

C# 08295

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

Between

UNITED STATES POSTAL SERVICE
(Employer, Service)

and

NATIONAL ASSOCIATION OF LETTER
CARRIERS, BRANCH 1427
(Union)

GRIEVANT: B. Dabbs
POST OFFICE: Los Altos, CA
CASE NO:
MANAGEMENT: W7N-5M-D 6939
UNION: GTS 11250

BEFORE ARBITRATOR: Kenneth M. McCaffree
Hansville, WA 98340

APPEARANCES:

For the U.S. Postal Service: Paul H. Mabus
Appeals Review Specialist
Human Resources Service Center
Western Regional Headquarters
850 Cherry Avenue
San Bruno, CA 94099-0421

For the Union: Dale P. Hart
Regional Administrative Assistant
National Association of Letter Carriers
855 Civic Center Drive
Santa Clara, CA 95050

PLACE OF HEARING: Los Altos, CA

DATE OF HEARING: July 28, 1988

DATE OF AWARD: August 22, 1988

OPINION, DECISION AND AWARD

INTRODUCTION

The grievance in this case alleged an unjust discharge of the Grievant by reason of falsification of her application for employment by failing to acknowledge a prior criminal conviction.

KENNETH M. McCAFFREE, Arbitrator
GALLANTRY WEST CORPORATION
7020 N.E. Twin Spits Road
Hansville, Washington 98340
(206) 638-2426

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 The parties affirmed that the grievance had progressed to arbitration
2 in accordance with the procedures in the National Agreement between them,
3 and was properly before the arbitrator for a final and binding decision in
4 accordance with that Agreement (Jt. Ex. 1). Accordingly, the arbitrator
5 offered the parties full opportunity to present evidence through the
6 testimony of witnesses and documents and otherwise to make known their
7 respective positions and arguments on the issues in dispute. The list of
8 witnesses and of exhibits is found in Attachment A hereto. Further, the
9 parties agreed to and did make closing oral arguments and statements before
10 the arbitrator rather than post-hearing written briefs. The arbitrator
11 tape-recorded the proceedings to supplement his written notes.

12 ISSUE

13 Was the removal of the Grievant for just cause and in accordance
14 with the 1987-1990 National Agreement? If not, what is the
15 appropriate remedy.

16 APPLICABLE AGREEMENT PROVISIONS

17 The applicable Agreement provisions and regulations per Article 19 are
18 set forth below as necessary. Those Articles cited by the Union as violated
19 by the Employer were Article 1 - Union Recognition; 3 - Management Rights;
20 9 - Salaries and Wages; 16 - Discipline Procedure; 19 - Handbooks and Manuals,
21 including Chapter 3 of the Personnel Operations Manual. The Employer noted
22 the provisions on PS Form 2591 and E & LR 666.2. Finally, the Union made
23 references to Article 17 and Weingarten rights of employees and unions.
24 Reference was made also to Article 12 - Principles of Seniority, Posting
25 and Reassignments, Section 1, and specifically Paragraph B.

KENNETH M. MCCAFFREE, Arbitrator
GALLANTRY WEST CORPORATION
7020 N.E. Twin Spits Road
Hansville, Washington 98340
(206) 638-2426

BACKGROUND AND FACT SUMMARY

1
2 The Grievant made application for employment with the Employer on
3 March 19, 1987 (Jt. Ex. 2, p. 14 a-f). She was among those employees
4 interviewed at Los Altos for a position as a city letter carrier.
5 Ms. Dennick, Superintendent for Postal Operations, went over the Grievant's
6 application with the Grievant on or about March 20, 1987, and subsequently
7 recommended the employment of the Grievant. In the course of the interview
8 and as normal practice, she asked specifically regarding the Grievant's
9 negative answer to question 18, which was "Have you ever been convicted of
10 an offense against the law or forfeited collateral, or are you now under
11 charges for any offense against the law? (You may omit: (1) traffic offenses
12 for which you paid a find of \$30.00 or less and (2) any offense finally
13 adjudicated in a juvenile court)" (Jt. Ex. 2, p. 14 d).

14 In processing the employment papers of the Grievant, Ms. Wells went
15 over the Grievant's application with her, and requested the Grievant to
16 sign a statement that her application contained no false statements. This
17 form stated:

18 I have reviewed my application for employment (PS Form 2591),
dated 4-21-87.

19 I was told to pay particular attention to item #18. I have read
20 and understand that I must cite all convictions against me. I
21 further understand that if I am not truthful on my application,
and have charges pending or have been convicted, I will be
subject to immediate termination (Jt. Ex. 2, p. 12).

