C#14171

REGULAR ARBITRATION PANEL

In the Matter of Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS	GRIEVANT: D. Peterson POST OFFICE: Colorado Springs, Colorado CASE NO.: E90N-4E-D 94046953

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Employer: Ms. Pamela Zimmerman

For the Union: Mr. Andrew T. Petersen

PLACE OF HEARING: Colorado Springs, Colorado

DATE OF HEARING: November 9, 1994

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer did not have just cause to remove the grievant. The grievant shall be reinstated without back pay but with a restoration of seniority and all other rights under the agreement between the parties. The arbitrator shall retain jurisdiction in this matter for ninety days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

DATE: 1-12-95

Carlton J. Snow
Professor of Law

IN THE MATTER OF ARBITRATION)
)
BETWEEN)
)
UNITED STATES POSTAL SERVICE) ANALYSIS AND AWARD
)
AND)
) Carlton J. Snow
NATIONAL ASSOCIATION OF) Arbitrator
LETTER CARRIERS)
(Peterson Grievance))
(Case No. E90N-43-D 94046953))

I. INTRODUCTION

This matter came for hearing pursuant to a collective bargaining agreement between the parties effective from June 12, 1991 through November 20, 1994. A hearing occurred on November 9, 1994 in a conference room of the postal facility located at 201 East Pikes Peak Avenue in Colorado Springs, Colorado. Ms. Pamela Zimmerman, Labor Relations Specialist, represented the United States Postal Service. Mr. Andrew T. Petersen, Regional Administrative Assistant, represented the National Association of Letter Carriers.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The arbitrator tape-recorded the proceeding as an extension of his personal notes. The advocates fully and fairly represented their respective parties.

There were no challenges to the substantive or procedural arbitrability of the dispute, and the parties stipulated that the matter properly had been submitted to arbitration. They authorized the arbitrator to retain jurisdiction in the matter for ninety days following the issuance of a report. The advocates submitted the matter on the basis of evidence presented at the hearing as well as oral closing arguments, and the arbitrator officially closed the hearing on November 9, 1994.

II. STATEMENT OF THE ISSUE

The parties stipulated that the issue before the arbitrator is as follows:

> Was the removal of the grievant for just cause? If not, what is the appropriate remedy?

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

IV. STATEMENT OF FACTS

In this case, the Union has challenged the decision of the Employer to remove the grievant for throwing away deliverable mail. For approximately fourteen years the grievant worked for the Postal Service and has been a Letter Carrier since 1985. During that time, the grievant received recognition for perfect attendance and, prior to this incident, enjoyed an unblemished record. He earned commendations for his efficiency, accolades from postal patrons, and received the Special Achievement Award of the Employer in recognition of notable performance. The grievant has received substantial training over the years and has served in a supervisory

capacity. (See, Joint Exhibit No. 12 and Union's Exhibit No. 6). Most recently, he was a Letter Carrier at the Ivywild Station.

On March 15, 1994, the grievant carried Route No. 624. He was an unassigned regular carrier and was not normally assigned to Route No. 624. The grievant was not scheduled to work the route the next day on March 16. In the afternoon of March 15, the grievant returned approximately fifty deliverable ADVO cards from his route because he did not have sufficient "flyers" to deliver with the cards. He placed the cards on his case when he returned to the station at approximately 3:30 P.M.

In the afternoon of March 15, a fellow employe, Ms. Diane Dreher, saw the grievant walk toward the dumpster at the rear of the station with ADVO mailing cards in his hand. She, then, saw the grievant with his arm in the dumpster up to his bicep. She saw him return from the dumpster empty-handed.

Approximately an hour later, Ms. Dreher reported the incident to Mr. Rehm, the grievant's immediate supervisor. Ms. Dreher and Mr. Rehm discovered approximately fifty ADVO cards in the dumpster. They retrieved the cards without searching for other mail. Mr. Rehm took no further investigative action at that time. He informed the Union steward of his discovery that evening and alerted postal inspectors of the incident the next morning.

