

UNITED STATES POSTAL SERVICE

M-00637

Washington, DC 20260

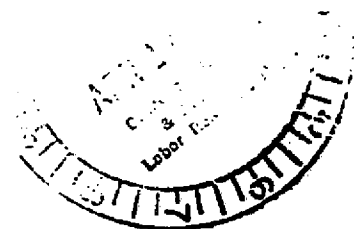
DATE: April 6, 1984

OUR REF: GC:340:MDHarrell, Jr.:mlf

SUBJECT: Referral from Regional Arbitration to
Step 4 - Case E1C-2D-D 6155
Castella Pinkney, Washington BMC

TO:

William E. Henry, Jr.
Director
Office of Grievance and Arbitration
Labor Relations Department



This responds to your March 20, 1984 request for an opinion as to whether a Gamser Award (APWU and USPS, Case No. AB-W-11, 369-D; NALC and USPS, Case No. NB-N-4980-D) requiring arbitration of two grievances which had been the subject of appeals to the then Civil Service Commission (CSC), would require the Postal Service to arbitrate the merits of the discharge of Castella Pinkney, who also had appealed her discharge to the MSPB.

The subject Gamser award involved two grievants. Each had appealed his discharge to the CSC and concurrently had filed a grievance over the same matter. Subsequently, "before any proceedings were initiated and before any action had been taken on their appeal (to the CSC), (grievants) decided to withdraw that choice and use the protection afforded to them as union members under the collective bargaining agreement." (Gamser Award at 11) Arbitrator Gamser noted that both appeals to the CSC were withdrawn when "notification permitted (the) Postal Service to avoid the obligation of preparing to defend its actions in two separate tribunals." (Id. at 10)

The facts in the Pinkney case are distinguishable. Pinkney was issued a removal notice which failed to notify her of her appellate rights as a preference eligible employee. Upon recognition of the deficiency, management issued another notice of removal, which "replaced" the first notice and properly advised her of her rights. Pursuant to the second notice, Pinkney appealed to the MSPB. At her MSPB hearing, Pinkney's counsel stated that she was not requesting that the MSPB adjudicate the merits of her case because "she wished to preserve her right to pursue the matter through the negotiated grievance-arbitration procedure in force under the collective bargaining agreement." (Pinkney v. USPS, MSPB)

Case No. DC07528310212 (April 11, 1983) at 1.) For that reason, she entered a "no contest" plea to the merits of the charges against her and "limited" her appeal to her claim of harmful procedural error with regard to the first removal notice.

The presiding official held that "the Board does not adjudicate an affirmative defense of alleged harmful error, absent an adjudication of the merits." (*Id.* at 4.) Noting that Pinkney's refusal to proceed with the hearing on the merits of the case unfairly denied the Postal Service the opportunity to prove that Pinkney's discharge was justified, the presiding official dismissed with prejudice Pinkney's appeal for failure to prosecute.

It appears from the above-referenced quotations from the 1976 Gamser award that, in order for that award to be binding as to the Pinkney grievance, two tests must be met:

1. Withdrawal of the MSPB appeal when "notification permitted (the) Postal Service to avoid the obligation of preparing to defend its actions in two separate tribunals," and
2. Withdrawal from the MSPB "before any proceedings were initiated and before any action had been taken on their appeal."

(Gamser Award at 10 and 11)

The Pinkney case fails to meet these tests. Unlike the grievants' CSC appeals chronicled in the Gamser award, action was taken on Pinkney's MSPB appeal. MSPB proceedings were initiated and a hearing was held to which the Postal Service was required to come prepared to carry its burden of proving Pinkney's discharge was justified. Notification was not given which permitted the Postal Service "to avoid the obligation of preparing to defend its actions in two separate tribunals." Importantly, Pinkney did not withdraw her appeal to the MSPB. And, perhaps most significantly, a ruling favorable to Pinkney on her theory of harmful procedural error could have resulted in reversal of the discharge action.

It is noteworthy that, after the Gamser award issued in 1976, the United States Court of Appeals for the 9th Circuit upheld a denial of access to arbitration in a case in which the facts were less favorable to the grievant than in the instant case. In Stephens v. Postmaster General, 623 F. 2d 594 (9th Cir. 1980), the court held that the Postal Service properly rejected a grievance on the basis of the grievant having appealed to the MSPB, even though his MSPB appeal had been denied on the ground that it was untimely and he, therefore, was never afforded the opportunity to have a hearing on the merits of his removal.

March 20, 1984

LR300:WEHenry:jr:4130

Referral from Regional Arbitration to
Step 4 - Case ElC-2D-D 6155
Castella Pinkney, Washington BMC

Mr. Stephen E. Alpern
Associate General Counsel
Office of Labor Law
Room 9346

Attached herewith is a copy of the subject case file, along
with copies of two arbitration awards.

The concern raised by the region in referring this case to
Step 4 is the possible application of the Ganser award in
case AD-W-11369 (copy attached) to the circumstances
involved with Ms. Pinkney.

Will you please review this material and give us your
opinion as to whether the situation with Ms. Pinkney is
sufficiently distinguishable from Ganser to proceed with
Step 4 and possible arbitration at this level.

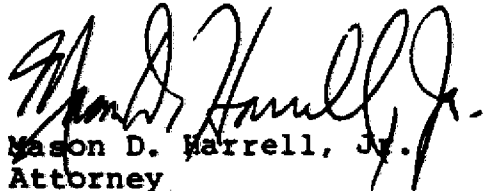
Signed W. E. Henry, Jr.

William E. Henry, Jr.
Director
Office of Grievance and
Arbitration
Labor Relations Department

Attachment

bcc: G. McDougald
S. Barber
W. Henry
File: Subject
Reading
Disk 2:Alpern/WEH

Although there are arguments to be made in favor of Pinkney's position, it appears that the above-mentioned considerations justify denying Pinkney's grievance on the basis that her appeal to the MSPB and later MSPB proceedings preclude prosecution of her grievance. Of course, the Postal Service also should continue to deny the grievance on the merits. If the grievance is appealed to arbitration, it appears logical to insist on a bifurcated proceeding. The issue of the merits of Pinkney's removal should not be heard until after a ruling on the arbitrability issue. If the Postal Service loses on arbitrability, it could still prevail on the merits. At worst, even a loss on the merits might only add a few months of backpay as a remedy.



Mason D. Harrell, Jr.
Attorney
Office of Labor Law