

C #09873

REGULAR ARBITRATION PANEL

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

GRIEVANT: A. Mora

POST OFFICE: Albuquerque, NM

CASE NOS: W7N-5S-D 14559

BEFORE: William E. Rentfro

ARBITRATOR

APPEARANCES:

For the U.S. Postal Service:

Jerry Garcia, Labor
Relations Representative

For the Union:

Peter A. Goodman,
Regional Administrative
Assistant

Place of Hearing:

Albuquerque, NM

Date of Hearing:

December 13, 1989

AWARD: The Grievant, Anthony Mora, was not discharged for just cause. He is reinstated to his job without loss of pay or seniority, or other benefits to which he may be entitled, less earnings and unemployment benefits received.

Date of Award: February 23, 1990

William E Bentgo
(Signature of Arbitrator)

of Arbitrator)

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JOE Z. ROMERO
NATIONAL BUSINESS AGENT
N. A. L. C.
DALLAS REGION #10

STATEMENT OF THE CASE

On Friday, February 17, 1989, the Grievant, Anthony G. Mora, was delivering mail to addresses on John Street, in Albuquerque, New Mexico. Ms. Marcy Marquez of 2924 John Street SE called the Post Office and reported that their letter carrier had discarded their mail prior to delivery. She stated that her father, Louis Aragon, and her daughter, Jacqueline Marquez, had witnessed the carrier discarding the mail in a neighbor's yard and had reported the incident to her. Mr. Aragon then called the neighbor, Bessie Purcella, and asked her to locate the mail. Ms. Purcella retrieved the mail, which was determined to be addressed to the Marquez family.

Postal Inspector R. L. Stephens investigated the incident. He spoke to the Marquez family and Ms. Purcella. The Inspector obtained statements from Marcy Marquez, Jacqueline Marquez, and Bessie Purcella. Mr. Aragon refused to give a statement. Despite their sworn statements the witnesses refused to testify in person. Thus, Grievant was never afforded an opportunity to confront the witnesses.

Inspector Stephens subsequently questioned Grievant about the alleged incident. Grievant stated that he knew the proper procedure for handling and returning mail. He denied discarding any mail.

Grievant's immediate supervisor, Arthur Pacheco, permitted him to continue working during the investigation. Pacheco

testified that he allowed Grievant to continue working during the investigation because he trusted him and always felt that he was innocent.

On March 14, 1989, a meeting was held between Supervisor Pacheco, Area Manager Jim McGrane, and Union President William J. Prestien. Pacheco and McGrane testified that Grievant was also present. Prestien testified that he was "absolutely sure" that Grievant was not present.

During that meeting Area Manager McGrane instructed Supervisor Pacheco to escort Mora off the floor of the Post Office and place him on administrative leave. Pacheco pleaded with McGrane to reconsider. He tried to get Mora transferred to a clerk position. At McGrane's insistence, Pacheco escorted Grievant off the floor and placed him on administrative leave.

Both McGrane and Pacheco testified that Grievant admitted discarding mail at that meeting. Prestien stated that since Grievant was not present at the meeting, it would have been impossible for him to have admitted anything.

A "Notice of Proposed Removal" was sent to Grievant on March 23, 1989. The removal letter to Grievant is from Supervisor Pacheco. However, he was on leave at the time. Area Manager McGrane's initials appear alongside Pacheco's name. McGrane testified that he didn't write the name "Arthur Pacheco," but he did put his initials there. This notice makes no mention of an admission by Grievant.

A second meeting was held on April 5, 1989, between Union President Prestien, Area Manager McGrane, Labor Relations Representative Jerry Garcia, and Grievant Mora. Supervisor Pacheco was not present. McGrane testified that at that meeting Grievant admitted discarding the mail. Both Prestien and Mora testified that at no time did Grievant admit discarding the mail. They both testified that in response to McGrane's questions to the effect, "Could you have discarded mail without realizing it?" Grievant replied with a comment like, "Anything is possible."

In response to cross-examination, McGrane testified that after hearing Grievant's admission, he made the decision to remove Grievant. He sent Grievant a "Letter of Decision - Removal" on April 20, 1989, effective April 28, 1989.