22 This form was signed by both the Grievant and Ms. Wells on 4/21/87. The
23 Grievant went to work in early May 1987, when again she signed an affidavit
24 as to the truth of the application, and indicated no changes were in order.

25 The Grievant remained employed until her removal on or about March 15,
26 1988. At this time, the Employer confronted her with evidence that she
27
28

KENNETH M. McCAFFREE, Arbitrator
GALLANTRY WEST CORPORATION
7020 N.E. Twin Spits Road
Hansville, Washington 98340
(206) 638-2426

1 had been convicted under "476 (a) of the Penal Code for non-sufficient funds:
2 checks," and had been sentenced on February 21, 1984, to "Three years
3 probation, 10 days in jail, a fine, restitution" (Jt. Ex. 2, 9 a & b, 10 a & b).
4 She had remained on probation for the three years, but performed 200 hours
5 of community service in lieu of the jail term and fine.

6 The letter on Notice of Removal stated:

7 CHARGE #1: FALSIFICATION BY OMISSION OF INFORMATION ON
APPLICATION FOR EMPLOYMENT

8 The letter went on to cite her "no" answer to question #18 in the application
9 form, the report from the State of California Department of Justice on her
10 offense and criminal conviction, and the statement in the application that
11 "a false or dishonest answer to any question in this statement may be grounds
12 for not employing you or for dismissing you after you begin work. . . ."

13 Mr. Gavino interviewed the Grievant regarding her answers on the
14 application on March 14, 1988. She asserted orally and in writing that she
15 had been advised by her probation officer that the matter was closed, and
16 that she need not notify any employer regarding the matter (Jt. Ex. 2, p. 13).
17 Those at the interview were Mr. Hicks, a 204 B Supervisor; Mr. Gavino;
18 Mr. Medina; and the Grievant. The latter three affirmed that the Grievant
19 made that claim at that time.

20 Although testimony varied somewhat on what happened and how Mr. Medina
21 got to the interview, he asserted that he came only as an observer/witness,
22 not as a union steward, even though he had previously been one. Mr. Gavino
23 asserted that the Grievant asked only for a witness. The Grievant stated
24 that she asked for Union representation and was denied it by Mr. Gavino. She
25 did proceed, however, with the presence of Mr. Medina. Other details of this
26 meeting are discussed below, as necessary.
27
28

1 On April 4, 1988, the Union and Grievant filed a grievance alleging
2 that the "Notice of Removal" and removal of the Grievant violated Articles 3,
3 9, 16, and 19, and Chapter 3 of the Personnel Operation Manuals (Jt. Ex. 2,
4 p. 7 a and b). The grievance statement alleged that the Grievant had no
5 intent to deceive or mislead. The postmaster denied the grievance because
6 the forms clearly required full disclosure of her criminal conviction which
7 the Grievant failed to do. As corrections and additions to the grievance
8 information, the Union signed under date of May 10, 1988, that the rights
9 of the Grievant were violated because she received improper representation
10 at the "investigative interview" by Mr. Gavino. She believed that Mr. Medina's
11 presence gave her that representation even though not a steward. Thus, since
12 he was not a representative of the Union, both the Grievant's rights to Union
13 representation and Union rights in the exclusive recognition clause by not
14 relying upon a steward and/or local union official were violated. The Union
15 cited "P-11 Handbook, Chapter 313.33 and .34" regarding use of arrest records
16 in employment as violated by the Employer.

17 At Step 3 grievance appeal, the Union contended that "Management has
18 violated the LMRA and the Privacy Act of the Grievant and Union. Management
19 called in carrier Manual Medina to sit as her representative during
20 questioning of the Grievant on March 14, 1988. Mr. Medina was not a
21 representative of the Union - but was projected as such. The Grievant
22 (thought) she had representation all of the time" (Jt. Ex. 2, p. 4). The
23 Employer response repeated the evidence of "dishonest responses," and concluded
24 by pointing out that all applicants "are advised they must cite all convictions
25 regardless of any previous advice" (Jt. Ex. 2, p. 3). The matter was then
26 sent to arbitration and these proceedings have ensued.

