

C#08386

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration
 between
 UNITED STATES POSTAL SERVICE
 and
 NATIONAL ASSOCIATION OF LETTER
 CARRIERS, AFL-CIO

GRIEVANT: Terri L. Bell
 POST OFFICE: Glendale, AZ
 CASE NO:
 (Management) W7N-5F-D 6022
 (Union) GTS 003244

RECEIVED
 OCT 17 1988
PAUL C. DAVIS
 NATIONAL BUSINESS AGENT

BEFORE: Gary L. Axon, ARBITRATOR

APPEARANCES:

For the U. S. Postal Service:

Robert M. Slider
 U. S. Postal Service
 4949 E. Van Buren
 Phoenix, AZ 85026-9402

For the Union:

L. A. Sant
 NALC
 11701 I-30, Suite 408
 Little Rock, AR 77209

Place of Hearing:

NALC Office
 Phoenix, AZ

Date of Hearing:

September 14, 1988

AWARD:

Management did not have just cause to remove grievant from employment. Grievant shall be reinstated and made whole for all wages and benefits lost. The last chance agreement shall be extended for a period of time equal to the period of time grievant was off work due to the removal. The Arbitrator will retain jurisdiction for a period of sixty (60) days to resolve any questions concerning the payment and implementation of the relief so ordered. The grievance is sustained.

Date of Award: October 11, 1988

Gary L. Axon

I. STATEMENT OF ISSUE

The parties stipulated to a statement of the issue as follows:

"Was the removal of grievant Terri L. Bell for just cause? If not, what is the appropriate remedy?"

II. RELEVANT CONTRACTUAL PROVISIONS

**"ARTICLE 16
DISCIPLINE PROCEDURE**

Section 1. Principles

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 in this Agreement, which could result in reinstatement and restitution, including back pay.

..."

Section 666.81 of Employee and Labor Relations Manual

"Employees are required to be regular in attendance."

III. STATEMENT OF FACTS

Grievant was first employed by the Postal Service on August 17, 1985. She was employed as a letter carrier at the Glendale, Arizona office until her removal on March 21, 1988. On

October 27, 1987, Management proposed to remove grievant for "Failure to Report for Duty as Scheduled" and "Continued Unacceptable Attendance." (Mgt. Ex. 1). The Union grieved the removal. During the course of the grievance procedure the parties entered into a settlement agreement to give grievant a "last chance" to correct her attendance problems. The removal was reduced to a twenty-four day suspension.

The settlement agreement provided as follows:

"SETTLEMENT AGREEMENT"

The following conditions constitute the express agreement of the undersigned parties as to the complete and final resolution regarding the removal of Terri L. Bell, effective November 30, 1987. The term of this agreement will be the period of November 30, 1987 to November 30, 1988. As a condition of employment, Employee agrees:

1. It is agreed that the removal of the employee effective November 30, 1987, will be modified to a 24 calendar day suspension. You will return back to work on November 23, 1987. The time served on administrative leave shall serve as the calendar day suspension.
2. Employee agrees to withdraw any or all other appeals which she may have filed concerning her removal or any other complaint, including but not limited to the grievance procedure and EEO appeals. Failure to withdraw all other appeals will render this agreement null and void.
3. The Employee shall actively participate in the EAP Program for a period of twelve (12) months, effective commencing upon her return to duty. The Employee shall authorize and direct the EAP Coordinator to submit a regular report of her participation and progress to the Postmaster, Glendale, Arizona.

4. The Employee also agrees that this program will include her regular participation in a program for alcohol/substance abuse. This program will be agreed upon in writing by the Employee and an EAP Coordinator.
5. Employee agrees that she will be regular and punctual in her attendance and satisfactorily perform the requirements of her position of City Carrier.
6. The Employee agrees that failure to meet any of the above conditions shall constitute just cause for her removal for breach of conditions of employment.

The above constitutes the entire Settlement Agreement in this case. The Parties agree that this settlement will not be cited in any Hearing related to any other employee."

Grievant returned to work under the terms of the last chance agreement on November 23, 1987. On January 14 and 15, 1988, grievant was absent from work due to illness. Grievant was again absent due to illness for the period February 3 through February 10, 1988. Grievant returned to work on February 11, 1988 and met with her manager, Rudy Montano. Montano asked grievant why she was absent on the above dates. According to Montano, grievant replied she was "too sick to report for work on those dates."