Postal inspectors interviewed the grievant on March 17 and March 18, 1994. When asked if he had thrown away the ADVO cards, the grievant stated that, to the best of his knowledge, the cards were on his case when he left the station at 5:00 P.M. on March 15. On investigating the matter, it was determined that the cards retrieved from the dumpster were deliverable as addressed and were for addresses located on the route the grievant had worked that day. The Employer placed the grievant on off duty status without pay on March 16, and his removal from the Postal Service was effective on May 9, 1994.

Undeliverable bulk business mail at Ivywild Station is picked up by clerks, sorted to determine that there is no first class mail included, and disposed of in the dumpster. Due to a cutback in hours of clerks, undeliverable bulk business mail was not being collected daily from carriers' cases. Carriers, themselves, had resorted to taking such mail to the dumpsters. On March 3, 1994, the Employer held a "standup" meeting to inform employes that this practice was inappropriate. The "standup" meeting took place on the grievant's scheduled day off. When the parties were unable to resolve their differences, the matter proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Employer

The Employer argues there is undisputable evidence that deliverable ADVO cards from the grievant's route were found in the dumpster at the facility and that the grievant was seen with his arm in the dumpster. The Employer asserts that the grievant's statement with regard to the cards being left on his case is unbelievable because a supervisor found the ADVO cards at approximately 4:00 P.M. The Employer contends the grievant later changed his story to suggest that, perhaps, he inadvertently threw away deliverable mail alongwith undeliverable bulk business mail. In the opinion of the Employer, the story lacks credibility because there was no other mail found in the dumpster. The Employer also asks why the grievant did not provide such an explanation earlier in the investigatory process.

The Employer maintains that any discussion of disposal practices at Ivywild Station with regard to undeliverable bulk business mail is irrelevant because the grievant has been accused of throwing away deliverable mail and because the grievant knew the correct procedure with regard to both deliverable and undeliverable bulk business mail. It, nevertheless, is the position of the Employer that it was not common practice for carriers at the facility to discard their own undeliverable bulk business mail.

The Employer maintains that the seriousness of charges

in this case combined with the absence of mitigating factors justify the grievant's removal. According to the Employer, the grievant's long, unblemished work history with the Postal Service aggravates, rather than mitigates, the seriousness of the charges because he knew or should have known the relevant procedures to follow. It is the belief of the Employer that ample arbitral precedent supports its personnel action in this case. Hence, the Employer concludes that the grievance should be denied.

B. The Union

The Union is quick to explain that it does not condone throwing away mail. At the same time, the Union asserts that such a practice existed at Ivywild Station and that management knew about it. According to the Union, it was unable to call witnesses to verify the practice because of the problem of self-incrimination.

The Union believes that the Employer did not demonstrate an intent on the part of the grievant to discard mail and asserts vigorously that the facts do not support the implication of such an intent. According to the Union, the grievant stood to gain nothing by discarding deliverable mail because he already had returned the mail to the postal facility and was not scheduled to deliver the route the following day. In

other words, the Union maintains that the grievant had no incentive to discard deliverable mail he already had brought back to the facility. Moreover, the Union points out that the ADVO cards were found on top of the garbage. Why, asks the Union, would a person who deliberately discarded deliverable mail not have hidden the material from easy detection?

The Union contends that the grievant inadvertently discarded the ADVO cards with undeliverable business mail that had collected at his case. It is the belief of the Union that the supervisor did not find other mail in the dumpster along with the cards because he admittedly did not look for it. The Union argues that, because undeliverable bulk business mail was regularly discarded into the dumpster after being sorted, there would have been such mail in the dumpster, and it is illogical for management now to argue that there absolutely was no other mail there.

With regard to the grievant's alleged changed story, the Union asserts that the grievant did not immediately suggest the cards inadvertently had been discarded because he was asked narrowly whether he threw away deliverable mail. He answered honestly that, to the best of his knowledge, he had not. No one asked him at that time how the deliverable mail could have ended up in the dumpster, and he was allegedly sufficiently intimidated not to offer explanations of anything.

