

C#01988

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DR. 53
PRESIDENT

Falsification of
Employment forms
#2591 - #61

IN THE MATTER OF THE) OPINION AND AWARD
ARBITRATION BETWEEN)
) S8N-3W-D-27309
United States Postal Service)	S8N-3W-D-27310
Jacksonville, Florida) Harry F. Tasset
) Jacksonville, FL
-and-)
)
National Association of)
Letter Carriers)
_____)

SUSTAINED.

Before:

Robert W. Foster, Arbitrator

APPEARANCES

For the Employer:

R. Wayne Ray, Labor Relations Assistant

For the Union:

James C. Mahlbacher

PRELIMINARY STATEMENT

The undersigned was appointed to arbitrate a dispute between the United States Postal Service (Employer) and the National Association of Letter Carriers (Union) arising out of a grievance pursued by the Union on behalf of Harry F. Tasset (Grievant) to this arbitration according to the National Agreement between the parties. A hearing was held on July 14, 1981 at the General Mail

Center in Jacksonville, Florida attended by the Grievant and the above-named representatives of the parties who were accorded full and equal opportunity to present evidence and arguments.

ISSUE

1. Whether the grievances are arbitrable.
2. Whether the Removal of Grievant was for just cause? If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE III - MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties;

B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

ARTICLE XII - PRINCIPLES OF SENIORITY, POSTING AND REASSIGNMENTS

B. The parties recognize that the failure of the Employer to discover a falsification by an employee in the employment application prior to the expiration of the probationary period shall not bar the use of such falsification as a reason for discharge.

ARTICLE XV - GRIEVANCE-ARBITRATION PROCEDURE

Section 2. Grievance Procedure-Steps

Step 1: (a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative.

ARTICLE XVI - DISCIPLINE PROCEDURE

In the administration of this Article, a basic principle shall be that discipline should be corrective in 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 or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

BACKGROUND

This grievance arises from the issuance of a Notice of Removal to Grievant, at the time a part-time flexible letter carrier since March 22, 1980. The notice was dated November 18, 1980 and stated that the removal would be effective on December 24, 1980. The stated reasons for this action reads as follows:

CHARGE NO. 1: FALSIFICATION OF APPLICATION FOR EMPLOYMENT, PS FORM 2591, AND APPOINTMENT AFFIDAVIT, PS FORM 61.

On June 18, 1978, you signed POS Form 2591, Application for Employment, certifying that all of the statements made in the application were true, complete, and correct to the best of your knowledge and belief and were made in good faith. Directly above your signature was the statement, "A false or dishonest answer to any question in this Statement may be grounds for not employing you or for dismissing you after you begin work, and may be punishable by fine or imprisonment (U.S. Code, Title 18, § 1001). All the information you give will be considered in reviewing your Statement and is subject to investigation." You checked the "No" block next to Item 15 which asks the question, "Within the last five years have you been fired from any job for any reason", and Item 16 which asks the question, "Within the last five years have you quit a job after being notified that you would be fired?" On March 10, 1980, you signed PS Form 61, Appointment Affidavit, below the statement, "All items and statements above are true as of this date." In the Instructions to Appointee section of this form is the statement, "Answer all questions. Your answers will be considered together with other information in your record in determining your present fitness for Postal Employment.

