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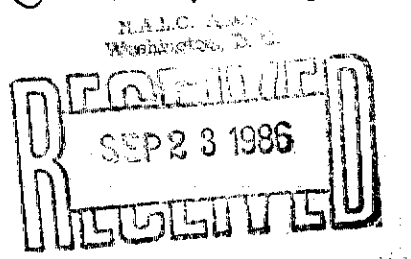

USPS-NALC ARBITRATION PANEL
SOUTHERN REGION
WILLIAM J. LeWINTER, ARBITRATOR

IN THE MATTER OF ARBITRATION BETWEEN UNITED STATES POSTAL SERVICE (Tulsa, Oklahoma) -AND- NATIONAL ASSOCIATION OF LETTER CARRIERS (Branch No. 1358)	Case No. S4N-3T-D 27530 Record Closed: August 26, 1986 Arbitrator File No. 1160

OPINION AND AWARD

Representing the Employer:
Gary Condley
Labor Relations Representative

Representing the Union:
Paul C. Davis
National Business Agent

William J. LeWinter
Arbitrator
5001 Collins Avenue, Suite 14B
Miami Beach, Florida 33140-2739

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Preliminary Statement

On March 25, 1986, the Union filed a written grievance on behalf of Columbus D. Dumas, alleging the Employer violated the parties' collective bargaining agreement by issuing grievant a Notice of Removal without just cause. The parties, being unable to resolve the matter, assigned it to arbitration. Hearing was held before William J. LeWinter, Panel Arbitrator, at Tulsa, Oklahoma, on August 26, 1986, at which time the parties were accorded full opportunity to present witnesses for direct and cross examination and such other evidence as was deemed pertinent to the proceedings. From the evidence adduced at the hearing, the arbitrator makes the following:

Findings of Fact

The grievant was hired on December 31, 1983. He had previously worked for the Postal Service in Chicago, Illinois, as a casual employee for over two years. On November 30, 1983, as part of his Employment Application, grievant filled out a "DRIVING RECORD" form where he reported an offense and accident where he was judged at fault for running a red light on October 4, 1983 and an offense of Driving without License on Person during August, 1981. He stated his License was not revoked or suspended for both reported offenses. On December 6, 1983, as part of his Employment Application, Section A - Summary of Driving Record, under question "13. RECORD OF TRAFFIC CITATIONS (tickets) AND OF ARRESTS PAST 7 YEARS (Except overtime parking)", grievant answered "8-81 Driving without License on person. Tulsa Fine". Under question "14. RECORD OF ACCIDENTS PAST 7 YEARS (Government and Non-Government)", grievant answered, "10-83 Running Red Light. Tulsa, Fine".

Following his hire, grievant received standard driving orientation and training and was issued his SF-46, Government Driving License. During December, 1985, grievant was involved in an accident where he was judged to be at fault. Steve Garman, Safety Specialist, was to give him a driving examination on December 17, 1985. At the time, grievant's State driver's license had expired the previous October. Since he had no valid State license, the test could not be given. Grievant asked for two days off to clear the matter and also stated he had to supply the State an SR22 insurance

form. Being aware that the SR22 form is used, *inter alia*, by the State for high risk liability insurance pool asignment, Mr. Garman decided to obtain grievant's prior driving record. On December 19, 1985, grievant returned with a valid State driver's license issued December 18, 1985 and valid to October 31, 1987. Grievant was given the driver's test and permitted to return to work.

Approximately two weeks later, Mr. Garman called the grievant to his office. He had received grievant's computer print-outs of his driver's record which contained matters not listed on his employment application. Mr. Garman testified grievant indicated he was aware he was going to be terminated. Grievant testified that Mr. Garman merely told him if he had any more driving problems he would be terminated, but he had no idea the Service was considering his removal at the time.

On February 19, 1986, grievant was issued the following notice of Removal by his then Supervisor, C. E. Whitehead, Supervisor of Mails and Delivery:

> You are hereby notified that you will be removed from the Postal Service on March 21, 1986, for the following reasons:
>
> Disqualification
>
> Part 365.322 of the Employee and Labor Relations Manual states that "Separation by disqualification results from the failure to meet conditions specified at the time of appointment (such as failure to qualify in investigation or failure to qualify by conduct or capacity during the probationary period), or it may result from information which, if known at the time of appointment, would have disqualified the employee for the appointment." A review of your driving records shows violations on 10/4/83, 1/27/82, and 9/16/81, which would have resulted in your disqualification had the information been available at the time of your appointment.

Falsification of Employment Application.

