even if a steward had been present. Such an analysis, however, would render *Weingarten* rights meaningless on the assumption that the presence of a steward cannot change the outcome of an interview since employees are required to answer all questions honestly and fully. In fact, the rights to consult with a Union representative about the charges prior to an interview and to have the assistance of a representative during an interview that might lead to discipline are important protections that can affect the focus and outcome of interviews. Moreover, these rights have been incorporated into the National Agreement through the JCAM and are part of the full and fair investigation that is required in order to establish just cause for discipline.

Similarly, denial of the grievant's *Weingarten* rights during the investigatory interview conducted by the OIG was not rendered harmless by a later PDI in which the grievant admitted to the conduct while represented by a steward. The investigation was fatally flawed when the grievant was not afforded his contractual rights during the investigatory interview conducted by the OIG. That meeting was the first time the grievant was questioned about his employment application and the denial of his rights at that stage could not be subsequently corrected.

The harm to the grievant was exacerbated in this case by the fact that he was apparently unaware that the truthfulness of statements he made on his employment application would be a subject of the February 20, 2009 inquiry. The grievant testified that at the outset of the interview the OIG agents told him that they wanted to interview him about the charge that he had intentionally delayed mail. He had previously been given a PDI concerning that allegation and had been represented by a Union steward during it. The grievant had reason to believe that the OIG agents

wanted to once again question him about a familiar matter. The agents did question the grievant about that matter, but then also questioned him about an additional matter concerning his employment application.

As of February 20, 2009 the grievant had not been given a PDI concerning statements on his employment application and there is no evidence that any concern about the truthfulness of statements he made in his application had been brought to his attention. Even at the outset of the February 20, 2009 interview the full scope of the inquiry was not made clear to him. There is no evidence that the grievant had sought or received the advice of a Union steward about statements he made in his employment application. He would have had no reason to do so since he was apparently unaware that the issue was the subject of investigation. The fact that the grievant was questioned for the first time about the truthfulness of his employment application at the February 20, 2009 meeting without advance notice that the application would be a subject of inquiry, without a chance to consult with a Union steward in advance and without representation by a steward during the interview cannot be considered harmless error.

Having concluded that the investigation into the grievant's conduct was fatally flawed, resulting in a lack of just cause for his removal, I do not address the Union's disparate treatment argument.

Management did not have just cause to issue the Notice of Removal dated April 16, 2009 because the investigation was fatally flawed by the denial of the grievant's *Weingarten* right to be represented by a Union steward at an investigatory interview that could lead to discipline. The grievant is to be reinstated and made whole for all losses he incurred as a result of the removal.