KENNETH M. McCAFFREE, Arbitrator
GALLANTRY WEST CORPORATION
7020 N.E. Twin Splits Road
Hansville, Washington 98340
(206) 638-2426

1 CONTENTIONS OF THE PARTIES

2 The positions and contentions of the parties were in close justa-
3 position. The Employer contended that the Grievant falsified her employment
4 application by an answer of "no" to a question on whether she had "ever been
5 convicted of an offense against the law or forfeited collateral, or are you
6 now under charges for any offense against the law?" She had been convicted
7 and served a three year probation in violation of 476 (a) PC, a charge
8 related to "non-sufficient funds: checks." Twice, subsequently, she denied
9 any such conviction. According to the Employer, the only one to gain by a
10 "no" answer was the Grievant. Had she answered "yes," she would not have
11 been hired, according to the testimony of Ms. Dennich. If the probation
12 officer told the Grievant she need not answer "yes" to such questions, it is
13 "beyond belief," according to the Employer, that she was not also told to
14 have her court record changed to not guilty as the law allows. The Grievant
15 did not do so, even though her probation papers show that she could and
16 Mr. Greene said normal procedures of probation officers was to tell clients
17 they could do so. The fact remains, according to the Employer, when she
18 applied for the job with the Postal Service, she had a conviction on the
19 record, and intentionally failed to report it, even after three opportunities
20 to do so.

21 Further, the Employer contended that no representation issue existed
22 here. The Grievant asked for a witness, which the Employer provided in the
23 form of a former union steward. Whether he acted officially or not,
24 according to the Employer, the Grievant did what she would have done if the
25 current union steward were present, and Mr. Medina gave her the advice that
26 Mr. Madrid would have. She told the truth, as she saw it, and made a
27
28

KENNETH M. McCAFFREE, Arbitrator
GALLANTRY WEST CORPORATION
7020 N.E. Twin Spits Road
Hansville, Washington 98340
(206) 638-2426

1 statement. If any alleged procedural defect occurred, no unfair labor
2 practice charge was filed. Also, no prejudice occurred to the Grievant nor
3 was any harm shown. Rather, according to the Employer, the Grievant got
4 benefits she would not otherwise have received by access to the grievance
5 procedure. If she had answered correctly, she would not have been hired.
6 Clearly, according to the Employer, employees must be trustworthy and honest,
7 and failing there, as the Grievant, the Employer has been denied the right
8 to judge the Grievant fully if she should be employed or not. The grievance
9 should be denied as the Employer had just cause to discharge the Grievant.

10 The Union contended that the Employer did not have just cause to
11 discharge the Grievant. Although her application was technically incorrect,
12 the Grievant acted in good faith with no intent to deceive and/or falsify
13 her application. The Grievant's testimony was credible and believable. She
14 had no prior convictions, and none in the last five years. She served her
15 probation, and had she understood and had it been explained to her, she
16 would have had no record of any conviction, a process she is completing now
17 since the issue has been raised. Had she had such rights explained, common
18 sense dictates that the conviction would be removed from public records. She
19 followed the advice of her probation officer, who told her that the record
20 was closed, and that she need not report her conviction when applying for
21 jobs, according to the Union. Consistently, from the time of her unexpected
22 investigative interview with Mr. Gavino on March 14, 1988, through this
23 hearing, the Grievant maintained the same explanation, that she was following
24 the advice of her probation officer, according to the Union. She provided
25 the Employer with the name and telephone number of her probation officer, who
26 neither Mr. Gavino nor anyone else in supervision attempted to reach, and she
27
28

KENNETH M. McCAFFREE, Arbitrator
GALLANTRY WEST CORPORATION
7020 N.E. Twin Spits Road
Hansville, Washington 98340
(206) 638-2426

1 did this in her written statement made at the end of her interview on
2 March 14, 1988. According to the Union, it is inconceivable that the Grievant
3 would not have cleared the record, had she thought it necessary, and no
4 question could then be raised about her "no" answer to a criminal conviction.
5 Her response was made in good faith with no intent to mislead or falsify her
6 application to the Employer, according to the Union.