ISSUE

Was the Grievant, Anthony Mora, removed for just cause. If not, what is the appropriate remedy?

POSITIONS OF THE PARTIES

U.S. Postal Service

The Postal Service states that discarding mail is just cause for discharge for a single offense, and neither Grievant's length of service nor the quality of that service can mitigate against the offense.

It contends that the signed statements of the witnesses and Grievant's admission prove that he discarded mail in violation of established policy. The fact that the witnesses did not testify in person goes to the weight of their testimony, not to its admissibility.

The Postal Service contends that the requirements of contractual due process were observed. The immediate supervisor made the decision as to the imposition of discipline followed by concurrence by higher authority.

Union

The Union states that management did not carry its burden of proving that just cause existed for discharge. Little or no weight should be given to the statements of the witnesses because the sworn statements of eyewitnesses amounted to merely the testimony of one child. The only other eyewitness was Mr. Aragon, who refused to give a statement or any other information. The other two sworn statements came from Ms. Marquez and Ms. Purcella, neither of whom saw the alleged incident. In addition, the witnesses refused to testify in person and Grievant was never given the opportunity to confront them.

The Union denies that Grievant ever admitted discarding mail. He could not have admitted anything in the March 14, 1989 meeting because he was not present. No mention of an admission was made in the March 23, 1989 letter of proposed removal. The only statements he made about discarding mail in

the April 5, 1989 meeting were hypothetical responses to hypothetical questions.

The Union relies heavily on its threshold issue that Grievant's contractual due process rights under Article 16, Section 8 were violated because the decision to discharge was made by Area Manager McGrane, not by Grievant's immediate supervisor Mr. Pacheco.

DISCUSSION AND CONCLUSION

For the reasons stated below, the Arbitrator concludes that the discharge of Grievant was not for just cause. The decision is based on the issue of contractual due process. The decision is not based on the issue of whether Grievant actually discarded mail; however, in light of the seriousness of that charge, a short discussion of that issue is included.

The National Agreement requires "review and concurrence" by higher authority after an initial disciplinary decision by the employee's immediate supervisor.

The "review and concurrence" requirement of contractual due process raises competing policy questions. Article 16, Section 8 states:

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 designee.

A decision by Arbitrator Nicholas H. Zumas, involving Article 16(6) of the National Rural Letter Carriers' Agreement,

which is identical to the above language, contains an often cited interpretation of that clause:

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. . . . Failure to carry out his responsibility under the National Agreement rendered [the postmaster's] issuance of the Notice of Removal a nullity. (Case No. ELR-2F-D 8832; Decision issued February 10, 1984).

This interpretation of the contract reflects the importance of the unique protection for employees provided by the negotiated bi-level disciplinary procedure.

A competing policy consideration is the Postal Service's legitimate desire for a national disciplinary policy free from patchwork inconsistencies. The Postal Service maintains that discussions between the immediate supervisor and superiors outside the installation do not violate the spirit of the contract so long as the disciplinary decision is in fact that of the immediate supervisor. A decision by Arbitrator Marshall J. Seidman supports this argument. (Case No. CLR-48-15005; Decision issued August 1, 1983). Arbitrator Seidman concluded that the procedure does not violate the review and concurrence requirement of the contract if the removal is "essentially" the decision of the immediate supervisor.

Arbitrator Jonathan Dworkin concluded that these decisions are reconcilable because "[b]oth 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 Jonathan Dworkin went on to state the following rule which this Arbitrator accepts as reasonable:

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 neglect 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 question in the instant case, therefore, is whether the decision to discharge Grievant was "essentially" that of his immediate supervisor, Arthur Pacheco, or whether higher level authority, Area Manager McGrane, took over the decision-making role and eliminated the contractual responsibility of local Supervision?

For the reasons that follow, the Arbitrator concludes that Area Manager McGrane was the moving force behind the decision to discharge and the Grievant's contractual due process protections were violated.

