GERALD COHEN 7/19/82 Won
Removal - Attendance

IN ARBITRATION

3543 (C1C-4A-D)

000239

UNITED STATES POSTAL SERVICE,	Case No. C1C-4A-D 3843;
and	Arbitrator's File 82-58-778;
AMERICAN POSTAL WORKERS UNION, DENISE BURNS, Grievant.	Date of Hearing: June 22, 1982, Chicago, IL

LOCAL ARBITRATION

JUL 21 1982

APPEARANCES

For the Postal Service:

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O P I N I O N

Issue

Was Grievant removed from the Postal Service for just cause?

Facts

On January 13, 1982, Grievant was issued a Notice of Removal which stated:

"You are hereby notified you will be removed from the Postal Service on February 22, 1982. The reason for this removal action is:

'Failure to Meet the Attendance Requirements of your Position.'

A review of your attendance record from September 25, 1981 until January 7, 1982 revealed that you have been absent from your scheduled tour of duty on November 11, 1981 8 hours and from January 4, 1982 to January 6, 1982 for 16 hours. A total of 24 hours leave. On December 17, 1981 you were late 17 minutes and on December 18, 1981 you were late 9 minutes.

This action is a result of a Step 2 decision dated September 25, 1981, which reduced a proposed removal to a 14 day suspension. This agreed upon action contained the provision that you must maintain a perfect attendance record for 120 days managements just cause would be removal.

A further stipulation of this agreement was that the Union could not grieve the management action of removal if you failed to maintain a perfect attendance record for a period of 120 days."

The "Step 2 decision dated September 25, 1981" mentioned in the Notice of Removal read as follows:

"My Step 2 decision dated September 14, 1981, which denied the grievance is being modified as follows:

Notice of Removal will be rescinded and a 14 day suspension will be the agreeable discipline with the following additions:

1. Grievant must maintain a perfect attendance record for 120 days, starting from return date of suspension.

2. If Grievant fails to maintain perfect attendance for 120 days, Management's just cause will be removal.

3. The Union will not grieve the Management action of removal for failing to meet item 1 in this agreement.

There will be no back salary reimbursement due to recission of removal."

A letter of Grievant dated "10/3/81" confirming the settlement read as follows:

"STEP 2 DECISION -
And Last Chance Agreement ...

As a result of a Step 2 Decision the removal notice issued to you on 7/27/81 is rescinded and the following agreement is made in lieu of your removal from the Postal Service:

1. You will serve a fourteen (14) days suspension starting on 10/6/81 at 0800 hours. You are to return to duty on 10/20/81 at 0800 hours.

2. You must maintain a perfect attendance record for 120 days starting from your return from the above suspension. Failure to maintain a perfect record on your part will result in your removal from the Postal Service for just cause.
3. There will be no back pay reimbursement for any time lost by you because of the original removal notice.

4. This agreement is to be considered a last chance effort to help you improve your record.

This agreement and/or any of the final results of it, up to and including your removal from the Postal Service, will not be grieved on your part or the union.

This action is taken without prejudice to the U. S. Postal Service position in this grievance or any similar grievance. It is agreed by all parties to this grievance that this is a final and complete settlement of this matter."

The supervisor who issued the Letter of Removal stated that he had become Grievant's supervisor on November 14, 1981, and he was aware of the agreement which Grievant had with the

Postal Service. He knew that she was required to maintain perfect attendance for 120 days. He had spoken with her concerning it, because he was interested in her living up to the agreement. Grievant told him that she would do her best to abide by the agreement.

Grievant had had some instances of late arrival and early departure during the 120 days in question, but the supervisor had ignored these. However, Grievant had taken some unscheduled absences which had violated her agreement with the Postal Service. Evidence disclosed that Grievant had been absent from work on November 11, 1981, and on two other occasions. The Letter of Removal was issued as a result.

Grievant's supervisor was asked on cross-examination if he believed that Grievant should be given any leeway in her attendance, and his reply was "No".

The first witness for Grievant was a licensed practical nurse employed by Grievant's doctor. She testified that Grievant had been in to see the doctor about January 4, 1982, and had been diagnosed as having acute follecular tonsillitis. The nurse had administered a shot of penicillin of 600,000 units, and Grievant was given prescriptions for Erythromycin and an oral expectorant. According to the information which Grievant gave to the doctor, she had been working in a very cold area. The doctor had advised her to take several days off work to allow

the infection to clear up.

Grievant produced a number of witnesses who worked in the same facility as Grievant and on the same tour. All of the witnesses testified that in the winter beginning at the end of 1981 and into early 1982, the facility was so cold and drafty that the employees working there wore coats, scarves and gloves at their work stations. The weather conditions were bitterly cold, and there was no heat in the building.

Some of these witnesses also testified that there were very heavy snow conditions on a number of occasions during the winter, which caused many employees to be either late or absent.

One of Grievant's witnesses testified that she was the driver of Grievant's car pool. The witness stated that on at least one occasion she had started from her house, which was some distance from the Postal facility at O'Hare Field, in relatively good weather, but the weather grew increasingly worse as they neared the facility which resulted in heavy traffic jams, causing them to be late for work.

