

REGULAR ARBITRATION PANEL

28701

 In the Matter of the Arbitration *
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 between: *
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 United States Postal Service *
 *
 and *
 *
 National Association of *
 Letter Carriers, AFL, CIO *

Grievant: S. Deberry-Williams
 Post Office: Ft. Lauderdale, FL
 USPS Case No: H06N-4H-D 09344379
 NALC Case No: F09-498
 09-144616

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Laura Taylor Laury
 For the Union: Tammie Jo Caldwell
 Place of Hearing: Ft. Lauderdale, FL

Date of Hearing: February 9, 2010
 Date of Award: March 5, 2010
 Relevant Contract Provision: Article 16
 Contract Year: 2006
 Type of Grievance: Discipline

Award Summary:

The Grievant was issued a Notice of Removal charging unsatisfactory performance after failing to complete a Form 3996, not returning to her station on time or calling in to report. The arbitrator found the Grievant was subjected to disparate treatment and sustained the Grievance.

JUDITH R. WILLOUGHBY, NALC
 National Business Agent



Lawrence Roberts, Panel Arbitrator

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VICE PRESIDENT'S
 OFFICE
 NALC HEADQUARTERS

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 9 February 2010 at the postal facility located in Ft. Lauderdale, FL beginning at 9 AM. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a digital recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

The Grievant in this case is employed as a Letter Carrier at a Lakeland, FL Postal facility, the Southside Branch. The Grievant is an eleven year veteran of the Postal Service, the last eight years being spent as a Letter Carrier.

On or about 20 August 2009, the Grievant received the following Notice of Removal letter:

"You are hereby notified that you will be removed from the Postal Service on September 25, 2009. If you file a timely grievance; this action will be deferred until after the Step B decision has been rendered on this Notice, or fourteen days after the appeal is received at Step B, whichever comes first, in accordance with the Memorandum of Understanding between the USPS and the NALC regarding Article 15 - Dispute Resolution Process.

The reason for this removal action is:

You are charged with Unsatisfactory Performance.

On August 17, 2009 you were given your work assignment on your route 1145. You were instructed to return to the office prior to 1700 hours, and authorized 1.25 hours of overtime as requested as a result of the route implementation. You failed to complete form 3996 as instructed. On that date, you returned to the station at 1817 hours, and ended tour at 1854 hours, incurring 1.33 hours of unauthorized overtime, which included .58 hour of penalty overtime. You failed to notify a member of management that you would be unable to return on time.

You have failed to follow the instructions of her supervisor, and expanded your street time unnecessarily."

The Letter goes on to cite the alleged violations of the various Postal Manuals and Handbooks as well as mentioning instances of the Grievant's past discipline.

The above Letter prompted the filing of the instant grievance. The Employer claimed the Notice of Removal was issued with just cause while the Union does not believe there to be any basis for the Removal action.

The Parties were unable to resolve the dispute mentioned above.

It was found the matter was properly processed through the prior steps of the Parties Grievance-Arbitration Procedure of Article 15, without resolve. The Step B Team reached an impasse

on 9 October 2009. Therefore, the matter is now before the undersigned for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. The record was closed following the presentation of oral closing arguments by the respective Advocates.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.
2. Notice of Removal Package

COMPANY'S POSITION:

The Service believes the evidence will show the presence of just cause in this case. It is the Employer's contention the Grievant failed to follow instructions.

The Agency insists that certain instructions have been made well aware to all Letter Carriers, including the Grievant, and are the result of the responsibility of operating the business of delivering the mail as efficiently as possible.

The Employer points out that various rules and regulations are sometimes necessary for some Employees in order to emphasize the importance of following the directions of Supervisor and Managers.

The Service contends the Grievant failed to return to the Post Office until incurring some 1.33 hours of unauthorized overtime on 17 August 2009.

The Employer mentions this removal was issued citing past elements of discipline for nearly the exact same infractions.

According to the Service, the Union will make several attempts to discredit some of the previous discipline issued to the Grievant. The Employer mentions such arguments are irrelevant and accordingly, Management will raise objections to such arguments.

Management claims they will prove the charges against the Grievant, and after hearing the testimony and evidence, will then ask that the instant grievance be denied in its entirety.