Following the conclusion of the February 11 meeting, Montano decided grievant had not met the standard of being regular in attendance and was therefore in violation of the last chance agreement. By letter dated February 18, 1988, Montano notified grievant of her removal from the Postal Service. The letter stated:

"You are hereby notified that you will be removed from the Postal Service on Monday, March 21, 1988. The reasons for this action are:

FAILURE TO ABIDE BY THE TERMS OF A 'LAST CHANCE' AGREEMENT, SPECIFICALLY: CONTINUED UNACCEPTABLE ATTENDANCE: On November 23, 1987, you were returned to duty as the result of a 'Last Chance Settlement Agreement'. This agreement resulted from a Removal Notice issued to you, to have been effective November 30, 1987. This agreement was entered into between your union representative, the EAP supervisor and me. Item #5 of that agreement provided that you would be 'regular and punctual' in your attendance and satisfactorily perform the requirements of your position of city letter carrier. Item #6 of that agreement provided that your failure to meet any of the conditions contained in the agreement would constitute 'just cause' for your removal from the Postal Service.

Since your return to duty on November 23, 1987 you have been absent from duty approximately 7 days for reasons of health; specifically, January 14 and 15, 1988 and February 3 through 10, 1988. This pattern of continued unacceptable attendance is in violation of the November 30, 1987 'Last Chance Settlement Agreement' as well as being in violation of Section 666.8 of the Employee Code of Ethical Conduct portion of the Employee and Labor Relations Manual, which states,

'Employees are required to be regular in attendance.'

When given an opportunity on February 11, 1988, in the presence of your union steward, to explain, you stated that you were not able to perform your duties and indicated your illnesses precluded you from performing your assigned duties.

The following elements of your past record were considered in taking this action:

10/27/87, 24 Day Suspension, Unacceptable attendance (reduced from termination).
10/10/86, 14 Day Suspension, AWOL
04/30/86, 7 Day Suspension, AWOL

02/28/86, Letter of Warning, AWOL
02/27/86, Letter of Warning, AWOL

You have the right to file a grievance under the Grievance-Arbitration procedure set forth in Article 15, Section 2, of the National Agreement within 14 days of your receipt of this notice."

Grievant testified at the hearing she was too sick to report for work on January 14. When grievant reported to work on January 15 she worked for approximately one hour. At this point Montano told grievant to go home and not to return until she had medical documentation. Grievant obtained the required medical certification and returned to work on January 16. Grievant was not on restricted sick leave or required by the last chance agreement to furnish medical certification as a condition to returning to work.

On February 3, 1988, grievant was too ill to report for work. She obtained medical certification and provided it to her supervisor, Vince Patterson. (Un. Ex. 11). The doctor certified grievant would be able to return to work on February 9. Supervisor Patterson called grievant at home on February 8 and left a message on grievant's answering machine that she needed a release from the Postal Service Medical Unit before she would be allowed to return to work. February 8 was a scheduled day off from work for grievant.

Grievant called Patterson on February 9 to confirm what was needed to return to work. She went to the Postal Service Medical Unit on February 10 but was told by medical unit personnel they needed a diagnosis, prognosis and list of

medications grievant was taking from grievant's personal physician. Grievant obtained the necessary documents from her personal physician and gave them to the Postal Service Medical Unit. She was certified able to return to work and so returned on February 11.

On February 11, grievant met with Montano to discuss her absence. Montano removed her from employment effective March 21, 1988. The Union filed a grievance alleging just cause did not exist to support the removal. Management denied the grievance and the Union moved the case to arbitration. A hearing was held at which time both parties were afforded the full opportunity to present oral testimony and documentary evidence, examine and cross-examine witnesses and to argue the case. The issue is now properly before the Arbitrator for decision.

IV. POSITION OF PARTIES

A. Management

Management takes the straight forward position that grievant was returned to work on November 23, 1987, pursuant to a "last chance agreement." Shortly after she returned to work grievant was once again absent from work. By virtue of her repeated absence grievant was not regular in attendance and thereby in violation of the last chance agreement. Hence, Management submits by failing to meet the conditions of the last chance agreement just cause existed for removing Bell from employment.

