GERALD COHEN 2/22/82 Reinstated
Removal - Tampering w/the Mails w/out back pau

28576 (C8C-4P-D)

C#00077

IN ARBITRATION

UNITED STATES POSTAL SERVICE,	Case No. C8C-4P-D 28576;
	Arbitrator's File 81-131-701;
and	
	Date of Hearing:
AMERICAN POSTAL WORKERS UNION, KENNETH L. MOE, Grievant.	November 23, 1981, Minot, North Dakota.

APPEARANCES

For the Postal Service:

VIOLET L. FLEMMER
Supervisor, Employment & Services
United States Postal Service
Bismarck, ND 58501

For the Union:

LARRY GERVAIS
National Vice-President, Minneapolis Division
American Postal Workers Union
15 South Ninth Street - Suite 100
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O P I N I O N

Issue

Was Grievant discharged for just cause?

Facts

On February 13, 1981, Grievant was issued a Notice of Proposed Emergency Suspension. This Notice read in part as follows:

"This is advance written notice that it is proposed to suspend you for no more than thirty (30) days from the U. S. Postal Service effective no sooner than seven (7) days from the time you receive this notice.

It appears that your retention in an active duty status may result in damage to Postal Service property, loss of mail or funds, or injury to you, your fellow workers or the general public, or be detrimental to the interests of the Postal Service.

On February 3, 1981, you violated the security of the mails as indicated in the Domestic Mail Manual, Part 115.1.

I. You were observed by the Postal Inspection Service and admitted that you had opened and examined the contents of two parcels and one large flat during your tour of duty on February 3, 1981:

a) At 7:25 PM, one parcel containing a Parker pen and pencil set addressed to Mary Rustad, Moorhead, MN 56560.
b) At 8:40 PM, a large flat containing five magazines and one letter addressed to W. J. Donovan, Williston, ND 58801.
c) At 8:50 PM, one parcel containing coins addressed to Howard Arthur Richards, Minot, ND 58701.

II. During your tour on February 3, 1981, you also pigeon-holed several flats and magazines at your distribution case and were observed tying them out and taking them out into the vestibule. You acknowledged that you had intended to take these magazines home and had done so for several years. The bundle involved was found to contain eleven articles. Among the items was a J.C. Penney catalog addressed to Delbert Quigley, Donnybrook, ND 58734, an Alden catalog addressed to Clifford Daleness, Roseglen, ND 58775, and one piece of mail being forwarded under official orders to Gary Thielen, New York, NY 10021."

Thereafter, on March 4, 1981, Grievant was issued a Notice of Charges - Removal, in which it was proposed that he would be removed from the Postal Service. This Notice of Removal repeated the charges that were contained in his Notice of Proposed Emergency

Suspension.

In its opening statement, the Union stipulated that it would not contest the charges that were contained in Paragraphs I and II of the emergency suspension notice and in the discharge letter received by Grievant. The Union stated that it would acknowledge that Grievant had been charged in Federal Court with two counts of opening mail, and that he had received a deferred sentence for two years on condition that he do 100 hours of community service and that he report to the Probation Service. Grievant had also been ordered in his probation commitment to continue in a counseling program at a local mental health center.

The Union stated that its defense to Grievant's discharge would be a mitigation of the offense.

Since the Union did not contest the factual basis for the discharge, but relied upon a defense of mitigation, the Union was ordered to proceed with its case, since, in effect, its position had created no need for the Postal Service to support its charges.

The first witness produced by the Union was Grievant's tour supervisor. He stated that Grievant was generally a good worker, although at times he would "fly off the handle" when things did not seem to be going his way.

The witness testified that some time near Christmas, in 1978, he saw Grievant apparently either trying to open a parcel

or trying to hide a parcel, and he told Grievant, "For Christ's sake, don't open packages. It's against the law".

The tour supervisor also stated that, at safety meetings, he had told all employees not to read magazines or to remove them from the Post Office.

The next witness for the Union was the manager of the installation. He testified that in fourteen years at the installation, he had known of other employees charged with theft. One employee in particular had had his case referred to Federal authorities, but no charges had been filed, and the employee eventually received nothing more than a 30-day suspension. He testified that one of the reasons that the employee had received only a 30-day suspension and not discharge was the fact that the mail which he had allegedly taken had turned out to be pornographic literature being sent to a local book distributor. The United States Attorney had declined to prosecute because of the nature of the mail that had been intercepted. He stated that this was the only incident of which he was aware of non-discharge of an employee accused of theft or interception of the mail.

The last witness for the Union was a social worker from the mental health center to which Grievan had been referred by the United States District Court. He stated that he had first met Grievant on February 9, 1981, when Grievant appeared voluntarily. The witness testified that he uses psychotherapy under

the direction of a medical director in treating persons either coming voluntarily to the mental health center or by being referred to the mental health center.

The witness testified that, in his opinion, Grievant was suffering from a post-traumatic stress disorder. Grievant had served three tours of duty in the Viet Nam war. The social worker stated that delayed stress reactions as a result of traumatic experiences were now coming to light as afflicting Viet Nam veterans, and the Veterans Administration was starting to accept the existence of the condition in considering disability claims of Viet Nam veterans.