7 In addition, the Union contended that the representational rights of the
8 employee were violated by the Employer, and, accordingly, her discharge should
9 be set aside. The Grievant claimed she asked for union representation, and
10 the Employer provided a craft employee to observe, but not to represent,
11 according to the Union. When the Grievant became upset at being called a
12 "liar" by Mr. Gavino, she had no Union representation, only an observer
13 present. The Employer set up the situation, according to the Union. The
14 Grievant was confronted on a day when the Employer knew neither stewards
15 would be on duty, and arranged to have Mr. Medina at the meeting, some two
16 hours before the Grievant even came to work, the Union argued. She was
17 conned into believing that she had Union representation when she did not,
18 when told no steward was available, but Mr. Medina could serve as
19 representative, and witness.

20 Further, the very credibility of the Employer and Mr. Gavino must be
21 questioned, according to the Union. Although Mr. Gavino alleged that he
22 called the probation office about the Grievant before confronting her, he
23 didn't know about the Grievant's probation officer and her instructions to
24 the Grievant about employment applications until at the interview. In
25 addition, the Employer knew as early as June 1987 about the Department of
26 Justice report, and did nothing until in March 1988, when the Grievant
27
28

KENNETH M. McCAFFREE, Arbitrator
GALLANTRY WEST CORPORATION
7020 N.E. Twin Spits Road
Hansville, Washington 98340
(206) 638-2426

1 approached a period for request of maternity leave and had been off work
2 short periods because of accidents. In sum, here, the Union sought redress
3 for the Grievant where her representational rights were violated under
4 Article 5 and the Weingarten decision.

5 Since the Grievant had no intent to deceive, and since the Employer's
6 procedure violated the rights of representation, the Grievant should be
7 reinstated and provided a make-whole remedy including appropriate maternity
8 leave.

9 Both parties provided several Regular Panel Arbitration Awards in
10 support of their positions. These are used below as appropriate.

11 DISCUSSION

12 I have concluded that the Employer failed to establish just cause in the
13 removal of the Grievant in March 1988. These considerations led to that
14 conclusion.

15 As a somewhat preliminary matter, Ms. Dennich testified that had she
16 known the Grievant had a criminal record involving the misdemeanor of
17 "non-sufficient funds: checks," she would not have hired the Grievant in
18 the first place. The nature of the offense indicated a "common thief,"
19 according to Ms. Dennich, and she would not hire such a person. Aside from
20 the speculative nature of such a statement, it was equally true that had the
21 Grievant acted as she was legally privileged to do, by court order, the
22 misdemeanor offense could have been changed from "guilty" to "not guilty,"
23 and wiped from the court records, prior to the Grievant's application.*
24

25 *According to Section 1203.4 (a) and (b) Penal Code of the State of
26 California, upon application to the Court "to withdraw a guilty plea and enter
27 a plea of not guilty, or . . . have the verdict set aside, the Court "shall
28 dismiss the accusation or complaint" against the individual "who shall
thereafter be released from all penalties and disabilities from the offense . . ."
(Jt. Ex. 2, p. 106).

KENNETH M. McCAFFREE, Arbitrator
GALLANTRY WEST CORPORATION
7020 N.E. Twin Spits Road
Hansville, Washington 98340
(206) 638-2428

1 On this basis, Ms. Dennich would have no knowledge, nor any basis,
2 for not hiring the Grievant as she did. Since the Grievant had not exercised
3 this legal privilege, prior to her employment with the Employer, she was
4 confronted with alleged "falsification by omission of information on applica-
5 tion for Employment," by not reporting the 1983 offense which was still a
6 matter of court record.

7 The Grievant told the Employer on three specific occasions that she had
8 no criminal offense of record. She did so when she submitted her application
9 and had an interview with Ms. Dennich on March 19, 1987 (Jt. Ex. 2, p. 14 e),
10 when she signed a special affirmation regarding "falsification of PS Form 2591"
11 (her application) (Jt. Ex. 2, p. 12), and again at the time she began work
12 and signed the affidavit section of her application on May 11, 1987
13 (Jt. Ex. 2, p. 14 f). On the application and the special form regarding
14 falsification of her application with regard to item #18, clear and unambiguous
15 statements appear to inform the applicant that if the application "is not
16 truthful" or contains "a false or dishonest answer," she may be or "will be
17 subject to immediate termination" (Jt. Ex. 2, p. 12, p. 14 f). After
18 verifying that the Bianca Rushing-Dabbs was the one on probation in San Mateo
19 County for the offense reported through the California Department of Justice,
20 and on the basis of the above signed application/statement of the Grievant,
21 the Employer removed the Grievant from employment with the Postal Service
22 by notice on March 15, 1987.*

