

USPS - NRLCA CONTRACTUAL GRIEVANCE PROCEEDINGS
CENTRAL REGION
ARBITRATION OPINION AND AWARD

0 46-79A, B

In The Matter of Arbitration
Between:

THE UNITED STATES POSTAL SERVICE
Lowry City, Missouri Station
Kansas City, Missouri MSC

-and-

NATIONAL RURAL LETTER CARRIERS'
ASSOCIATION
Missouri RLCA

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* APWU AIRS #4654 & #4655
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* Case Nos. CIR-4H-D 31648
* CIR-4H-D 31707
* NRLCA Nos. MO-73/74-81-D
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* Decision Issued
* January 12, 1985
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APPEARANCES

FOR THE EMPLOYER

Williams E. Simmons
Mary C. Atchison
Kenneth Hudgens

Labor Relations Executive
Postmaster, Lowry City, Mo.
Postal Inspector

FOR THE UNION

David Jonathan Cohen
Harry L. Palmer
David L. Engeman

Attorney for the NRLCA
Missouri State Steward
Grievant

ISSUE: Article 16, Sections 1 and 6 -- Removal for theft; Claim Employer violated contractual due-process requirements.

Jonathan Dworkin, Regional Arbitrator
16828 Chagrin Boulevard
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BACKGROUND OF DISPUTE

Grievant was a Rural Letter Carrier employed at the Lowry City Station of the Kansas City, Missouri Post Office. On February 7, 1984, he opened an undeliverable parcel containing a five-dollar bearer refund check from Standard Brands, Inc., and a fifty-cent piece. He cashed the check and kept the half dollar. What he did not know was that the parcel was "bait" which had been placed in the mail stream by the Postal Inspection Service. From time to time, test mailings of this kind are used to assess employee honesty and identify thieves. Test mail is generally misaddressed or otherwise undeliverable items which appear valuable. When Grievant failed to return the parcel to the post office for processing, the Inspection Service targeted him for further investigation. Two "live" tests were administered. In a "live" test, a suspect is placed under surveillance while s/he is handling test mail. Grievant passed both tests; he returned the undeliverable items to the post office without disturbing them.

The investigation ended in mid-April, 1984. The suspicion that Grievant took the test parcel from the mail stream on February 7 was confirmed when the five-dollar check was recovered. It had been negotiated and bore Grievant's endorsement. On April 13, while he was delivering mail, Grievant was arrested by a postal inspector. He was taken to the post office where he made a voluntary confession. He was cooperative and remorseful. His statement went beyond the matter at hand -- theft of mail; he also admitted to unauthorized curtailments. On several previous occasions,

he postponed delivering magazines in order to read them himself. Grievant's statement concluded with an expression of his willingness to make restitution for what he had stolen.

On April 13, the Inspection Service reported its findings to the Lowry City Postmaster. Upon the advice of a labor relations representative of the Kansas City Management Sectional Center (MSC), the Postmaster immediately placed Grievant on emergency suspension. On April 19, she mailed a Notice of Proposed Removal to the Employee citing both theft of mail and curtailments of magazines as the reasons for the action. On May 27, 1984, the MSC Postmaster issued a Letter of Decision stating that the removal would be effective on June 1.

Grievances were initiated challenging both the emergency suspension and the removal. They remained unresolved and the Union processed an appeal to arbitration. A hearing was convened in Clinton, Missouri on December 18, 1984. Throughout the preliminary levels of the grievance procedure, the Postal Service maintained that the grievances were untimely and should be dismissed on that account. However, the objection was waived at the outset of the hearing, and the Employer stipulated to the Arbitrator's authority to decide the case on its merits.

ISSUES

Article 16, Section 1 of the Agreement binds the Postal Service to certain principles in exercising its disciplinary authority. The Section requires that discipline be administered correctively, not punitively, and

provides that no employee may be disciplined or discharged without just cause. In any dispute of this kind, a paramount issue is whether the Employer's action conformed to the restrictions on Management Rights set forth in Article 16, Section 1. In this case, however, the Union introduced a procedural issue which must be resolved before the question of just cause may be addressed. The Union maintains that the manner in which the removal was imposed violated Grievant's negotiated rights to "due process." The argument centers on Article 16, Section 6 of the Agreement which provides:

Section 6. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or the designee.

In associate post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken.