He testified that persons suffering from this syndrome would not recognize the symptoms themselves, and it would generally take a crisis of some nature to bring the problem to light. He said that in reviewing Grievant's actions, his statements to Postal Inspectors, and his living habits, it was his opinion that Grievant possessed all of the symptoms of a delayed stress reaction. Grievant apparently could not sleep, he was depressed, he had lost interest in his job, he made statements such as "fighting lost causes" and also made statements in reply to questions that were more incriminating than the questions called for. He conducted himself in a manner which seemed to invite retribution.

The witness stated that a person with this type of disorder seemed to resist proper orders by passive means, such as

by being stubborn, forgetful, inefficient, and the like. A response to problems would also be inappropriate.

The witness stated that Grievant was currently receiving therapy, and that his wife was joining with him in order to better understand his problem. Grievant was brooding less, and was now able to express himself. Grievant was also developing better action patterns, in that he did not carry what he considered to be wrongs internally, nor did he attempt to "get back at the system", and now he could express himself more openly.

On cross-examination, the witness stated that the problems of the Viet Nam veteran were unique due to the nature of the Viet Nam war. In the Viet Nam war, the men were rotated in and out of Viet Nam on an individual basis, rather than coming back in groups with friends, as was true in other wars. He stated that the problems were handled better in World War II and the Korean War. He acknowledged that persons with this stress syndrome would frequently make damaging statements, including confessions, to Postal Inspectors, but such persons are generally more defensive in their statements, saying less, rather than more.

A Postal Inspector testified on behalf of the Postal Service. He stated that he had investigated some 80 to 110 cases of internal theft, and almost all of the employees had been discharged. A few had been allowed to resign. He did not know whether any of these employees had ever raised the question

of a delayed stress syndrome. He further testified that 90% of the employees charged with theft at first denied the allegations, and then, after the Postal Inspectors disclosed their information, the employees generally admitted their misconduct.

The Postal Service also introduced in evidence newspaper articles from a local newspaper recounting Grievant's trial and conviction.

The parties introduced in evidence a four-page handwritten letter which Grievant had sent to the manager of the installation several days after his emergency suspension. In it, Grievant set forth some of his reasons for opening the mail, and his general attitude. Grievant said that one of the reasons that he had opened the mail was that Postal patrons generally had no familiarity with anything but first-class mail, and therefore, on occasion, when the mail apparently was of third and fourth-class type, he felt it necessary to open the mail to be sure that it was classed properly. He further stated that he had taken magazines home to read because he found them in the trash, and it was common practice to do this.

He also wrote in the letter that he had not been doing his job properly because of real or imaginery "things". He thought that his previous very positive attitude had been changing to a "real bad negative one". He felt that living with a negative attitude was something that he did not want to do, and that he

disparate treatment because another Postal employee who had stolen mail had received only a 30-day disciplinary layoff. The Postal Service's reply to this allegation is that the treatment was not disparate, because the other employee had been given a second chance, just as Grievant had been given a second chance after his first incident of misconduct. Therefore, the Postal Service contends, the two had been treated the same.

Concerning the medical treatment which Grievant was receiving, the Postal Service points out that this treatment commenced only a very few days before Grievant had received a letter of emergency suspension. It therefore questions whether the seeking of this medical treatment was sincere, or whether it was actually done for purposes of defense.

On behalf of Grievant, the Union submitted a number of cases to the Arbitrator which held that an arbitrator has a right to mitigate the penalties imposed by management under certain circumstances.

The Union further stated that in 99% of the cases involving bargaining-unit employees who had had their misconduct referred to Federal Court, the Union would not seek reinstatement. It was doing so here, however, because of Grievant's unique difficulties and the feeling of the Union that there were extenuating circumstances sufficient to warrant a different result.

The Union pointed out that Grievant had been an employee with 12 years' service. He had spent three years in the U.S. Navy in the Seabees, and had volunteered for three tours of duty in the combat zone of Viet Nam.

The Union then argued that the medical evidence that it produced showed very clearly that Grievant had psychiatric problems. His post-traumatic delayed stress syndrome resulted directly from service to his country. Further, according to the Union, Grievant sought treatment on February 9, 1981, which was at least four days prior to the notice of his emergency suspension. Therefore, it could not be argued that his emergency suspension precipitated his seeking help.

The Union further argues that Grievant did receive disparate treatment in view of the fact that another employee had stolen mail and had received only a 30-day suspension. The Union stated that Grievant's first warning was not sufficient because Grievant had never been told that such conduct might result in discharge. He had, in fact, been lulled into complacency by the manner in which the first warning, if it was such, had been given.

Concerning the Postal Service's statement that returning Grievant to work might encourage other employees to misconduct themselves, the Union argues that that statement is not borne out by the facts. The return of the other employee to work could very well have done this, but no proof that it had happened was

given. In point of fact, the Union argues, all employees have a potential for theft.

The Union further states that the Postal Service's argument of adverse reaction by the public is merely speculation, and there was no real evidence of this.

