

C # 18215

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration) GRIEVANT: McLean
Between) POST OFFICE: Flagstaff, AZ
UNITED STATES POSTAL SERVICE) CASE NO: E94N-4E-D-9706 ⁸¹⁵⁶⁹ 9925
And) NALC NO: 10074
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO)

BEFORE: EDWARD E. HALES

APPEARANCES:

For the U.S. Postal Service: TERRY B. WHITMARSH

For the Union: PAUL E. WINGER


Place of Hearing: 2400 N. Postal Blvd. Flagstaff, AZ 86004

DATE OF HEARING: February 6, 1998

AWARD:

The grievance is sustained. The Grievant shall be reinstated to full employment with back pay and all applicable benefits.

DATE OF AWARD: April 15, 1998



 EDWARD E. HALES, Arbitrator

BACKGROUND

The grievance in this case was filed by the National Association of Letter Carriers ("Union") on behalf of William McLean ("Grievant"), a Letter Carrier, alleging that he was issued a "Notice of Removal" letter by the United States Postal Service ("Service" or "Management") on March 9, 1997, without just cause.

The evidence presented in this case reveals that the Grievant completed a pre-employment "Medical Examination And Assessment" form (PS 2485) concerning his medical history. The Service claims that the Grievant gave false answers on the PS Form 2485 on June 28, 1995 and October 10, 1996, and it outlines the purported false answers as follows:

8. Specifically, the following falsifications are noted on both PS Form 2485 completed by Mr. McLean:
 - Question 4 Page 2 of the PS Form 2485 states: Have you ever been treated for any medical condition other than minor illness, or had any operations?
Mr. McLean answered "No". He fails to disclose information regarding treatment he received following the knee injury he suffered in 1993 while employed as a driver for Interstate Brands - Dolly Madison.
 - Question 8 Page 2 of the PS Form 2485 states: Have you ever received compensation or a cash settlement from an employer insurance company, government or other organization for injury or disease? (If "Yes" explain)
Mr. McLean answered "No". He fails to disclose information regarding compensation received following his industrial injury in 1993.

- Item 21 (Page 3) states: "Do you know or have you ever had any of the following conditions? (Give Dates)
#37. Painful or Swollen Joint
#61. Have you ever had any illness/injury other than those listed above?
Mr. McLean answered "No". He fails to disclose any information regarding the knee injury he suffered in 1993.
- 9. William B. McLean signed his name in Item 6, Page 1 of the PS Form 2485 stating: "I certify that all the information to be given by me in connection with this examination will be correct to the best of my knowledge and belief."

On January 15, 1997, the Grievant filed a worker's compensation claim for an on the job injury he sustained delivering his mail route. The Grievant's injury was described as a "sprain - left foot." Because the Grievant filed the compensation claim, his name was submitted to the Service's Injury compensation Office to investigate whether he had filed a prior worker's compensation claim. The Service claims its investigation revealed that the Grievant had filed a prior worker's compensation claim with his previous employer for allegedly sustaining "Torn Ligaments in R Knee" on August 31, 1993. On February 5, 1997, the Service sent an inquiry to Kemper Insurance Co. ("Kemper") requesting additional information concerning the Grievant's August 31, 1993 injury. In response, Kemper reported that the Grievant was treated for his injury by Dr. T.J. Bonatus, who diagnosed the injury as "Medial Plica Syndrome, possible medial meniscus Tear." In addition, it was reported by Kemper that the Grievant was off work for two (2) weeks, and he received compensation as a result of his injury.

Finally, Kemper reported that the Grievant did not follow up after September 9, 1993, and that his physician was considering arthroscopic surgery.

Because the Grievant did not list his August 31, 1993 knee injury on the PS Form 2485, he was issued a "Notice of Removal" letter dated March 7, 1997, with the Removal becoming effective on April 15, 1997, for "Unacceptable conduct -- providing false or incomplete information on official postal records: PS Form 2485 Medical Examination and Assessment."