23 *The parties agreed at Article 12.1.B that:

24 . . . the failure of the Employer to discover a falsification by an
25 employee in the employment application prior to the expiration of
26 the probationary period shall not bar the use of such falsification
27 as a reason for discharge.
28

KENNETH M. McCAFFREE, Arbitrator
GALLANTY WEST CORPORATION
7020 N.E. Twin Spits Road
Hansville, Washington 98340
(206) 638-2426

1 Among the several arbitration awards which the parties submitted and
2 which involved some aspect of a failure to report criminal offense records
3 correctly on an employment application form, one uniform principle was clear.
4 It was not enough to show that the answers on criminal offenses were incomplete
5 or incorrect. A burden lay on the Employer to establish that "it had a
6 reasonable basis for believing that an intent to deceive existed" (U.S. Postal
7 Service (San Francisco, CA) v. National Association of Letter Carriers,
8 W4N-5C-D 2779, C. Simon, Grievant, Thomas F. Levak, Arbitrator, March 17,
9 1986, p. 11). Arbitrator William J. LeWinter stated it even more specifically:

10 It is not sufficient to show that the facts in the employment
11 application were not correct. The Employer must show that there
12 was an intentional act on the part of the Employee to lie (U.S.
13 Postal Service (Houston, Texas) v. National Association of Letter
14 Carriers, S4N-3U-D 58 and 59, G.C. Joiner, Grievant, William J.
15 LeWinter, Arbitrator, June 20, 1985, p. 11).

16 This arbitrator concurred with those principles as set forth here.*

17 In this case, even though the Employer established without doubt that
18 the application forms and other affirmations of the Grievant were incorrect
19 or contrary to the court records, the evidence and arguments on the Grievant's
20 deliberate intent to falsify and mislead the Employer were unpersuasive.
21 Clearly, intent per se is subjective, and only manifests itself in the
22 actions, statements, and general behavior of the individual. The Service
23 relied here primarily on the contention that the Grievant read, or must have
24 read, the clear and unambiguous language in the application and other
25 documents cautioning her regarding false statements. Thus when she omitted

26 *Other recent cases cited included: National Association of Letter
27 Carriers v. U.S. Postal Service (San Francisco, CA), WIN-5C-D 29747,
28 Johnnie Howell, Grievant, F.R. Walsh, Arbitrator, June 5, 1985, p. 10;
National Association of Letter Carriers v. U.S. Postal Service,
W8N-5G-D 10974, Wayne McClanahan, Grievant, William Eaton, Arbitrator,
October 20, 1980, p. 5).

KENNETH M. McCAFFREE, Arbitrator
GALLANTRY WEST CORPORATION
7020 N.E. Twin Spits Road
Hansville, Washington 98340
(206) 638-2426

1 the 1983 conviction, she was straightforwardly misleading, deceitful and
2 falsifying her application. Since the Postal Service must hire and retain
3 only employees who are "honest, reliable, trustworthy, courteous and of good
4 character and reputation," it had just cause to remove the Grievant for
5 dishonesty (Jt. Ex. 2, p. 15; ELRM 666.2).*

6 I found the Grievant's explanation, responses and behavior with regard
7 to her answer on the employment application and the other statements to belie
8 an intent to mislead the Employer, deliberately and intentionally, or
9 otherwise to deceive the Service. The Grievant claimed that she was advised
10 by her probation officer at or near the end of her probation in 1986, that
11 the matter of her conviction was behind her and was a closed file. The
12 Grievant asserted that they discussed what she should put on employment
13 applications, and the Grievant's recollection was that mention of the
14 conviction was unnecessary as the matter was closed. She followed this
15 advice and repeatedly answered "no" to questions about criminal convictions
16 and/or pending charges, as she did on her application for employment with the
17 Postal Service.

18 The Grievant's explanation was credible, and persuaded this arbitrator
19 that she had no intent to deceive or falsify her application so as to mislead
20 the Employer. Most persuasive in this regard was the Grievant's immediate
21 response to the accusation of lying on the application when confronted by
22 Mr. Gavino on March 14, 1987. The Grievant became "upset," and immediately
23 claimed that "the matter had been taken care of and not needed to report it,"

24
25 *The arbitrator concurred fully with the Employer regarding the necessity
26 to obtain and retain only "honest" persons in its employ. It is the "honesty"
27 of the Grievant, however, that is at issue here, not the principle for hiring
28 and retaining employees.