In December of 1985, you were involved in a vehicle accident. Because you had been involved in three (3) other accidents during your brief tenure, you were scheduled for Driver Improvement Training. This training was scheduled for December 19, 1985. A portion of this training included a road test. It was at this time Examiner Steve Garman discovered that your Oklahoma Drivers License had expired some two months prior. Article 29, National Agreement, states an employee must inform the supervisor immediately of the revocation or suspension of such employee's State driver's license. A form DL99 was requested by Mr. Garman, and upon receipt of this form, examination revealed that on three (3) occasions your Oklahoma Drivers License has been under suspension for failure to provide or carry liability insurance. Your supervisor was never informed of the suspensions.

A Step 1 grievance meeting was held on March 12, 1986, with Supervisor Steve Lundak, Mr. Whitehead having been promoted and transferred. On March 25, 1986 (time limits extended by mutual agreement) a written, Step 2 grievance was filed as follows:

Mr. Dumas states that in response to information known at the time of appointment 10/4/83 and 8/81 (referring to 9/16/81) were noted on his application by him. The other two (2) 10/20/83 and 1/27/82 he cannot vouch for. Even if he had the assistance of the Department of Public Record, which he now has, they would still have been omitted because they are not on the official record. Mr. Dumas states that he has been involved in three accident all of which were not his fault. Before 1985, Driver licenses notices were mailed out before renewal and this was the first time he did not receive the notice and had not realized they were expired. He did not inform his supervisor that his insurance had expired. There were two periods when his insurance lapsed and he was not aware at the time that he had to inform his Supervisor or he would have.

We feel that the removal is not for just cause because Mr. Dumas did not knowingly falsify his application and because of the notice not being mailed overlooked his drivers license. We ask that the grievance be sustained and Mr. Dumas be whole for all wages and benefits lost due to this action. Mr. Dumas statement attached.

The grievant attached the following statement in his own handwriting:

In response to your "Notice of Removal", I Columbus D. Dumas thereby state that I met conditions specified at the time of employment, and qualified through Investigation carried out by your department which I felt would illuminate any discrepancies at that time. Having filled out the application to the best of my Knoledge at the time, without the assistance of the Department of Public Saftey Records, I accepted the career position of Carrier offered, having qualified for Clerk & Carrier. Feeling safe that your part, and my part, were carried out to the best of our abilities and was satisfied of justified in your accepting me I

have carried out. My Job responsibility for the past two years and have recieved much praise from my direct supervisors who see me every work day and know me well enough to give descriptions of my attitude and performance on the job. Which there is no reference to in your "Notice of Removal".

I also state that, I qualified by Conduct and capacity during my probationary period.

In response to Information known at time of appointment. 10-4-83 and 8-81 (referring to 9/16/81 were noted on my application by me & the other two 10/20/83 & 1/27/82 I cannot Vouch For. Even if I had the assitance of the Department of Public Record which I have now. They still would have been omitted because they are not on the official records. and any statement of Falsification of Employment Application is a defermation of my character.

I am the same Columbus D. Dumas who a year and a half ago recieved a five day suspension because I refuse to lie on an accident report and stated I did not have a seat belt on at the time, and no one could verify if I did or didn't. But I don't lie about things like <u>that</u> because <u>that</u> is the very thing that will get you fired. Why would I lie on an application, when you check it out, and would disqualify me from employment, Imediatley when otherwise I might get the position.

I have been involved in three accidents. All of which were not my fault (1 copy enclosed, one other could be explained if given a chance). Before 1985, Drivers Licenses were mailed out, at the time before renewal and this was the first time I did not recieved them and had not realized they were expired. I did not inform my supervisor that my insurance had expired. There were two periods when my insurance lapsed I was not aware at the time I had to inform my supervisor or I really would have. Because I would have not minded doing something else. Just as I feel <u>if</u> my lapse in insuance or things all related to driving are reason enough not to have any driving assignment they should not disqualify me from employment.

Management responded as follows:

My investigation reveals that the grievant falsified his employment application and violated Article 29. The grievant failed to place on his employment records the fact that he had additional traffic citations, which would have disqualified him to be a City Carrier. It should also be noted that the citations that were left off were within a (2) two month period prior to him completing U.S.P.S. employment forms. Additionally, the grievant has failed to notify management that his state driver's license had been suspended on (3) three separate occasions during his three year employment. This is in violation of Article 29, of our National Agreement. With these facts in mind, the removal was for just cause.

<u>Issue</u>

Was the grievant removed for just cause? If not, what is the remedy?

Contract Provisions

ARTICLE 12

PRINCIPLES OF SENIORITY, POSTING AND REASSIGNMENTS

Section 1. Probationary Period

***

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 16

DISCIPLINE PROCEDURE

Section 1. Statement of Principle

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.

***

ARTICLE 29

LIMITATION ON REVOCATION OF SF-46

***

Initial issuance--an employee shall be issued an SF-46 when such employee has a valid State driver's license, passes the driving test of the U. S. Postal Service, and has a satisfactory driving history.