UNION'S POSITION:

The Union will show through testimony that Management charged the Grievant with Unsatisfactory Performance and that the Notice of Discipline contains narratives of the events that transpired on 17 August 2009, but nothing in the Employer's case file supports their charges.

The Union argues the facility went through route inspections and the Grievant's route changed approximately ninety percent, going from curbside to dismount delivery.

According to the Union, the Grievant verbally told Management she could not complete the deliveries and asked for assistance. The Union insists it is Management's responsibility to provide the Letter Carrier with a PS Form 3996 to complete.

It is the contention of the Union that Management had verbally approved the overtime and failed to provide a PS Form 3996.

The Union mentions the Grievant was accused of the failure to notify Management of her inability to complete the assignment.

It is the claim of the Union the North Andrews Facility is difficult to contact via phone with either busy signals or no one answering the phone. The Union claims the Grievant made several failed attempts calling the facility.

According to the Union, on the date cited by the Notice of Removal, 17 August, there were 27 Full Time Regular and PTF Carriers working overtime, with only one of those submitting a PS Form 3996. The Union mentions there to be other Letter Carriers on the street after 1700, on various dates, without submitting the PS Form 3996.

It is the argument of the Union that, regardless of what the Grievant would have done, Management was on a mission to remove the Grievant.

The Union argues disparate treatment of the Grievant. The Union points out the just cause principles require rules to be consistently and equitably enforced.

The Union asks the instant grievance be sustained in its entirety and the Grievant be made whole for all lost wages and benefits.

THE ISSUE:

Did Management have just cause to issue the Grievant a Notice of Removal. If not, what is the proper remedy?

PERTINENT CONTRACT PROVISIONS:

**ARTICLE 16
DISCIPLINE PROCEDURE**

SECTION 1. Principles

DISCUSSION AND FINDINGS:

This matter involves an issue of removal, wherein the facts, circumstances and reasoning surrounding the incident bringing rise, is contrasting between the Parties. Regardless of circumstance or respective argument, the burden of proof falls on Management to establish reason for their actions.

While Article 3, Management Rights, provides the Employer with the power to "suspend, demote, discharge, or take other disciplinary action..." the Employer is limited in any decisions as restricted by other Articles or Sections of the Agreement.

According to the Agreement, no Employee may be disciplined or discharged except for just cause. In my view the "just cause" provision is ambiguous; however, its concept is well established in the field of labor arbitration. The Employer cannot arbitrarily discipline or discharge any Employee. The burden of proof is squarely on the Employer to show the discipline imposed was supported with sound reasoning.

In addition, the just cause standard cannot be gauged in the same matter in all cases since each discipline case is unique to its own set of facts and circumstances.

The chief negotiators of Article 16 suggest progressive discipline. In many cases, that guideline prevails and progressive discipline works to serve both the Employer and Employee. As an example, absenteeism is oftentimes corrected with progressive discipline.

Then, there are those infractions, whereby progressive discipline, is simply improper. Theft would certainly be a good example of one of these instances. In this business, such an act would be intolerable and removal following the first occurrence would only be appropriate. I'm sure the chief negotiators would agree with this reasoning.

However, each matter of discipline rests solely on its own merits. What is found to be applicable in this case cannot be applied evenly to other similar issues. In fact, this case is totally unique when compared to other matters of discipline that I've decided throughout my arbitral career.

The one constant is the burden of proof rests with the Postal Service. It's their obligation to establish just cause or, at the very least, via their case in chief, demonstrate the existence of clear and convincing evidence.

It is not up to the Union to prove innocence, instead, for the moving party to establish guilt. In order to prevail however, Management need not prove their case beyond a reasonable doubt.

Instead, in arbitral matters, the preponderance of evidence rule applies. Clear and convincing evidence is proof via the preponderance. Regardless of the specific term employed, this Agreement, like most others, requires a showing, via evidence, that, more likely than not, the Grievant is guilty as charged.

This is based on the probability of the evidence, its probable truth and accuracy, not necessarily the quantity. In

any case, the meaning is somewhat subjective and this forum lacks a steadfast rule that can be applied to all cases. Instead, only a guideline delineates the evaluation of the evidence and accordingly, is considered on a case by case basis.