1 according to the testimony of Mr. Medina and consistent with the testimony
2 of Mr. Gavino.* Further, immediately at the end of the interview with
3 Mr. Gavino, she wrote that:

4 When I applied for this position 3 years ago, I was under the
5 impression that my file was a close (sic) matter due to the
6 fact that it was closed.

7 She concluded her statement, after references to her satisfactory job
8 performances at the Post Office and other positions since 1983, by writing:

9 For more information, contact Jo Rawlings Gilbert at 363-4244
10 in Redwood City (Jt. Ex. 2, p. 13).

11 The latter name was that of her probation officer, and the number was that
12 of the Hall of Justice and Records at Redwood City, where her probation
13 officer had been located (Un. Ex. 1).

14 The testimony of all indicated that the Grievant's responses were
15 immediate and direct, with no attempt to hide the fact of the conviction
16 once raised, but insisting that it was a closed matter and therefore not
17 necessary to be put on the application form. Although this could conceivably
18 have been a "planned" response, I found such deviousness to be incredible in
19 these circumstances. There was no evidence that the Grievant had any advance
20 warning that the Postal Service had made any inquiries, or that the subject
21 of the March 14 meeting would be her application. Furthermore, were she
22 lying again, she left herself open to an immediate check with probation
23 officer Gilbert when she gave an accurate name and telephone number at which
24 the Employer could check her story (Jt. Ex. 2, p. 13).

25 *When Mr. Gavino asked the Grievant "why had she not indicated it
26 (the conviction) on the application," he stated that "she thought it
27 was a closed case and, --- or sealed or whatever, and she didn't have to
28 put it down" (Quote from arbitrator's tape-recording.)

1 Furthermore, the Grievant called the Union, and when she talked with
2 steward Madrid, she gave him exactly the same explanation as she had given
3 Mr. Gavino. Mr. Madrid's statement was as follows:

4 Hart: How did she explain the reason for her answer on
item 18 the way she did?

5 Madrid: She said that she talked to her probation officer
6 prior to taking the test and prior to filling out
7 the Postal Service application form. She told her
8 it was a closed case and not to report it (from
9 arbitrator's tapes).

10 In addition to the above, at no time has the Grievant varied her story
11 in any way. The Postal Service made no effort to verify her testimony
12 regarding the probation officer's advice. Throughout, the Grievant acted on
13 the belief that her record was clear, and no evidence appeared on the record
14 to indicate anything different.

15 Also, the Union's argument regarding her failure to seek removal of her
16 conviction from the court's records was reasonable. The Grievant contended
17 that she did not know or recall if told that the conviction could be
18 removed. As the Union argued, no prudent or reasonable person would leave
19 a criminal conviction on record if it could be removed, if they knew about
20 it. The Grievant is a high school graduate with some college, a married
21 woman, and expectant mother. Her work experience and relationships indicated
22 no reason why she would not act on knowledge as any average person, and clear
23 her record.

24 The conditions of probation indicated a procedure for removing a guilty
25 plea or conviction from the record and the probation officers are required by
26 law to tell offenders about it at the beginning of a probation period
27 (Jt. Ex. 2, p. 106). The Grievant's explanation was both plausible and
28 reasonable on why she had not acted to clear the court records. At the time

1 of her court appearance in 1983, she said she signed a lot of papers and left
2 the courthouse, and that she has no recollection of advice or knowledge of
3 the procedure to clear the court records of her conviction. She relied upon
4 the advice of her probation officer in 1986. She considered the matter closed,
5 thus the "no" answer to item #18 appeared on her Postal Service application
6 for employment, even though the court records show the conviction. She began
7 the process of having the record cleared, when she learned about it following
8 her discharge.

9 Finally, aside from direct proof that the court has removed the
10 conviction, the Grievant completed her probation and became eligible for
11 the record to be cleared. Had she done so, as pointed out above, she would
12 have been hired by the Employer, and no statement on her application would
13 have been incorrect. Thus, in one respect, the Employer's charge of
14 falsification reduced into one that the Grievant failed to take advantage
15 of her legal privileges to clear her record, through either ignorance or
16 otherwise. This failure to act may indicate a less than desirable
17 characteristic of the Grievant at most, but did not indicate dishonesty
18 or wilful intent to deceive the Employer. The Employer established no clear
19 intent or wilfulness by the Grievant to deceive the Service by her answers
20 on the application form. The Employer failed to demonstrate or establish
21 just cause for the removal of the Grievant in March 1988.