In protesting the Removal action, the Grievant testified at the arbitration hearing that he did not willfully leave out any information requested on PS Form 2485, and he answered all questions to the best of his knowledge. Further, the Grievant stated that he did not list the August 31, 1993 knee injury on the PS Form 2485 because he considered it a minor injury. In addition, the Grievant claims that at the time he completed the PS Form 2485, no one defined what was considered a minor injury. Further, the Grievant stated that he was never told that he had torn ligaments as a result of the injury and that he did not have surgery. Finally, the Grievant claims that he thought the funds that he received while off work for the August 31, 1993 injury were for his lost wages and not compensation for the injury.

At the arbitration hearing, the Union presented a copy of Dr. T.J. Bonatus' "chart notes" concerning the August 31, 1993 injury, and it reports the following:

CHART NOTES
9 SEPTEMBER 1993

MC LEAN, WILL

Mr. McLean presents in follow up for a medial plica syndrome of the left knee. He reports that his symptoms are markedly improved after a steroid injection at his last visit. He feels that his time off work has been helpful with the improvement of his knee. He reports feeling an occasional "like when you hit your funny bone pain" over the medial aspect of his knee. He has not had any catching, locking sensations or swelling in his knee.

Physical examination demonstrates persistent tenderness although much improved over the medial plica. It is possible to reproduce the symptoms by snapping the plica. He does not have any clicking or snapping with range of motion. McMurray and Apley tests are negative. There is no tenderness along the medial joint line. The ligamentous exam of the knee is stable. He has no patellar femoral findings.

ASSESSMENT: Medial plica syndrome, improved.

PLAN: I believe that Mr. McLean could return to work on Monday, 9/13/93. He should be careful of squatting and bent knee activities as this is likely to aggravate his symptoms. If he were to experience a recurrence, he should return to the office for repeat evaluation and further treatment which would include anti-inflammatory medications and perhaps a second injection. If his symptoms become persistent, arthroscopic excision of the plica should be carried out. At the preset time, he is doing well and I do not think surgery will be imminently indicated.

/s/
T.J. BONATUS, D.O.

In defense of the Grievant, the Union suggests the evidence reveals that there was no intent on his part to falsify PS Form 2485 and the August 31, 1993 injury was not listed because he considered it to be minor. Further, the Union maintains that an

applicant for employment with the Service may omit prior minor injuries, as the Grievant did in this matter.

Although both parties presented evidence concerning the merits of this case, the Service claimed that the grievance filed in this matter was defective, because it was not filed within fourteen (14) days of the Grievant's receipt of the March 7, 1997 "Notice of Removal" letter, as required by Article 15, Section 2, Step 1(a) (a) of the National Agreement, which states:

ARTICLE 15.2 Step 1

- (a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. The Union may also initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. In such case the participation of an individual Grievant is not required. A Step 1 Union grievance may involve a complaint affecting more than one employee in the office.

The Union acknowledges that the grievance was not filed within fourteen (14) days of the Grievant receiving the "Notice of Removal" letter on March 11, 1997. However, the Union maintains that it was not aware of the fact that the Grievant receive a "Notice of Removal" letter on March 11, 1997, and when it became aware of the Removal action, the grievance was filed

within fourteen (14) days after it became aware of Management's action. The evidence also indicates that the Grievant may have been at fault in not notifying the Union that he had received the Removal letter.

The Union also raised as part of the procedural problems present in this case the fact that Management neglected to schedule a Step 2 grievance meeting concerning the Removal action. Thus, the Union claims that Management's neglect to schedule a Step 2 meeting resulted in the Grievant being denied due process in this matter, because it was not provided with all relevant information concerning Management's position in this case.

However, the evidence does reveal that a Step 1 grievance meeting was held in this matter, and the evidence does indicate that Management raised the issue of the filing of an untimely grievance.