Management next argues the removal meets all of the tests for just cause. A valid attendance rule existed of which grievant was fully aware. The attendance rule was evenly enforced. Management investigated the situation before determining removal was warranted.

Because grievant did not respond to lesser corrective action in the form of discussions, letters of warning and suspension, Management had no choice but to remove her from employment. Grievant is a short-term employee (three years) with a history of attendance problems. Thus, Management submits the penalty of removal was appropriate.

With respect to the Union's claim of disparate treatment, Management asserts grievant was the only employee on a last chance agreement at Glendale Post Office. Under such circumstances the attendance records of other employees at Glendale during the period of the last chance agreement are irrelevant.

For the above stated reasons Management concludes the Arbitrator should find just cause existed for the removal and deny the grievance.

B. The Union

The Union maintains just cause does not exist to remove grievant. According to the Union, Management incorrectly cited two letters of warning as elements of past record. First, the letters of warning were to be removed from all employees' records pursuant to a "CAN DO" policy adopted at the Glendale Post

Office. Second, the notice of removal incorrectly listed the dates of the two letters of warning.

The Union next argues the notice of removal cited as an element of past record a fourteen day suspension dated October 10, 1986, when in fact the suspension was a seven day suspension. Management cited the elements of past record as a consideration for taking the removal action. Because Management relied on incorrect information of past record of this grievant, the Union submits the removal does not meet the test of just cause.

It is also the position of the Union that Management was partially responsible for the absences of grievant. On January 15, grievant reported to work and after working for one hour was sent home by Management. She was told not to report for work until she had medical documentation. Management cited the January 15 absence as part of the justification for concluding grievant had unacceptable attendance.

Moreover, on February 8, grievant was called at home on her regularly scheduled day off and told she needed a release from the Postal Service Medical Unit in order to return to work. Grievant spent February 9 and 10 going back and forth between the Postal Service Medical Unit and her personal doctor securing the necessary medical documentation. The absences of February 9 and 10 are charged against grievant.

The Union points out that grievant was not on restricted sick leave or required by the "last chance" agreement to provide medical certification before returning to work after

an absence due to illness. From the viewpoint of the Union it is basically "unfair" for Management to force the extension of grievant's absences and then use those same absences against her to justify removal.

The Union also claims that seven other carriers at Glendale had worse attendance records than grievant but were not disciplined. Hence, Union reasons disparate treatment exists with respect to Bell and the other carriers.

Lastly, it is the position of the Union that grievant has been regular in attendance. Since the last chance agreement was put in place, grievant improved her attendance. By virtue of the fact the last chance agreement does not demand perfect attendance, the Union concludes grievant was not in violation of the agreement. Therefore, the Arbitrator should sustain the grievance and make Bell whole for her loss of wages and benefits.

V. FACTS OF CASE

Last chance agreements when properly utilized are a valid tool to allow employees to escape discharge and prove themselves able to correct their deficiencies. Management gains in that a productive worker who might otherwise be severed from employment is able to deliver effective and efficient services. The employee benefits in earning the right to retain employment rather than being terminated.

Consistent with the above described goals Management agreed to reduce a removal to a twenty-four day suspension and

give this grievant a final chance to demonstrate her ability to be regular in attendance. The last chance agreement specified several conditions under which grievant would be returned to work. Primary to this arbitration is condition number 5 which states:

"Employee agrees that she will be regular and punctual in her attendance and satisfactorily perform the requirements of her position of City Carrier."

Management invoked the last chance agreement because of absenteeism. No claim is made grievant did not satisfactorily perform the requirements of her job. The Union does not challenge the settlement agreement itself, only its application.

Based on the just cause principles embodied in Article 16, Section 1 of the Collective Bargaining Agreement, the Arbitrator concludes Management improperly invoked the provisions of the last chance agreement when it issued the notice of removal to grievant. For the reasons given below, the grievance is sustained.