A false statement or dishonest answer to any question may be grounds for dismissal after appointment or conversion and is punishable by law." You checked the "No" blocks next to Item 9 which asks the question "Since you filed application for this employment, have you: A. been discharged (fired) from employment for any reason? B. Resigned (quit) after being informed that your employer intended to discharge (fire) you for any reason? C. Been discharged from the armed services under other than honorable conditions? If your answer to A, B, or C is "Yes", give details on reverse. Show the name and address (including ZIP Code) of employer, approximate date, and reason in each case." As a result of the National Agency Check conducted by the Office of Personnel Management, informatin was received from one of your former employers, Bio Dynamics/BMC, indicating that you were terminated from that company on Februaary 28, 1975, for lack of sales production. However, on PS Form 2591, you had indicated that the reason you left this company was "advancement". Information received from another of your former employers, Medical Supply Company, indicating that you were terminated from that company due to your low volume of sales. However, on PS Form 2592, you indicated that you left Medical Supply Company due to "limited marketing potential-advancement". On September 19, 1980, you were interviewed at your residence. You were advised of your rights per PS Form 1067. Although you agreed to discuss the discrepancies on your employment applications, you refused to sign the warning and waiver form. You indicated your refusal by initialing the word "refused" in the signature block. You verbally stated that you understood your rights and were willing to discuss the matter. You provided a sworn statement relative to the circumstances under which you left these two former positions. You stated that on the employment application, PS Form 2591, dated June 18, 1978; and on your Employment Affidavit, PS Form 61, dated March 10, 1980, you indicated that you had never been fired from a job; however, you added that you were let go from two former positions. You stated that you formerly worked for Bio-Dynamics, and the General Manager asked you if you would like to resign because of your productivity. You added that at the time, you were considering another job anyway so that is why you left and why you put on your employment application that the reason you resigned was for advancement. You stated that you held another sales job with Medical Supply Company, and were let go, along with other employees, when this company was being taken over by another. You added that they just did not have a large enough territory for you to make any income, and that is why you put "limited marketing potential" on your employment application as your reason for leaving. You added that the Company eventually did go out of business.

When the information regarding Grievant's prior employment came to the attention of the Employer as a result of the National Agency Check conducted by the Office of Personnel Management on January 25, 1980, the matter was thereafter investigated by a Postal Inspector who filed his report containing the evidence as stated in the charge on September 25, 1980. The report with attachments was received into evidence. These included the PS Form 2591 and PS Form 61, executed by Grievant in the manner stated in the charge, along with Form 49s executed by two former employers of Grievant, Bio-Dynamics and Medical Supply Company. On the first of these forms the "yes" box was checked by the question: "To your knowledge has this person ever been fired from any job for any reason, or quit a job after being notified that he/she would be fired?" A notation indicated that Grievant "lacked the aggressiveness and qualities necessary to be a good sales person". On the form received from Medical Supply Company the "no" box was marked by the question as to whether Grievant had been fired. A notation on the form indicated that the reason for Grievant leaving was his low volume of sales.

A Union officer testified that representing Grievant during the grievance steps he made telephone inquiries to Bio-Dynamics where he was told by one person that he didn't remember the circumstances of Grievant leaving but thought that it was mutual. In making a similar inquiry to Medical Supply he was told that the Company had gone out of business and that there were no records available regarding Grievant's employment. He did learn that Grievant had worked at both of these companies before he completed the original application for employment with the Postal Service in 1978.

Grievant testified that he voluntarily resigned his employment from both Bio-Dynamics and Medical Supply. He sponsored the introduction of a letter that he had sent to the former on February 10, 1975 referring to a recent telephone conversation in which he had expressed his desire to submit a letter of resignation, and further stating: "With your stated approval I therefore regretfully submit this letter of resignation wishing to terminate my employ with Bio effective 15 March 1975." He further stated that at the time he had a job with another company where he began working in May 1975. He left that job to go to work for Medical Supply from which he resigned since the Company was going out of business, which it did the following year.

When the removal letter dated November 18, 1980 was drafted, Grievant had been off from work on total disability since August 19, 1980 as a result of a dog bite he incurred while delivering mail. For this reason the original notice of removal was sent to Grievant's home address by certified mail on November 18, 1980. On the same day a copy of the notice was also sent to Grievant's home address by ordinary mail, as noted in the letter. The certification slip showed a first notice of attempted delivery on November 24, a second notice on November 29 and the letter returned on December 9. This certification notice was received by the Employer indicating non-delivery on December 15, 1980.