The proposal to remove Grievant was signed by the Lowry City Postmaster and received the concurrence of the MSC Manager of Associate Office Services. The Lowry City Station has fewer than twenty employees, and the procedure ostensibly conformed to the second paragraph of Article 16, Section 6. However, the Union contends that the proposal did not in fact originate with the Postmaster -- that it was initiated by a higher-level authority who instructed the Postmaster to sign it. According to the Union,

the Postmaster merely followed the directive of her MSC superior when she executed the Notice. The Union regards this chain of events as violating substantive protections which Grievant was contractually entitled to receive. In the Union's view, Article 16, Section 6 was designed to create a buffer against the possibility of injudicious or excessive disciplinary penalties. It is contended that the provision requires that disciplinary proposals begin at the local level where Supervision is best acquainted with the record of an employee and best able to judge what would constitute a sufficiently corrective response to misconduct. Higher-level authority does not enter the picture until after local Supervision makes a disciplinary decision, and its function is limited to concurring or dissenting. The Union maintains that the manner in which Grievant's removal was issued bypassed the prescribed procedure and eliminated the negotiated buffer. It concludes for this reason alone the grievance should be sustained, notwithstanding the Postal Service's reliance upon what appears to have been ample just cause for the discharge.

The Postal Service contends that the Union's position is factually inaccurate. It concedes that the Lowry City Postmaster contacted the MSC for advice when first confronted with proof of Grievant's theft. It urges that she acted responsibly in doing so. She had no experience in dealing with employee misconduct of this magnitude and, according to the Postal Service, seeking input from labor-relations professionals at the MSC was a prudent thing for her to do. The Employer unqualifiedly denies, however, that the Postmaster acted under instructions, or that anyone other than she initiated the removal. Although the MSC admittedly drafted the Notice of

Proposed Removal for the Postmaster's signature, it is contended that the ultimate decision was hers, and she had authority to sign and issue the notice or impose a lesser penalty as she saw fit. According to the Postal Service, the Union's procedural argument should be dismissed because the initiation and concurrence attending this discharge were entirely consistent with the language and intent of Article 16, Section 6.

"DUE PROCESS:"

FACTS, ARGUMENTS AND CONCLUSIONS

The Postmaster learned of Grievant's misconduct on April 13 when the inspector in charge of the investigation presented her with a copy of the signed confession. Until then, she held Grievant in reasonably high regard and believed that he was a conscientious, trustworthy individual. Even when confronted with the facts, she was unaware of the gravity of the offense. She undoubtedly knew that discipline was warranted, but she did not realize that removal was a viable possibility. She had no meaningful understanding of the Postal Service's policy in matters such as this because she had never before been called upon to deal with a serious disciplinary event.

The Postmaster obviously was in need of guidance. The first counsel she received was gratuitous. The postal inspector who developed the case against Grievant told her the employee was guilty of a felony and he defined the word, "felony" for her. He told her Grievant's discipline would be a matter of policy and that she should contact the MSC for advice. The

Postmaster complied. She spoke with a labor relations officer of the MSC who informed her that the proper procedure was to verbally place Grievant on emergency suspension at once. According to the Postmaster's testimony, The MSC representative told her that Grievant "had to be discharged." When the conversation ended, it was understood that the MSC would prepare the formal notices of suspension and discharge and send them to the Postmaster for signature.

The Postmaster did as she was told. She instituted the emergency suspension on April 13 and, when the disciplinary letters arrived, she signed and delivered them to Grievant. The critical question to be resolved here is whether the Postmaster acted on her own volition after soliciting and considering advice, or whether she merely followed instructions from the MSC. The answer lies in the Postmaster's perception of her function and authority at the time, and in this regard her testimony was illuminating. When asked why she issued a removal against Grievant rather than selecting a more moderate form of discipline, her response was that the Employee committed a "felony offense." Notably, the Postmaster made no mention of reviewing Grievant's employment history, nor did she indicate that she paid any attention to the possibility of corrective discipline. The record contains no testimony that she herself weighed the interests of the Postal Service against retaining Grievant or that she considered any of the other factors which are recognized ingredients of a decision to remove an employee. In fact, the Postmaster admitted that for approximately a week following her conversation with the MSC officer, her sympathies were with Grievant and she felt that the discipline was too harsh. She reconsidered her feelings

after receiving the written disciplinary notices and, in her words, "I concurred with the decision."