In order for Management to successfully remove an employee, the action must be based on factually correct information. The notice of removal cited two letters of warning as an element of past record in determining removal was appropriate. The reliance by Management on these two letters of warning was in direct contradiction of the, CAN DO - Carrier Alternative Discipline Objective, program adopted at Glendale

Post Office. (Un. Ex. 1). Section 7 of the CAN DO agreement states:

"7. CAN DO will be effective on August 29, 1987. On the effective date all prior letters of warning issued to City Carriers will be withdrawn and will not be cited in any future disciplinary action. Prior suspensions will remain in effect and can be cited in future disciplinary actions. However, on August 29, 1988, all remaining time-off suspensions will not be citable in any future disciplinary action provided the employee was not issued a letter of warning during the one-year period." (Emphasis added)

By considering the two letters of warning which should have been stricken by the CAN DO agreement, the removal action is tainted.

With respect to the citation of incorrect dates on the letters of warning cited in the removal notice, the Arbitrator finds the listing of incorrect dates by itself would not be sufficient to overturn the discharge. However, when coupled with the fact Management also considered as an element of past record a fourteen day suspension when in fact the suspension was seven days and the previously discussed improper reliance on two letters of warning, the errors can no longer be considered minor or harmless. The Arbitrator has no way of determining at this point, if Management had relied on factually correct information removal might not have been invoked.

The finding of an absence of just cause is also supported by an examination of the absences charged against grievant to support the removal. At the outset it must be observed the last chance agreement did not require grievant to

maintain "perfect" attendance only that she be "regular" in her attendance. The general sloppiness by which Management handled this case is illustrated by the charge in the removal notice of being "absent from duty approximately 7 days." (Emphasis added) (Jt. Ex. 2 p. 14). If Management seeks the removal of an employee for absenteeism it should be prepared to state "exactly" how many absences are charged against the offending employee. The grievant in the instant case is entitled to notice of the precise charges leveled against her. Approximately seven days could mean 5, 6, 8 or 9 days of absence constituted the basis for the discharge. In a close case where the issue involves a relatively few absences, accuracy is essential.

The need for accuracy is well dramatized by what happened in the instant case. Grievant missed work on January 14 and reported for work on January 15. She worked approximately one hour and then was sent home and told not to return until she furnished medical certification. Management charged the absence of January 15 against grievant. Grievant was not on restricted sick leave. The last chance agreement did not require that she furnish medical certification prior to returning to work. Under these circumstances it is basically unfair for Management to charge grievant with the absence of January 15 caused by the employer sending grievant home until she fulfilled a "new requirement."

Management repeated the error on February 9 when the supervisor called grievant at her home, on a regularly scheduled

day off, to tell grievant that before she could return to work certification would have to be obtained from the Post Office Medical Unit. Here again was a completely new requirement not called for by the last chance agreement. Because of the lateness of the time grievant received notice of this new requirement she was compelled to miss an additional two days of work. Management cited these two dates against grievant as a grounds to invoke the last chance letter.

The Arbitrator finds that these three days of absence were caused by Management and improperly used against grievant as a basis to invoke the last chance agreement. If the three days are deducted from the "approximately" seven days charged against grievant, the removal is based on "approximately" four days.

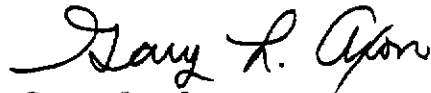
Based on the reliance by Management on inaccurate and improper elements of past record, and wrongfully charging grievant with three days of absenteeism, the Arbitrator concludes invocation of the last chance agreement to warrant removal was without just cause.

The Arbitrator will order the grievant reinstated. However, the last chance agreement will be extended for a period of time equal to the time grievant was off work due to the removal. Grievant still has the obligation to demonstrate she can be regular in attendance. The sustaining of this grievance does not alter her obligation to satisfy the conditions of employment as set forth in the last chance agreement.

AWARD

Management did not have just cause to remove grievant from employment. Grievant shall be reinstated and made whole for all wages and benefits lost. The last chance agreement shall be extended for a period of time equal to the period of time grievant was off work due to the removal. The Arbitrator will retain jurisdiction for a period of sixty (60) days to resolve any questions concerning the payment and implementation of the relief so ordered. The grievance is sustained.

Respectfully submitted,



Gary L. Axon
Arbitrator

Dated: October 11, 1988