An employee must inform the supervisor immediately of the revocation or suspension of such employee's State driver's license.

Employee and Labor Relations Manual

365.32 Separation-Disqualification (S-Disqual)

.321 Applicability. This type of separation applies only to employees who have not completed their probationary period, except where the separation is caused by a finding that employees who have completed the probationary period have failed to meet certain conditions attached to their appointment.

.322 Reasons for Action. *Separation by disqualification* results from the failure to meet conditions specified at the time of appointment (such as failure to qualify in investigation or failure to qualify by conduct or capacity during the probationary period) or it may result from information which, if known at the time of appointment would have disqualified the employee for the appointment.

Fleet Management Manual (M-52)

214.4 Driver Qualification Requirements

***

.43 Past Driving Experience

.431 Before the applicant is scheduled for a road test, the official in charge or his designated representative will verify the acceptability of the applicant's past driving experience. Records on applicant's past experience may be obtained from several sources: such as, the local police department, the appropriate State agency that maintains records of traffic accidents and review of State driver's license for citations, and/or arrests. Where State or local authorities charge a fee for furnishing copies or records of driver's accidents, citations, or arrests, officials in charge of postal installations will use Account No. 52419, *Postal Operations-Fees for Service*, for recording the amounts paid.

.432 For the purpose of the initial issue of an SF 46 Exhibit 214.432 defines an unsatisfactory driving record. Its use is mandatory when an employee's driving history is being reviewed prior to issuing an SF 46 for the first time.

.433 For reissuance, suspension, or revocation of the SF 46, only the employee's *on duty record* will be considered.

.434 Applicants who do not meet the qualifications must not be allowed to drive.

Discussion

The Employer takes the position that under Article 12, Section 1, Clause B, it has the right to use information gained after the probation period to discharge grievant for filing a false employment application. That proposition, while correct, does not alter the fact that the Employer has the obligation of proving a fraudulent application. Article 12,1.B merely permits the use of information.

The record demonstrates that the grievant supplied the Employer information at the time of filing his application which would, if properly handled, possibly render grievant

unqualified for an SF 46, thus being unqualified for the carrier assignment. This will be discussed in greater detail later. However, the supplying of such information is evidence of lack of intent to commit a fraud. The grievant listed an "at fault" accident on October 4, 1983. He failed to list the same incident as a ticket. While this may be an omission, it is hardly a fraudulent one. The grievant in good faith informed the Employer of the accident. He also stated that he was fined. This is an indication that he received a ticket. He knew, and the Employer is bound to know, that an investigation of the incident would reveal a ticket. Such an investigation would be automatic if the required review under the M-52 Manual had been made.

The grievant had not made a computer search of his driving record when he was asked to fill out the application. By reciting the incident he answered according to the best of his knowledge with the reasonable belief that the answers would be checked out. While the answers may have been incomplete for the application, the failure does not rise to the knowledgeable omission required for fraud.

The grievant reported a moving violation "8/81". Apparently, the incident occurred September 16, 1981. He testified he had no recollection of September 16, 1981. The record does not show an August, 1981 violation. If grievant made an honest error, we are again faced with an omission without the guilty knowledge required for fraud. The evidence merely shows the different dates and grievant's knowledge that a

sufficiently poor driving record would cost his appointment as a carrier. There is no evidence which connects the two except sheer assumption. The reporting of an offense is evidence of lack of intent to defraud.

On October 20, 1983, grievant was issued a ticket for driving with one headlight. This was given while grievant was on his way home. It was a warning ticket; grievant made the repair the next day; and there was no conviction, fine or penalty of any kind. Grievant testified that in Tulsa, a black man driving through a white neighborhood at night is often stopped. This has happened numerous times to him. On October 20, he received a ticket which was a warning that he would be penalized if he did not repair the headlight deficiency within a stated period of time. The repair was made the next day. He testified that he was unaware that the headlight had been out of commission. He believed that if the warning was heeded, he would not be considered as having committed any offense. There was no fine or conviction of any offense.

The failure to list this ticket on his employment application cannot be considered as a fraudulent omission. Granted, the offense occurred within a short time before the application was filled out, and grievant should certainly have remembered receiving it; however, the nature of the ticket and his response resulted in a reasonable belief that there was no offense committed which would warrant the placement of the ticket on the application. Again, this could be considered an omission, but the evidence is lacking

which would demonstrate that there was fraudulent intent.

After a review of the evidence, I can find no fraudulent evasion on the part of grievant in the omissions occurring in his application. There is no requirement that an applicant first obtain computer printouts from all jurisdictions in which he has driven to guarantee that his responses are 100% accurate. He is expected to make reasonable responses to the questions. He is expected to include all offenses and accidents over the seven years requested that he can reasonably be expected to remember and believe applicable. Before the grievant can be discharged for filing a fraudulent application, it must be shown that he had fraudulent intent. The mere fact that an omission was made and that offenses on his driving record could result in his disqualification are not sufficient, in and of themselves, to warrant a finding of fraud. There must be some nexus shown. The omissions can be defended from the fraud point of view. I believe that grievant gave sufficient response to the application that he has not been shown to be fraudulent in its filing.