In this matter, Management insisted the Grievant's actions established a clear pattern of poor behavior. And, according to the Employer, even though the Grievant has been disciplined in the past, similar incidents continue to occur.

The record shows the Grievant had previously been issued a Letter of Warning for Unsatisfactory Performance, a Seven Day Suspension for Unsatisfactory Performance and a Fourteen Day Suspension for Unsatisfactory Performance. Therefore, the Agency contends the Removal was progressive discipline instead of punitive.

The record also shows that, on the day in question, the Grievant was authorized 1.25 hours of overtime and instructed to return to the office prior to 1700 hours. The Grievant did not complete Postal Form 3996 requesting additional time. Also, she did not return to the station until 1817 hours. Accordingly, the Grievant incurred 1.33 hours of unauthorized overtime which included .58 hours of penalty overtime.

The Union made several arguments as to why this had occurred. The Union also mentioned that Management had failed to respond to the Grievant's various requests for help on her route.

All of that may very well be true. However, the burden of proof is on the Employer in this case. Specifically, as I've stated in many of my previous decisions, one of the basic premises in the application of discipline, in meeting the just cause statute, is that of uniformity.

In this case, the Union claims discipline has not been meted out with an even hand. The Union also contends disparate treatment in this instance. And to that end, I certainly agree, based on several factors.

First, the Union Steward identified some three pages of Letter Carriers that, previously had worked past 1700, failed to submit a Form 3996 and were not disciplined. The Employer was unable to successfully challenge the Union's point in that regard.

Even though the last page of Joint Exhibit 2 indicates that oral discipline, albeit via discussion did occur to another Letter Carrier on 17 August 2009, the affected Employee credibly

testified, without Employer contradiction, that such a conversation of warning never took place.

Secondly, I also found it suspect that the PS Form 1017-B, the USPS "Unauthorized Overtime Record," indicating the subject date of this grievance, was not included in the Grievance Package, Joint Exhibit 2. Instead, Management submitted it as an Employer Exhibit and I accepted it for face value, over the objection of the Union.

And the value of that document only added suspicion to the Employer's case in chief. For on Page 8 of the Step B decision the Union mentions "There is no PS Form 1017-B for August 17, 2009 documenting any unauthorized overtime or that the Grievant was so notified the time was recorded as unauthorized as required."

While understanding the formalities of the Team Settlement Process, I find it suspect for such a crucial document to not be part of the Step B record. Also suspect is the fact the last three entries on that Form, on this record as Management Exhibit 1, appear to have been made by the same marker with the same writing and style. To me, this indicates the last three entries were made at the exact same time, even though the three dates are separated by some fourteen days.

In the Union's contentions, the following portion of the Article 16 Joint Contract Administration Manual is quoted:

"Is the rule consistently and equitably enforced?

A rule must be applied fairly and without discrimination. Consistent and equitable enforcement is a critical factor... Singling out employees for discipline is usually improper. If several similarly situated employees commit an offense, it would not be equitable to discipline only one."

To that end I subscribe, and for that reasoning, the instant grievance will be sustained. For it was quite obvious, based on the uncontested evidence introduced by the Union, that the rule relied upon by the Employer in support of the removal, was not equitably or consistently enforced.

While the Agency did show that progressive discipline had been properly deployed in this case, the evidence clearly shows disparate treatment of the Grievant. Other Employees, committed similar acts, and were not disciplined in any way. The Union showed some several dozen instances wherein Letter Carriers committed similar acts as the Grievant without any form of discipline or warning.

And that, in and of itself, opposes one of the basic premises of just cause. Discipline must be consistent and

uniform. The clear and convincing evidence in this case show that did not happen.

However, I cannot leave this discussion without mentioning the Grievant in this case will be returned to work and made whole. By the same token, the previous steps of progressive discipline will not simply be set aside. This ruling is based on a procedural irregularity.

The next occurrence of a similar act by the Grievant may not be accompanied by such a procedural miscue. It could very well result in a final separation.

And with that in mind, the instant grievance will be sustained and the Grievant will be made whole.

AWARD

The grievance is sustained and the Grievant shall be made whole.

Dated: March 5, 2010
Fayette County PA