From the Employer's point of view, the Postmaster's testimony was unfortunate. The comment that she concurred in the discipline was probably a misstatement brought about by pressures of the moment. The arbitration forum was unfamiliar to her, and cross-examination was a new experience. Certainly that single statement could not be the sole premise for a determination that the decision was not the Postmaster's. However, the record confirms that what she said was in concert with the facts. The decision to discharge Grievant was not made at the local level; it was made by labor relations officers at the MSC. It is clear that the Postmaster exercised no independent judgment. When she signed the disciplinary notices, she was following instructions. The evidence does not even suggest that she had or believed she had authority to do anything contrary to MSC directions. She was told that Grievant "had to be removed," and from then on the decision was no longer hers.

Article 16, Section 6 of the Agreement requires discipline to be proposed by lower-level Supervision and concurred in by higher-level authority. The requirement was omitted in this instance. The remaining question is whether this technical omission was fatal to the Postal Service's attempt to protect itself and the public against a thief. The Union argues that it bargained for a two-step procedure which includes both a lower-level proposal and higher-level concurrence before discipline may be imposed. It maintains that the Employer's failure to follow the contractual mandate breached Grievant's substantive due-process entitlement and nullified the discipline.

The Union submitted several prior arbitral decisions in support of its position. One was issued by Arbitrator J. Fred Holly in a dispute between the Metairie, Louisiana Post Office and the National Association of Letter Carriers (Case Nos. S8N-3D-D 30492 & 30493; Decision issued January 15, 1982). In that case, the Union alleged that several procedural defects including lack of concurrence called for overturning a discharge. Arbitrator Holly was not absolute in his statement that such defects are necessarily fatal to discipline. What he did say was that the parties do not have the right to bypass or ignore contractually prescribed procedures and that a grievance will be sustained on such grounds if contractual omissions prove prejudicial to an aggrieved employee.

A decision by Arbitrator Nicholas H. Zumas contains what is perhaps the clearest, least equivocal statement of the principle relied upon by the Union (Case No. E1R-2F-D 8832, Decision issued February 10, 1984). The dispute stemmed from the removal of a rural letter carrier in the Fleetwood, Pennsylvania Post Office. When postal customers accused the employee of sexual harassment, the local postmaster did not know how to proceed so he contacted the Lancaster Pennsylvania MSC. The MSC took over. It drafted a notice of removal and instructed the postmaster to issue it to the employee. Arbitrator Zumas' finding of facts highlighted the postmaster's lack of participation in the removal decision:

[The local postmaster] testified that he made no decision or recommendation to terminate Grievant. His superiors at the Lancaster MSC did not, according to [the postmaster], ask him what he thought about the case, but he agreed later with their decision to terminate.

Arbitrator Zumas concentrated on Article 16, Section 6 of the Agreement which he held to be a guarantee of "due process" in discipline matters. He found that the employee's procedural rights were violated and that the breach nullified the removal. He reasoned:

Implicit in the language of Article 16(6) is the requirement that a supervisor (or a postmaster in a small installation) make a recommendation or decision as to the imposition of discipline before referring the matter for concurrence to higher authority. * * * It follows that the decision to impose discipline or the nature of the discipline may not be initiated, as in this particular case, outside the installation by higher authority. As outlined above, [the postmaster] made no recommendation and no decision with respect to disciplining Grievant; he merely concurred in the termination decision after it came down from the Lancaster MSC. Failure to carry out his responsibility under the National Agreement rendered [the postmaster's] issuance of the Notice of Removal a nullity.

The Postal Service vigorously disagrees with Arbitrator Zumas' interpretation of Article 16, Section 6. It argues that misconduct as serious as Grievant's is amenable to a national disciplinary policy and should not be left to the kind of patchwork inconsistencies which would result if Supervision of small local stations were solely responsible for dealing with such problems. The Lowry City Post Office where Grievant was employed is one of the smallest in the country. Its workforce consists of the Postmaster and one rural letter carrier. The Postmaster was not adequately equipped to react properly when she learned of Grievant's violation, and it is argued that turning for guidance to MSC labor relations experts was entirely reasonable.