Form 50, Request for Personnel Action implementing Grievant's removal was executed on December 30, 1980 with a copy mailed to Grievant's home address. After Grievant received the Form 50 in the mail on January 23, 1981, he contacted a Union representative and on January 29 went to the station where he had worked and asked if there was a certified letter there for him. After checking into the matter, the Grievant's supervisor advised Grievant that the certified letter was at the main post office. The letter was then mailed to Grievant's home by certified mail where he received it on January 30, 1981. Thereafter the Union filed the instant grievance which was denied at step 1 for being untimely on February 13, 1981. After receiving a step 2 appeal from the Union on February 17, 1981, the Employer returned it on February 20 for the reason that it was not received in accordance with Article XV of the National Agreement. The Employer likewise responded at step 3 that the grievance was filed untimely at step 1 of the grievance procedure. Grievant testified that his first notice of the removal action against him was when the Form 50 was delivered by mail to his home on January 23, 1981. He stated that he had been living alone prior to that time and that an elderly neighbor lady would pick up his mail on the occasion when he was away from home, including several days in December while he was in the hospital under treatment for the dog bite injury. During this period he had been in communication with the Employer regarding his disability and was not told of the removal action. He received his disability compensation check by regular mail at his home on December 14, 1980.

SUMMARIZED POSITION OF THE PARTIES

The Employer

Arbitrability

While conceding that Grievant did not actually receive the certification letter notifying him of his removal when delivery was first attempted, the Employer says that Grievant deliberately avoided receipt knowing of its contents. The Employer further contends that since the letter which was sent to his home address by ordinary mail on November 18, 1980, was not returned, it was in fact delivered to him. Since this occurred some several months before the grievance was filed, the Employer says that the step 1 action was untimely under Article XV, section 2, step 1, and therefore its November 18, 1980 Notice of Removal is not properly before the arbitrator.

The Merits

In support of its position that the Grievant was discharged for just cause, the Employer contends that it has a right to expect truthful statements from all job applicants which is needed as a proper basis for the evaluation for employment of the applicants. Article XVII, section 1(B) of the National Agreement, is cited in support of its position that an employee who is subsequently found guilty of employment application falsification is subject to discharge. The Employer then concludes that Grievant's falsification was deliberate and willful since there is no credible explanation for the false answers to the questions regarding prior employment. Accordingly, the Employer requests that the Grievant be discharged for just cause.

The Union

Arbitrability

The Union contends that the Grievant had no notice of the removal action until January 23, 1981 when he received Form 50, and therefore the grievance was properly processed at step 1 when timely action was taken after Grievant received the certified Notice of Removal on January 30, 1981. In support of its position that the Employer has failed to meet the requirement of positive notification of Grievant's removal, the Union says that the Employer should have inquired as to why the certified letter was not delivered to Grievant and should have informed Grievant of its removal action when communicating with him regarding his disability. The Union further rejects the Employer's suggestion that Grievant knowingly avoided receipt of the certified letter containing the removal notice on the ground that Grievant could not have known its contents.

DISCUSSION AND OPINION

Arbitrability

In addressing the threshold question of whether this grievance is arbitrable, it should first be noted that the limitation on the arbitrator's jurisdiction of applying contract language to the facts of record, applies with equal force to procedural as well as substantive matters. These parties have followed the usual practice of setting out the grievance step process with specified time frames in the interest of prompt and orderly settlement of

grievances that the arbitrator is compelled to enforce by withholding jurisdiction to pass on the merits where it is clearly established that the procedure has not been followed. On the other hand, the countervailing policy of having disputes decided on their merits through an orderly arbitration process which the parties are deemed to have intended as a basic purpose of mandatory arbitration, dictates that a forfeiture of that opportunity should not be lightly applied. Thus, substantial doubt as to whether this has occurred should be resolved in favor of arbitrability.

The Article XV, section 2, step 1(a) triggering word "learned" as the point where the 14 day period begins to run can only mean actual knowledge of the event that gives rise to a grievance. Since it is an undisputed fact that the Notice of Removal sent by certified mail was not received by Grievant until later January, 1981, it cannot be said that this conveyed the necessary knowledge to Grievant. Nor is there any indication from the evidence of record, beyond the speculation of the Employer, that Grievant deliberately refused to accept service of his certified letter in order to avoid its consequences. Thus, the question of whether the step 1 time period had expired turns on the disputed fact of actual receipt of the copy sent to Grievant by ordinary mail.