The Union contends that the grievant has established an outstanding work record and has accumulated several commendations

during his fourteen years as a postal employe. Such a record ought to have been considered as a mitigating factor, even if the grievant were adjudged guilty of unintentionally discarding undeliverable mail. Because he had no wrongful intent, the grievant allegedly deserved corrective action at a minimum. According to the Union, the Employer customarily has dealt with situations of this sort through standup meetings, written warnings, and discussions, but never removal. Consequently, the Union believes that the grievant should be reinstated and made whole.

VI. ANALYSIS

A. The Matter of Intent

Management charged the grievant with discarding mail. The single incident involved an allegation that he discarded approximately fifty ADVO cards in the trash. The Employer alleged a specific intent on the part of the grievant to discard mail. The grievant, however, cannot be guilty of deliberately discarding mail unless he had a specific intent to do so. He might negligently have discarded mail without an intent to commit the offense, but a specific intent was necessary if he deliberately committed the act.

In appropriate circumstances a specific intent to commit a wrongful act might be inferred from conduct. Inferred intent depends on the circumstances of an incident. It generally is required today to prove more than that a person intended the probable consequences of his or her act, and more specific facts that support such an inference are generally sought by an arbitrator.

Deliberately discarding mail is a serious offense and provides a basis for a substantial sanction. In this case, however, the Employer failed to establish that the grievant intentionally disposed of deliverable mail. From the beginning, the grievant stated that, to the best of his knowledge, he returned ADVO cards to the station because there were no "flyers" to be delivered with them. He stated that he returned

undeliverable ADVO cards as well and that there was additional undeliverable bulk business mail accumulated at his case. According to the grievant, he took undeliverable bulk business mail to the dumpster so that it would not become mixed with deliverable mail. His version of the facts was not implausible.

Ms. Diane Dreher testified that she saw the grievant walk toward the dumpster with ADVO cards in his hand. She testified she had no recollection regarding whether or not the grievant had other mail in his hands at the time. The grievant conceded it was possible that he could have gathered up some deliverable ADVO cards along with the undeliverable bulk business mail, including some undeliverable ADVO cards, from "the mess" that had accumulated on his case.

Logic failed to support a conclusion that the grievant intended to discard deliverable mail. If a person intends to commit a wrongful act, it is logical to assume that he or she will attempt to avoid detection. A crucial gap in this case is the absence of concealment. Just as concealment may be evidence of wrongdoing, the absence of concealment shows a lack of intent to violate the work rule against discarding mail. There was no evidence that the grievant secreted deliverable mail in a place of hiding or even under other trash in the dumpster. On the contrary, there was unrebutted evidence that the ADVO cads were found on the very top of garbage in the dumpster.

At that juncture, the grievant's work record became highly relevant. It is long and exemplary. He had no reason

to place his career in jeopardy by disposing of fifty ADVO cards. Moreover, he was not assigned to deliver that route the next day. This is an important fact and further undermined the logic of concluding that the grievant acted deliberately. In other words, it would have been more work for the grievant to take the cards to the dumpster than it would have been to leave them on the case for a new carrier to deal with the following day.

B. The Investigation

Management argued that the grievant's story lacked credibility because there was no undeliverable bulk business mail found with the ADVO cards in the dumpster. The flaw in such an assertion, however, is that no one searched for such mail. First, Ms. Dreher spent approximately an hour deliberating whether or not to report what she had seen. It is impossible to assess what happened in and around the dumpster during that time. Most importantly, Ms. Dreher and Supervisor Rehm testified that they did not look for other mail in the dumpster. Given the height of the dumpster, it is questionable how well either could have seen the contents of the dumpster with a casual look. No search was made of the dumpster that day.

After failing to search the dumpster that day and after

not notifying the grievant about the ADVO cards in the dumpster, management seriously undermined its ability later to challenge the implausibility of the grievant's story. The Employer argued, however, that the grievant changed his story. At first he allegedly denied any knowledge of the incident. Only later did he state that he, perhaps, inadvertently threw away deliverable mail along with undeliverable bulk business mail. Evidence submitted to the arbitrator, however, failed to establish that the grievant altered his version of the facts.