The initial decision to place Grievant on administrative leave was clearly that of Area Manager McGrane. Prestien testified that on March 6, 1989, Pacheco told him that McGrane required Grievant's removal and that he (Pacheco) had a problem with the removal. Supervisor Pacheco testified that initially he did not believe Grievant discarded the mail. At the meeting on March 14, 1989, Pacheco pleaded with McGrane to transfer Grievant to a clerk position. Prestien confirms this statement. In hearing testimony, in reply to the question, "Did you instruct Pacheco to put Mora on administrative leave?" McGrane responded, "Yes."

Pacheco further testified that he only proposed the removal after Grievant, in his presence, admitted discarding the mail. However, Pacheco's testimony about the alleged admission is difficult to credit. He testified that Grievant made the admission in the March 14, 1989 meeting. Three facts cast doubt on this testimony. First, Prestien and Grievant both stated that Grievant was not present at that meeting. Second, in the "Notice of Proposed Removal," dated March 23, 1989, no mention of an admission is made, which bolsters the claim that Grievant was not present at the meeting and therefore could not have made such admission. Third, Area Manager McGrane's testimony about the alleged admission was unclear as to when it occurred; however, he indicated that it occurred

during the meeting on April 5, 1989, at which Supervisor Pacheco was not present.

McGrane did testify that Grievant admitted discarding the mail. However, in response to cross-examination about the alleged confession, McGrane stated that at the April 5 meeting Grievant was asking to save his job and that basically he realized he made a mistake. McGrane could not recall the exact words or time of the admission. Words to the effect of "making a mistake" or "wanting one's job back" can be construed in many ways. They are not a direct admission. Prestien testified that Grievant was responding to hypothetical questions such as, "Could you have discarded the mail without being aware?" A response of "Yes" to such a question could be construed as an admission, even though in fact it might have no such meaning.

McGrane initially stated that Grievant made the admission at the March 14, 1989 meeting. As discussed above, Prestien and Grievant deny that Grievant was present at that meeting and no mention of an admission was made in the notice of removal. Such an omission is too glaring to be ignored.

Area Manager McGrane testified that "Mr. Pacheco reached his decision and I concurred." However, actions by McGrane and other statements during his testimony lead to the opposite conclusion. McGrane conducted his own personal investigation of the site after receiving the Postal Inspector's report and after the Notice of Proposed Removal. He stated that he "wanted

to make sure in my mind that if I did this I was doing the right thing."

McGrane testified that the "Notice of Proposed Removal" was initialed by him in Mr. Pacheco's name. (The record does not contain the original letter or a copy with any signature.) Prestien stated that Pacheco could not have participated in or signed the notice because he was on leave at the time. Curiously, Pacheco could not remember if he was on leave or not. This is not determinative because it is entirely proper for the letter itself to be written by an outside authority so long as the decision itself is essentially that of the immediate supervisor. However, it lends support to the Union's contention that the decision was made by McGrane.

McGrane made several statements in his testimony which indicate that he made the decision to remove. On direct examination by Garcia, he stated that "I made my decision to remove." (Emphasis supplied). On cross-examination he was asked, "Then you made the decision to remove." He responded, "Yes."

The above facts and circumstances lead the Arbitrator to conclude that the initial decision to discharge Grievant was made by Area Manager McGrane. Pacheco subsequently concurred in the decision after he allegedly became convinced that Grievant admitted discarding the mail. This reverses the sequence required by the National Agreement. Under these circumstances the Arbitrator must sustain the grievance.

A short discussion of the question of whether Grievant discarded the mail is warranted. The only direct evidence against Grievant is the sworn statement of a child. None of the witnesses came forward. This greatly diminishes the weight of this testimony. Mr. Mora testified that he did not discard the mail and that he never admitted discarding mail. As discussed above, there is reason to believe that Mora never actually admitted discarding mail. The fact that Ms. Purcella found the mail in her yard does not directly link Mr. Mora to its presence. Other plausible explanations are readily available. The ultimate punishment of discharge can be made on circumstantial evidence; however, in this case the evidence was not strong.

AWARD

For the reasons discussed above, the Arbitrator finds that the Grievant, Anthony Mora, was not discharged for just cause. He is reinstated to his job without loss of pay or seniority, or other benefits to which he may be entitled, less earnings and unemployment benefits received.

William E. Rentfro

William E. Rentfro
Arbitrator