22 Although the above resolves the issue of a just cause discharge, the
23 Union contended additionally that procedural and representational rights of
24 the Grievant were violated. The Employer was irregular in how the matter of
25 representation was handled, and may have been faulted for the long delay
26 between availability of the information on the conviction and the confrontation
27
28

KENNETH M. McCAFFREE, Arbitrator
GALLANTRY WEST CORPORATION
7020 N.E. Twin Spits Road
Hansville, Washington 98340
(206) 638-2426

1 with the employee, I found these matters marginal at best and adding
2 little to the above analysis and conclusion.*

3 CONCLUSIONS, DECISION AND AWARD

4 After study of the testimony and other evidence produced at the hearing
5 and the arguments of the parties on that evidence in closing oral statements,
6 and on the basis of the above discussion, I decided that the removal of the
7 Grievant was not for just cause, and was not in accordance with the 1987-1990
8 National Agreement between the parties. Although the Employer's documents
9 and testimony showed an incorrect answer to item #18 in the Grievant's
10 application for employment, it did not establish that the answer was made
11 with the intent to mislead or deceive the Employer. The Grievant convinced
12 the arbitrator that she acted on advice, which may have been misunderstood
13 or wrong, but acted in good faith without intentionally and deceitfully
14 misleading the Employer or evidencing dishonesty. The promptness,
15 openness and consistency with which she gave the same explanation for her
16 answer on item #18 and elsewhere proved convincing, in the absence of any
17 substantive evidence or reason to conclude otherwise. In contrast to the
18 reasonableness of the Grievant's statements and explanations, I concluded the

19 _____
20 *The employee may refuse to continue an interview, if proper
21 representation was not present. The Grievant proceeded knowing that
22 Mr. Medina was not the union steward, even though his presence occurred
23 in investigative interviews, this is a grievance of the Union against the
24 Employer for violation of its rights, not violation of rights of the
25 Grievant.

26 In addition, I found the period between July 1987, when the Service had
27 the conviction record at hand (Jt. Ex. 2, p. 96), and March 1988, when
28 Mr. Gavino confronted the Grievant, to be unreasonably long. Delays in
processing charges violate employee rights because time has passed since the
event, and important evidence to a grievant may be past. This possibility
existed in this case by reason of the unavailability of testimony of the
Grievant's probation officer who had retired and moved out of the country.

KENNETH M. McCAFFREE, Arbitrator
GALLANTRY WEST CORPORATION
7020 N.E. Twin Spits Road
Hansville, Washington 98340
(206) 638-2426

1 Employer failed to show, by the actions, statements, or other behavior of
2 the Grievant, that she intentionally and wilfully attempted to deceive the
3 Employer in order to get employment with the Service. The grievance was
4 sustained, and a remedy was in order.

5 Under the above conclusions and decision, the Grievant is entitled to
6 reinstatement, and without loss of benefits and privileges under the
7 Agreement. Since the Grievant is now (or was at the hearing) incapacitated
8 for work by reason of pregnancy, the determination of back pay must be
9 dependent upon the parties following their normal practices with regard to
10 the provision of maternity leave. The specifics of these conditions were
11 not provided the arbitrator, and, accordingly, he relies upon the good faith
12 relationship of the parties to resolve this condition. Finally, the Grievant's
13 knowledge now includes the process for the removal of the misdemeanor
14 conviction from the court records. In order that her court record should be
15 cleared of any criminal conviction, this must be completed within a reasonable
16 time by the Grievant, as permitted in item 4 of Joint Exhibit 2, p. 10 b. I
17 make the following award.

18 ARBITRATOR'S AWARD

19 On the basis of the above discussion, conclusions and decision, I make
20 this award.

21 I. The removal of the Grievant in March 1988 was not for just
22 cause in accordance with Article 16 of the 1987-1990 National
23 Agreement between the parties. The grievance was sustained.
24
25
26
27
28

KENNETH M. McCAFFREE, Arbitrator
GALLANTRY WEST CORPORATION
7020 N.E. Twin Spits Road
Hansville, Washington 98340
(206) 638-2426

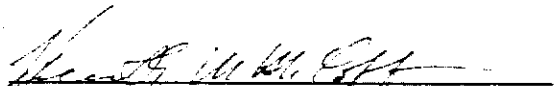
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

II. The Employer is directed hereby to offer reinstatement to the Grievant to the same position under the same conditions as she would have had she been covered continuously by all provisions of the National Agreement since her unjust removal in March 1988. Inasmuch as the Grievant was incapacitated for work at the time of the hearing by reason of pregnancy (and may still be), reinstatement shall allow the Grievant the same alternatives as other employees in like condition with respect to maternity leave and reemployment following such leave.