Investigators initially asked the grievant only whether or not he had thrown away deliverable mail. Since he intentionally had not done so, it was reasonable for him to answer in the negative. The grievant was intimidated by the process after he had been asked to waive his Miranda rights. There was no allegation that he became uncooperative, but it is not unreasonable that he failed to be expansive in his comments. No investigator inquired whether the grievant had been to the dumpster for any other reason that afternoon or even whether he had any idea how the ADVO cards might have gotten there. In this context, his failure to speculate about how it all happened could not later be used as an indication of his guilt.

C. The UBBM Practice

The extent to which it was a common practice at Ivywild Station for carriers to throw away undeliverable bulk business mail was hotly disputed by the parties. The grievant testified unequivocally that all carriers but one had followed this practice. Supervisors Rehm and LeMaire, on the other hand, testified that they knew of only two carriers who had done so prior to the standup meeting of March 3, 1994 regarding the practice. They believed that no carrier had engaged in such activity after March 3.

Yet, Shop Steward Beverly Lussier testified she had informed Supervisor Rehm that there were more than eight carriers involved in the practice. Further, she maintained that some of the mail which had been discarded actually was deliverable and that Supervisor Rehm used four pieces of deliverable mail that had been found in a dumpster as an example at the March 3 standup meeting to illustrate why carriers should not discard undeliverable bulk business mail. She asserted that the carrier who discarded the mail easily could have been identified by the route number but that no carrier other than the grievant had been disciplined for throwing away mail.

Regardless of exactly how many carriers were discarding undeliverable bulk business mail, it is clear that the activity had occurred and that management knew of it to some extent. The necessity of a standup meeting on the topic demonstrated that the Employer had sufficient awareness of the practice to

believe it needed to be addressed generally. It had become a pervasive problem, and management set about to stop such conduct.

The grievant, however, did not work on the day of the relevant standup meeting. That he was absent from work that day was uncontroverted. Moreover, the grievant is hearing impaired, and the parties had an understanding that the grievant was to receive the content of all standup meetings in writing. It was uncontroverted that he received no such written notice about the content of the standup meeting on March 3. Actions by the grievant which served as the basis for his removal took place only twelve days after the standup meeting.

D. An Appropriate Remedy

This is a case in which the grievant acted wrongly, but his misconduct was closer to simple negligence than it was to wilfully discarding mail. In such circumstances, the concept of just cause required the Employer to evaluate mitigating factors in selecting an appropriate sanction. Arbitrator Gentile has presented an insightful discussion of mitigating considerations in a case dealing with the security of the mail. (See, Union's Exhibit No. 10, p. 7). Five of the six mitigating factor summarized by Arbitrator Gentile were found in this case. They are:

(1) Long service without discipline;

(2) No issue of theft;

(3) A distinguished work record;

(4) No pattern of misbehavior; and

(5) Discipline of a noncorrective nature. (See, Case No. W1N-5F-C 14092 (1983)).

The sixth factor used by Arbitrator Gentile focused on the individual's attitude during the investigation. It would be inappropriate in this case to conclude that the grievant was not open and candid with investigators. Had he been asked the appropriate questions, there is no basis for concluding that the grievant would not have been forthcoming about the fact that he had thrown undeliverable bulk business mail into the dumpster that day or that he inadvertently might have discarded deliverable mail in the process.

In view of the circumstances of the case, the Employer did not have just cause for the grievant's removal. His conduct, however, was serious. Regardless of the common practice at Ivywild Station, the grievant knew it was not his role to discard undeliverable bulk business mail. At the same time, the messy collection of undeliverable bulk business mail at cases of letter carriers at the facility had been caused by management. The fact remains that the grievant's decision to disregard an established work rule and follow a covert practice of a number of employes caused him inadvertently to throw away deliverable mail. The rule that precluded carriers

from discarding undeliverable bulk business mail was designed to prevent the sort of negligence that occurred in this case. By allowing himself to be seduced into ignoring the rule, the grievant chose to place himself in harm's way.