The Union contends that the Postal Service's argument that Grievant was a knowledgable person and could have sought help for his problems rather than to do what he did showed a lack of knowledge of Grievant's problem. Had Grievant been able to seek alternative ways of help, he would not have had the post-traumatic stress syndrome in the first place. One of the symptoms of this type of syndrome is that the possessor is not aware enough of the problem to seek help.

In considering the two grievances at issue here - the emergency suspension and the discharge - little time need be spent on the grievance concerning the emergency suspension. Grievant was observed conducting himself in a manner that was not only a violation of Postal Service regulations, but also was in violation of Federal law. The actions taken by the Postal Service in response thereto were justified by its immediate need to protect the integrity of the mail above all else.

I must conclude, therefore, that the grievance concerning Grievant's emergency suspension must be denied.

Concerning the grievance for Grievant's discharge, the

first defense raised in Grievant's behalf is that Grievant received disparate treatment in that he was discharged when another clerk was not. In order to prove disparate treatment, Grievant would have had to show that a general course of conduct was usually followed in such situations but which was departed from in his case. I do not believe that such was shown to be the case here. One instance of difference in treatment in a given situation is not evidence of disparate treatment. Disparate treatment is indicated by a course of conduct which an employee has a right to rely on, but which was departed from in his case and to his surprise. Differences in treatment can arise from different factual circumstances. Treatment becomes disparate only when a large number of at least generally similar factual situations are treated the same but the situation under consideration which is similar is treated differently. There was no such proof of that here. Therefore, Grievant was not the subject of disparate treatment.

The next issue to be considered is one of mitigating circumstances. This presents a very difficult situation. What constitutes mitigating circumstances to one party is a substitution of the arbitrator's judgment to another. It is accepted arbitration procedure that arbitrators should not substitute their judgment for that of management.

However, as has been pointed out by the Union in the cases

submitted to the Arbitrator, an arbitrator is permitted to take mitigating circumstances into consideration. A discharge must be for just cause, and "just cause" does involve the circumstances surrounding a grievant's actions. Therefore, if such actions show a lack of culpability, they may be considered as mitigating, and a discharge that occurs under those circumstances would therefore not be for just cause.

The conflicting contentions are well set out in American National Insurance Co., 44 LA 522, at page 527.

A reading of the authorities cited by the Union indicates that a too-ready acceptance by arbitrators to consider circumstances as mitigating so as to justify setting aside a discharge would make it most difficult not to substitute the judgment of the arbitrator for that of management. There is a fine line between (1) deciding that certain circumstances were not given proper consideration by the employer in its decision to discharge, and that such circumstances should have been considered as mitigating, and (2) substituting an arbitrator's judgment for management.

After careful consideration of the facts and circumstances in this case, and with an awareness of the "fine line" referred to above, I am constrained to rule that there are mitigating circumstances which indicate that Grievant's discharge should be set aside.

The medical evidence introduced by the Union set out

that Grievant was, in truth, suffering from mental or emotional problems. That, of course, is a mitigating circumstance which is raised frequently. Without more than just that fact, I would be reluctant to accept it as mitigating because the issue is so generally raised, and frequently apparently as an afterthought.

The "more" which I find to exist is the decision of the United States District Court to defer Grievant's sentence. A deferral of sentence can result in the eventual dismissal of the charges, and a finding of "not guilty". It is generally known that Federal Courts guard the Postal Service most jealously. Therefore, the fact that the Federal Court did not finally convict Grievant is significant. It is an indication that the Federal Court found mitigating circumstances.

Also significant in the Federal Court's decision was the fact that Grievant was ordered to continue with his counseling program at the local mental health center, and that his program was to be monitored by the supervising probation officer.

Prior to sentencing, Federal Courts order extensive probationary reports. Grievant's conditions of probation would indicate that the Federal Court accepted that Grievant had a mental/emotional problem needing counseling. That, in my view, is a confirmation of Grievant's argument that such was the case. If the Federal Court was willing to accept the position

of Grievant after extensive inquiry, I believe that that is proof of extenuating circumstances sufficient to justify sustaining Grievant's grievance on his discharge.

I wish to emphasize that the defense of mitigating circumstances to set aside a discharge is difficult to establish. However, I believe that Grievant has overcome the difficulties and has sustained his defense.

The grievance is sustained, and Grievant is ordered reinstated.

In view of the fact that, basically, Grievant has admitted the charges made against him, it would be grossly unfair to the Postal Service to order his reinstatement with back pay. To borrow the language which appears in Enterprise Wire Co., 46 LA 359, at page 363, an arbitrator "may properly, without any 'political' or spineless intent to 'split the difference' between the opposing positions of the parties, find that the correct decision is to 'chastize' both the company and the disciplined employee by decreasing but not nullifying the degree of discipline imposed by the company - e.g., by reinstating a discharged employee without back pay".

The grievance is sustained as to Grievant's discharge, and he is ordered reinstated without back pay. However, seniority shall still accrue, as well as all fringe benefits, including vacation entitlement.

The costs are assessed equally.

Dated this 22ND day of February, 1982.

Gerald Cohen

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