A decision by Arbitrator Marshall J. Seidman firmly supports this argument (Case No. C1R-4B-D 15005; Decision issued August 1, 1983). The case arose in the Coloma, Michigan Post Office, a tiny installation, and involved the discharge of a rural letter carrier who had been a postal employee for nineteen years. The ground for removal was theft of mail. During his ten years of service at Coloma, the local postmaster never had occasion to deal with serious disciplinary occurrences, and he was at a loss as to how to proceed. Moreover, he had known the employee for twenty years and, previous to the incident, had a high regard for what he believed was her integrity and honesty. He was emotionally unable to make a decision when the theft was first brought to his attention. His dilemma was described by Arbitrator Seidman as follows:

Gearhart [the postmaster] was so shocked and surprised by the incident that he was unable to make a rational decision as to the disciplinary action to be taken against Stewart [the grievant] under the then existing circumstances. Because of his twenty year friendship with Stewart and her exemplary record in the Post Office Gearhart did not wish to make a decision which would adversely affect her employment unilaterally; didn't want to make a recommendation that she should be discharged; was willing to have her continue as a Postal employee; and was so emotionally involved that he was unable himself to make either a recommendation or a decision regarding discipline for Stewart.

Uncertainty led the postmaster to call a labor relations representative in the Kalamazoo, Michigan MSC for a recommendation. He was told that Postal Service policy called for removal and that an immediate emergency suspension was advisable. Following the conversation, the MSC drew up the

letter of charges and forwarded it to the postmaster for signature and service upon the employee. The postmaster followed the advice because, as determined by Arbitrator Seidman, he agreed with it.

Arbitrator Seidman held that the procedure did not violate Article 16, Section 6 of the Agreement. He concluded that removal essentially was the decision of the postmaster. His analysis of the facts leading to this conclusion was basic to his award denying the grievance. He noted:

When the [Postal Inspection Service] report was received and discussed with the Sectional Center the doubt Gearhart earlier had felt, based on his long term personal relationship with Stewart which made his initial reaction primarily emotional rather than intellectual in character, the passage of time which gave the opportunity to reflect upon the circumstances, and the availability of the written Postal Inspectors report caused Gearhart to accept the recommendation of the Sectional Center that discharge was the appropriate penalty in such circumstances. Gearhart therefore signed the form prepared for him.

The mere fact that the letter was drafted by Foster [the Sectional labor relations representative] and typed in the Sectional Center does not necessarily mean, as the Union contends, that it was Foster's decision rather than Gearhart's which resulted in the discharge of the grievant. Gearhart received the letter, reviewed it, and signed it because he agreed with its statements of fact and its conclusion. This did not mean that the decision was not his. Foster did not threaten him with disciplinary action if he changed the letter as submitted or if he declined to sign it on the ground either that its facts were incorrect or that its conclusion was inappropriate.

The Union maintains that the Seidman decision is erroneous. Based on its arguments, the Union appears to contend that conceptualization of and proposal for discipline must be entirely local Supervision's without any interference, assistance, or advice from higher level authority. Applying

the argument to this case would require a ruling that, once the Lowry City Postmaster discussed her problem with the MSC, Grievant could no longer be subjected to discipline for stealing mail. The Arbitrator does not agree. Moreover, he does not find the opinions of Arbitrators Zumas and Seidman irreconcilable. Both decisions implicitly hold that local Supervision is solely responsible for determining whether misconduct warrants discipline and, if so, how much discipline should be applied. The ruling in each case acknowledges this principle, and the differences in the awards are responsive to different findings of fact. Arbitrator Zumas found that the disciplinary decision was made by the Lancaster MSC without judgment or meaningful input by the Fleetwood Postmaster. Arbitrator Seidman held that, while the Coloma Postmaster sought and received advice from the Kalamazoo MSC, it was his own decision to propose the removal.

This Arbitrator does not find fault with the Postal Service's contention regarding the propriety of labor relations personnel advising inexperienced supervisors in serious disciplinary matters. The Postal Service's desire to ensure uniformity of treatment by establishing a national policy for dealing with certain kinds of misconduct is reasonable. However, when higher-level authority does more than advise: when it takes over the decision-making role and eliminates the contractual responsibility of local Supervision -- and then concurs in its own decision -- a substantive due-process violation occurs.

Such violation cannot be overlooked as a mere technicality. The negotiated bi-level disciplinary procedure provides a unique protection for employees. It cannot legitimately be disregarded, and the Employer's neg-

lect to follow it creates a breach of contractually established due process requirements of such importance as to require that the resulting discipline be overturned. The evidence in this case confirms that the decision to discharge Grievant was wholly made and concurred in by the MSC without any discretionary judgment by the Lowry City Postmaster. Under these circumstances, the Arbitrator finds that he has no alternative other than to sustain the grievance.