Arbitrator Dworkin confronted a problem in which it was a common practice for carriers to discard undeliverable mail. In the process an individual inadvertently disposed of deliverable mail. Arbitrator Dworkin concluded that management needed to be certain notice had been given to all employes when reasserting the primacy of the rule against carriers' disposition of undeliverable mail. Because of management's failure to communicate the reassertion of the existing rule to an individual, Arbitrator Dworkin concluded that it was inappropriate to remove the employe. On the other hand, he concluded that the individual who chose to discard undeliverable mail accepted the personal responsibility to be certain that no deliverable mail had been discarded. Because the employe failed in his responsibility, Arbitrator Dworkin concluded that the individual should be reinstated without back pay. (See, Case No. CIN-4F-D 8807 (1982)).

The Employer presented a number of arbitration decisions in support of its contention that the grievant should be removed. In one case, an employe was guilty of "deliberately discarding" two bags of mail. (See, Case No. N4N-1N-D 3388 4007 (1986)). In this case, not only is the amount of discarded mail substantially smaller but also the element of deliberateness is missing. In another case, an employe disposed of

deliverable mail on three separate occasions. (See, Case No. EIN-2D-D 3587 (1983)). There was no pattern of misbehavior in the case before this arbitrator.

In another case, an employe discarded deliverable mail and had a motive for doing so. There was evidence that he was unwilling to work overtime. (See, Case No. W 1093 76N (1978)). There was an absence of any sort of motive in this case, and the grievant has enjoyed an exemplary work record. In yet another case, there was evidence that over 300 pieces of deliverable mail had been discarded inadvertently. (See, Case No. S4N-3V-D 39881 (1987)). But the mitigating circumstances in the grievant's work record for this case were absent in the 1987 case before Arbitrator Britton.

In a case before Arbitrator Caroway, there was a finding that the employe could not have inadvertently discarded deliverable mail. It was so bulky that the arbitrator was able to imply an intent deliberately to violate the work rule. (See, Case No. S8N-3A-D 13611 (1980)). The evidence there was entirely different from this case, and the grievant there easily could have gathered up deliverable and undeliverable ADVO cards in the same collection of mail he took to the dumpster.

Finally, there was a case involving an employe who presented a completely implausible explanation for discarding mail. Moreover, he denied having been at a meeting where supervisors reemphasized correct procedures for handling undeliverable bulk business mail. Yet, he had been at work

on the day of the meeting and even signed an attendance sheet for the meeting. (See, Case No. H9ON-4H-D 93019277 (1993)). The facts are entirely different for this arbitrator. It was undisputed that the grievant was not at the relevant standup meeting called to combat an improper practice at Ivywild Station. Moreover, the Employer neglected its responsibility to present a written summary of the meeting to the grievant in response to his hearing impairment.

The Union argued that, if the grievant should be found innocent of deliberately discarding mail, he should receive back pay for his time off the job. According to the Union, arbitral precedent supports such a conclusion. (See, Case No. E9ON-2D-D 930006991 (1993)). Although the case on which the Union relied involved an employe's discarding deliverable mail, the employe in that case was questioned only on the basis of circumstantial evidence and without benefit of representation during the investigation. The employe was not informed about the purpose of the questioning and received no response when he specifically asked if he needed a union representative. It was not until the employe admitted discarding mail far into the investigatory interrogation that management permitted the individual to have a union representative present. The grievance process has not been tainted in this particular case, and such flaws offered no rationale for a back pay decision.

All other cases submitted by the Union to the arbitrator support the proposition that the grievant should be returned

to work without back pay. (See, Case No. W-1224-77N-NC-W-10,132-D (1978); Case No. 91-122 (1992); Case No. EIN-2D-D 4628 (1983); Case No. W8N-5K-D 18048 (1981); and Case No. WIN-5K-D 5156 (1982)).

The grievant violated a fundamental work rule of the Employer. He inadvertently discarded deliverable mail. He recognized that the procedure he followed was incorrect. While the Employer imposed too harsh a sanction for his misconduct, he, too, must share the consequences of ignoring established procedures in a crucial area of the Employer's operation.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer did not have just cause to remove the grievant. The grievant shall be reinstated without back pay but with a restoration of seniority and all other rights under the agreement between the parties. The arbitrator shall retain jurisdiction in this matter for ninety days from the date of the report in order to resolve any problems resulting from the remedy in the award. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow

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Professor of Law

Date: 1-12-95