Grievant testified that her absence of November 11, 1981, occurred as a result of her purse being snatched as she waited for public transportation to take her to work. She called the police, who arrived after some delay, and they took her to the nearest police station to make a report. After making the report, Grievant called a family member to come for her. By the time the family

member arrived, it was close to noon, and Grievant stated that she was so unnerved by all that had happened that she did not go to work. There were still approximately four hours left of the workday.

Grievant testified that her absence early in January, 1982, was due to her having contracted tonsillitis. She was very ill, and had to have medical attention. She stated that her illness resulted from the working conditions at the airmail facility at O'Hare Airport. She said that for almost the whole winter beginning at the end of 1981, the airmail facility was unheated. It was necessary for employees to work in gloves, scarves, hats and coats while they worked.

Grievant stated that she was aware of her last-chance settlement, and she wanted to save her job. She had hoped to work for 120 days without any absences, but sickness prevented her from doing so.

Discussion and Opinion

The Postal Service argues that in order for it to operate efficiently, it is necessary that it have employees who attend work regularly. Regulations require that employees be regular in attendance.

The Postal Service contends that Grievant's employment record shows anything but regularity in attendance, and she was discharged as a result. The Postal Service points out that, prior

to this discharge, and in an attempt to accommodate Grievant and to salvage her as an employee, the Postal Service entered into an agreement with her setting aside a previous discharge provided she maintained perfect attendance for only 120 days. The Postal Service urges that this shows its compassion for Grievant. Grievant's failure, however, to abide by this agreement is an indication of her disregard for her obligation to the Postal Service, and justifies her discharge.

The Postal Service further argues that Grievant and her Union were not coerced in any way into entering into the settlement agreement. It was done freely and with knowledge of its requirements. In summation, the Postal Service argues that, in view of Grievant's past record and her failure to abide by her agreement, her grievance should be dismissed as without merit.

It is the position of Grievant and the Union that the National Agreement still requires that discharge be only for just cause, no matter what the parties have agreed to, and that "just cause" is still an issue for an arbitrator to decide.

Grievant states that the requirement that a person be perfect in attendance is not recognized as a requirement in the National Agreement. All employees are entitled to sick leave on occasion. They are also entitled on occasion to take leave without pay. In short, Grievant contends that absences due to mitigating factors are possible, as previous case decisions have

shown. The Union cites a number of cases in which mitigating factors have been used to excuse what would otherwise be unacceptable absences.

In short, the Union argues that there is no hard and fast rule on what constitutes irregular attendance sufficient to justify discharge.

The Union contends that it is clear in this grievance that Grievant's absences should have been excused by the Postal Service and not considered grounds for discharge. The purse snatching was something entirely beyond her control, and it is understandable that it would be so unnerving that she would be unable to work that day.

In addition, Grievant's absences due to illness were documented beyond doubt. As a matter of fact, Grievant's tonsillitis was caused by working conditions, and could almost be considered the same as an on-the-job injury. Work conditions were so bad that a number of employees remembered them and recounted them.

So far as one of Grievant's tardies is concerned, the facts showed that when Grievant and her driver started for work, conditions were not so bad as to alert them that any extra precautions were necessary. The answer to the Postal Service's argument that Grievant should have lived closer to her work station is that not everyone can live next door to where they work.

In summation, the Union and Grievant argue that the

evidence is clear that Grievant's record in the 120-day period after her original settlement was not so bad as to warrant her discharge.

It is obvious that the parties have not taken Grievant's last-chance settlement of September 25, 1981, literally. One of the provisions of that agreement is that Grievant would not grieve a subsequent discharge for failure to maintain a perfect attendance record during the 120-day period. She has grieved her discharge, and the Postal Service does not contend that she has no right to file a grievance. Obviously, her agreement not to grieve is unenforceable because the National Agreement gives her the right to grieve.

Similarly, a provision in an agreement setting forth what constitutes just cause for dismissal is also unenforceable, because the final decision as to what constitutes just cause for discharge must be left to an arbitrator. Otherwise, a grievant's right to arbitrate would be effectively terminated. If the parties could determine what is "just cause", then all an arbitrator could do would be to rubber-stamp the agreement. That is not the intention of the National Agreement. The National Agreement reserves to the arbitration process the eventual resolution of disputes. What constitutes just cause is one such dispute.

Turning, then, to the issue of just cause in this grievance, it is clear that Grievant's discharge was not for just cause.

Were it not for the last-chance settlement involved here, every absence that Grievant had in the period in question would have been accepted as reasonable, and Grievant would not have been criticized for them.

Perfection in attendance has always been recognized as a goal to be striven for. But lack of perfection is not recognized as grounds for discharge. It is an impossible expectation that an ordinary mortal will attain perfection in anything, and lack of perfection is accepted as a part of every-day life. If lack of perfection should reach a certain point, of course, it might be a basis for discipline. But lack of perfection itself is not grounds for discharge.

Such is the case here. To impose upon Grievant the requirement of perfection at the risk of discharge is to require her to live up to a standard which is almost impossible to keep, and which neither the National Agreement nor the Handbooks and Manuals require. Therefore, her discharge was not for just cause.

The grievance is sustained, and Grievant is ordered reinstated with back pay. The Postal Service is entitled to credit for any earnings or other income which Grievant may have received up to the time of her reinstatement. The Arbitrator will retain jurisdiction to compute back pay should the need arise.

The costs are assessed equally.

Dated this 19th day of July, 1982.

GERALD COHEN
Arbitrator
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