III. The Employer is directed further to compensate the Grievant for lost wages and benefits, and to make other payments in her behalf as may be required to make her "whole" with regard to those terms and conditions, including appropriate timing of maternity leave, to which she would have been entitled under the National Agreement had she not been removed from employment in March 1988.

IV. The Grievant is directed, hereby, to obtain a court order, or the applicable document, which removes her 1983 conviction from the court records as indicated in item 4, page 10 b, of Joint Exhibit 2, and to do so within a reasonable time. When a copy of that document is submitted to the Employer, the Employer shall remove all references to the Grievant's removal from its files and complete the requirements in item III above.

Approved, Ordered, and Signed this 26th day of August 1988.


Kenneth M. McCaffree, Arbitrator

KMM/jj

KENNETH M. McCAFFREE, Arbitrator
GALLANTY WEST CORPORATION
7020 N.E. Twin Spits Road
Hansville, Washington 98340
(206) 638-2428

ATTACHMENT A

Witnesses and Exhibits

Witnesses (Positions at time grievance arose)

Donald F. Greene, Supervisor, Probation Officers,
County of San Mateo, CA (by telephone)

Kathleen Dennich, Superintendent for Postal Operations,
Los Altos, CA

Olivia Wells, Personnel Assistant, GMF, San Francisco, CA

David Gavino, Assistant Superintendent of Postal
Operations, Los Altos, CA

Manuel Medina, Letter Carrier and Prior Union Steward,
Los Altos, CA

Robert Madrid, Letter Carrier and Union Steward,
Los Altos, CA

Bianca Rushing-Dabbs, Grievant and Part-Time Flex
Letter Carrier, Los Altos, CA

Exhibits

1. 1987-1990 National Agreement, U.S. Postal Service - NALC Jt. Ex. 1
2. Moving Papers, Including Documents Relied Upon by Employer Jt. Ex. 2
 - a. Arbitrator's Assignment, 7/20/88 page 1
 - b. Request for Arbitration, 6/17/88 page 2
 - c. Employer Step 3 Response, 6/14/88 page 3
 - d. Union Appeal to Step 3, 5/10/88 page 4
 - e. Union Corrections and Additions to Step 2 Employer Response, 5/10/88 page 5
 - f. Employer Step 2 Response, 5/4/88 page 6
 - g. Union Standard Grievance Form, 4/4/88 page 7 a & b
 - h. Notice of Removal, 3/15/88 page 8 a & b
 - i. Department of Justice Fingerprint and CII Record page 9 a & b
 - j. Conditions of Probation, B.R. Rushing, 2/21/83 page 10 a & b
 - k. Chapter 3, Personnel Operations Manual (10 pages) page 11
 - l. Falsification of PS Form 2591, 4/21/87 page 12
 - m. Dabbs Handwritten Statement, 3/14/88 page 13
 - n. Dabbs Application for Employment to U.S. Postal Service, 3/19/87 page 14 a-f
 - o. Employee and Labor Relations Manual 666.2 page 15

KENNETH M. McCAFFREE, Arbitrator
GALLANTRY WEST CORPORATION
7020 N.E. Twin Spits Road
Hansville, Washington 98340
(206) 638-2426

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

KENNETH M. McCAFFREE, Arbitrator
GALLANTRY WEST CORPORATION
7020 N.E. Twin Spits Road
Hansville, Washington 98340
(206) 638-2428

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 3. Letter, Greene to Spencer, Re Jail Term Un. Ex. 1
- 4. Ninth Circuit Court of Appeals, Decision, Un. Ex. 2
NLRB v. Texaco, 10/16/81
- 5. Letter, Jacowsky to Douglas, RE Union Stewards, Un. Ex. 3
10/8/87
- 6. Memo, Madrid to Granato, Re Request for Information, Un. Ex. 4
3/25/88