The second basic charge presents a much more serious problem for grievant: failure to inform his supervisor of the revocation of his State driver's license, and the continued use of his SF 46 while his driver's license had expired. Grievant's only real excuse is that he was unaware of the need to do so.

As to the expiration of his license, grievant testified

that he had previously received renewals during the mail, and the State changed the system, no longer sending the renewals. Accordingly, he did not realize his license had expired. This may be true, but it is not a valid defense. Grievant must have a valid State license to drive. It is up to him to maintain that license. It should be sufficiently important to him to be aware of the status of that license.

As to the suspensions, they occurred because grievant had lapses in his State required insurance. There was extensive testimony about the reasons for the lapses and how part of the suspension situation resulted from errors committed by the State administrative offices. For our purposes, it is not important why the license was suspended. What is important is the fact that the suspension occurred, and grievant was fully aware that he had no valid Oklahoma driving license.

As to committing an act which gives rise to discipline, the answer is quite clear grievant gave sufficient and proper cause. Article 29 of the parties' contract clearly requires that a suspended license be reported to grievant's supervisor. That requirement was contractually agreed to between the Union and the Employer. The Union is grievant's representative and bargains on his behalf. The grievant is bound by the agreements made by his representative. This is not a rule unilaterally enforced by management, it is a contractual duty grievant has agreed to through his collective bargaining representative. He is bound to it.

The grievant received the basic orientation for his SF

46 Government Driving License. He was instructed as to this requirement. If that was not sufficient that he remember the requirement, it is the Union's duty, not that of management, to advise him of the obligation. It made the agreement on his behalf. If he cannot remember the requirement, he is at his own risk. Contractual agreements may not be ignored because grievant claims he was not aware of them.

The failure to report the suspensions is a serious one. The government does not give driving privileges to drivers on the highways. It permits, through the SF 46, licensed drivers to operate government vehicles. Without a license, the privilege to operate a government vehicle on the public highway is non-existent. An employee driving in the course of his employment without a valid State driver's license places the Employer in serious jeopardy in the event of an accident.

As serious as the violation is, however, it does not necessarily rise to one which always warrants a discharge on its first commission. The Union has submitted numerous Awards by highly respected regional arbitrators where a finding of "guilt" resulted in mitigation of the penalty of discharge. Article 16 commits the Employer to use corrective discipline. This is not a guarantee of any specific progressive discipline procedure, but it does mean that the Employer will examine the facts of the individual case before removing an employee when the offense is not one that warrants removal upon its first occurrence.

In this case we have an additional factor of some Employer complicity in the problem. As to the question of fraudulent employment application, the Employer's case was built upon the theory that had grievant revealed a full record, he would have been disqualified. There is a procedure and a standard to be used. While there was some question about the standard raised at the hearing, the Employer took the position that the standard presented and used was two accidents in a three year period disqualified an applicant for issuance of an SF 46. The application, as filed, demonstrated that disqualification. Still, management granted him the SF 46. Apparently, the basis for decision is a review of the driving record. The mere fact of having an accident may not disqualify the applicant if the circumstances surrounding it indicate no disqualification should occur. Whatever the reason, the granting of the SF 46 with a potential disqualification showing on the face of the application renders the balance of the information omitted a questionable factor as far as disqualification is concerned.

Even if we are to assume that the Employer would have disqualified grievant with the omissions, it has the obligation to verify the information. In such a circumstance, the ommissions could have been determined and evaluated with the grievant. If the Employer is going to take the position that it is required to disqualify grievant under the terms of the Fleet Management Manual, M-52, Section 213.434, it cannot ignore the M-52 at Section 213.431, *supra*. The manual provides a requirement to verify the driving record

before the driving test and issuance of the SF 46. This was not done. Management thus contributed to the problems which arose because of its omission.

We are therefore faced with the commission of a serious infraction; while at the same time, the infraction is not necessarily to result in discharge, and management has had some complicity. In such situations, I find that the grievant should bear a strong penalty, but management must take responsibility for its connection. Accordingly, I will deny the removal and order grievant's reinstatement. There shall be no further remedy as far as damages are concerned. Grievant's seniority shall not be affected, but he shall regain no other lost benefits during the period of his removal to his reinstatement.

AWARD

The grievance is sustained in part. Grievant shall be reinstated without loss of seniority. He shall receive no other damages.

Respectfully submitted,

William J. LeWinter

William J. LeWinter, Arbitrator
Dated: September 20, 1986