REMEDY

In a dispute substantially similar to this, Arbitrator J. Earl Williams held that the Postal Service's failure to follow Article 16, Section 6 required reinstating an employee (Case Nos. S8N-3W-D 28220, 29835, 29834 & 30217; Decision issued December 9, 1981). Arbitrator Williams expressed his own belief that checking with higher authority was "a positive act," but nevertheless concluded:

Despite the strong feelings of the Arbitrator in this regard, he still is bound by the contract between the parties, and the inherent informality of the smaller post offices cannot be utilized as justification for due process violations.

Arbitrator Williams did not end his analysis at that point. He fashioned an award which was designed to correct the "imbalance" which, in his opinion, would result if the grievant were awarded lost wages. He ordered reinstatement without back pay on the following basis:

Even though the absence of due process in certain vital aspects mandates the return of the grievant to the job, it does not follow automatically that back pay should be received. For example, there was no evil intent or malice aforethought on the part of Management. It is apparent that the Postmaster's feeling was that this was the only solution to what, admittedly, could be classified as a serious infraction. While this does not allow the Arbitrator to dismiss the lack of due process, when this intent to act in good faith is coupled with at least some contribution to the situation on the part of the grievant, equality of justice would not be served by back pay awards.

In addition, the grievant must accept some responsibility for presenting mitigating factors or evidence that he is not guilty. He cannot sit back passively and, in effect, rely upon technical violations to resolve the grievance in his favor. Yet, this essentially is what happened in the subject case

Arbitrator Williams' concept of providing more perfect justice is inviting. The Employee is an admitted thief. Although the Union presented volumes of evidence and a mass of testimony designed to induce mitigation of the penalty, the presentation fell short of convincing the Arbitrator that Grievant did not earn his removal. Grievant's reinstatement will be premised entirely upon a procedural defect. Because of a technical omission (although not a trivial one), the Postal Service will be forced to retain an employee who violated the single most fundamental responsibility of a rural letter carrier. An individual who cared so little about his oath of office as to steal \$5.50 will have to be entrusted with mail again.

It is distasteful to this Arbitrator to be compelled not only to reinstate Grievant, but also to require the Postal Service to pay him thousands of dollars in wages for time he did not work; for time that he was justifiably not permitted to work because he was a proven thief. The Williams deci-

sion, therefore, presents an extremely attractive alternative. The result of following it would be far more just and far more consistent with this Arbitrator's personal sense of morality. However, without intending to unduly criticize what Arbitrator Williams did, this Arbitrator finds that the "split" award was plainly erroneous because it exceeded universally recognized restrictions on arbitral jurisdiction. Arbitrators do not legitimately sit as independent judges of what is or is not ethical in industrial relations. The collective bargaining agreement which creates the office of an arbitrator confines the authority of that office. Arbitrators do not have the right to venture into considerations which are not contractual. This principle was unequivocally pronounced by the United States Supreme Court in the 1960 "Steelworkers Trilogy" in which it was held:

[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. United Steelworkers of America v Enterprise Wheel and Car Corp., 363 U.S. 593, 597 (1960)

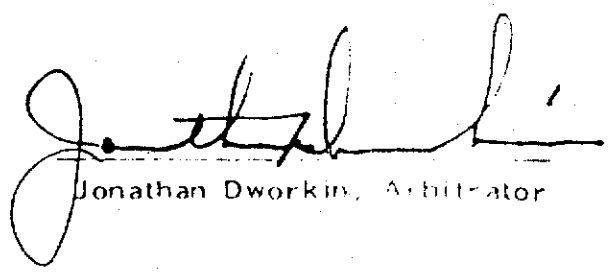
The Court's statement has stood undisturbed as an arbitration guidepost for a quarter century. It must be followed in this case. This means, once it was determined that the discipline imposed on Grievant was contractually improper because it lacked substantive due process, the Arbitrator's power to explore the merits ended. Since a suspension would have

required the same adherence to Article 16, Section 6 as did the removal. Any penalty involving time off without pay would have been unsupportable unless the requisite procedures were followed. Therefore, even though an award of back wages will be manifestly unjust, that is the award which must be made.

AWARD

The grievance is sustained. The Postal Service is directed to reinstate Grievant's employment and restore his losses. In accordance with 15, Section 5A of the Agreement, the Arbitrator's fees and expenses are assessed against the Postal Service.

Decision Issued
January 12, 1984


Jonathan Dworkin, Arbitrator