In addressing this factual issue, the starting point is the rebuttable presumption that a letter properly sent is received by the addressee. Absent any evidence to the contrary, that result becomes compelling because of its high probability of truth. When

receipt is denied, however, the presumption is reduced to an evidentiary inference to be balanced against other evidence creating a contrary inference in the search for the true fact.

In judging the degree of credibility to be accorded Grievant's testimony that he did not receive the ordinary mail copy of the Removal Notice, no self-interest motive is apparent to explain why Grievant would have ignored such a notice. His subsequent acts of contacting the Union and the Employer shortly after the time when he claims to have first learned of the proposed removal provides a further indication that he did not intend to delay his challenge to the Employer's action at the earliest opportunity. Moreover, Grievant's frequent absences while his house was unattended provides plausible explanations of how the letter could have been lost without having reached him.

In summary, the normal presumption that a letter sent has been received is rebutted by the evidence and circumstances, leaving the reasonable inference that Grievant did not in fact receive the letter sent by ordinary mail. Accordingly, the Employer has failed to meet its burden of proving that Grievant learned of the removal action more than 14 days before the institution of step 1 of the grievance procedure.

The Merits

Turning to the substantive issue of whether the Grievant's removal was for just cause, the Employer properly observes that arbitral authority and Article XII of the National Agreement recognize its right to receive honest and accurate answers to

questions on an application for employment form so that its decision can be based on an informed judgment. But the essence of the dischargeable offense of falsification is the employees dishonesty that requires a finding of intentionally issuing a false statement, as distinguished from a reasonable mistake, in direct conflict with the necessary characteristic of a letter carrier that he must always be trustworthy. Thus, the critical question is not just whether the Grievant had in fact been fired, or forced to resign from a former job, but whether he misrepresented the known fact in order to be accepted for employment. In addressing this factual question, the employee must be presumed innocent with the Employer bearing the burden of rebuttal by clearly establishing fraudulent intent.

It is obvious from the answer to the question on Form 49 that the responding person at Bio-Dynamics believed in 1980 that Grievant was fired from his job in 1975. Moreover, the evidence indicates that when Grievant ended his employment with this Company, his employer was displeased with his qualities as a sales person, and it is probable that Grievant was aware of this. But Grievant's letter of resignation accepted by the Company refers to his desire to resign following a conversation with his employer is inconsistent with the employer's charge that he knew he was fired or that he quit after being notified that he would be fired. Accordingly, the Employer has not established that Grievant knowingly falsified PS Form 2591 with respect to his job with Bio-Dynamics by that employer's response on Form 49 in light of the indication of Grievant's reasonable belief that he had voluntarily resigned.

The defect in the Employer's charge of deliberate falsification with respect to Grievant's employment with Medical Supply Company lies in the ambiguous response by that employer on Form 49. While there is again an indication that this employer was dissatisfied with Grievant's sales volume, the more direct question of whether Grievant had been fired was answered in the negative. Without any further clarifying evidence as to the circumstances under which Grievant left that job, his denial of the charge is credibly based on the documentary evidence at hand.

As to the charge that Grievant falsified PS Form 61, the evidence conclusively established that the Employer was simply mistaken in its belief that Grievant had been employed by the two companies in question after he completed Form 2591.

In summary, the Employer has failed to meet its burden of establishing by the evidence of record that Grievant deliberately and knowingly falsified PS Form 2591 or PS Form 61 with sufficient certainty to overcome Grievant's presumption of innocence. Accordingly, the removal of Grievant was not for just cause.

AWARD

After careful consideration of the evidence and arguments of the parties, and based on the reasons set out above, the award is as follows: (1) The grievance is arbitrable. (2) The removal of Grievant was not for just cause.

The remedy is that Grievant shall be offered reinstatement to his prior employment if and when he is physically able to do so and

the record of disciplinary action against him shall be expunged from his record. In view of the fact that Grievant has been totally disabled from the time of his removal to the present, there is no basis on which to award back pay.

Grievance sustained.


Robert W. Foster

August 7, 1981
Columbia, South Carolina