ISSUES

1. Was the grievance protesting Management's Removal action against the Grievant timely filed?
2. Was the Grievant denied due process in this case by Management neglecting to schedule a Step 2 grievance meeting?
3. Did the Service have just cause to remove the Grievant from employment for allegedly falsifying PS Form 2485?

DISCUSSION AND FINDINGS

Since procedural issues were raised in this case, it is necessary to deal with those matters before considering this dispute on the merits.

The evidence in this case reveals that certain facts pertaining to the dispute are not in dispute; they are the following:

1. On March 9, 1997, the Grievant was sent a "Notice of Removal" letter informing him that his employment would be terminated effective April 15, 1997.
2. The Grievant received the "Notice of Removal" letter on March 11, 1997.
3. The grievance as filed in this case by the Union on April 9, 1997.
4. A Step 2 grievance meeting was not scheduled by Management, as requested by the Union, and no Step 2 decision was rendered in this case.

The record developed in this case indicates that the grievance was appealed to Step 3, as indicated by the Union's May 9, 1997 letter to the Postmaster, which reads as follows:

May 9, 1997

Gary Packer, Postmaster
2400 Postal Blvd.
Flagstaff, AZ 86002

Dear Mr. Packer,

On 4/22/97, you received a Step 2 grievance in regards to the removal of William McLean. The issue in this case was falsification of PS Form 2485.

You or your designee failed to meet with me after the receipt of the Step 2 grievance, thus the grievance is being appealed to Step 3.

I respectfully request the following information in accordance with Article 31 of the National Agreement so that the grievance can be appealed to Step 3.

- 1) Complete copies of both PS Forms 2485 filled out by Mr. McLean. Dated 6/08/95 and 10/09/96. I now have partial copies of the forms.
- 2) Copies of any discipline issued Mr. McLean since his employment 7/22/95.
- 3) Copy of Mr. Mcleans (sic) personnel folder, material relevant to this case.
- 4) Copies of any disciplinary action taken against other employees for falsification of Official Postal Records.

Your attention and cooperation in this request would be greatly appreciated.

Respectfully

/s/
Ron Resop
Step 2 Designee
Branch 1902

In reviewing the Service's position in this case concerning the timeliness issue, it appears to suggest or imply that Article 15, Section 2, Step 1 requires an aggrieved employee to file a grievance within 14 days of the date that such employee "learned of its cause." However, the language of the provision does not indicate that an aggrieved employee must file a grievance but must discuss the grievance with the employee's immediate supervisor within 14 days. From the definition of a grievance at Article 15, Section 1, it is reasonably suggested that the

discussing of the grievance with the immediate supervisor implies or suggests an unwritten grievance at that stage. In a separate sentence at Article 15, Section 2, Step 1, the provision permits the Union to "initiate" a grievance at Step 1, within 14 days of becoming aware of the matter. The language permitting the Union to initiate the grievance does clearly suggest that the grievance is to be reduced to writing. In this matter, the Union claimed, without being controverted, that it filed the grievance within 14 days of becoming aware of the Removal action.

Article 15, Section 3(B) and (C) appear to be relevant to the factors presented in this case. The provisions read as follows:

ARTICLE 15.3 B

The failure of the employee or the Union in Step 1, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance. However, if the Employer fails to raise the issue of timeliness at Step 2, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.

C

Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided (including mutually agreed extension periods) shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure.

Section 3(B) addresses the issue of an employer not raising the timeliness issue at Step 2 of the grievance procedure. The

language of the provision appears to indicate that the timeliness issue must be raised at Step 2 or at the step where either party failed to meet the prescribed time limits. Nevertheless, the language of the provision appears to suggest that Step 2 is the significant stage for raising the timeliness issue. However, the evidence does reveal that the issue of timeliness was raised by Management at Step 1 of the grievance procedure on April 9, 1997. Thus, the question that must be answered in this case is whether Management's neglect to schedule a Step 2 meeting and render a Step 2 decision operates as a waiver of the timeliness issue as described in Section 3(B).

In support of its position in this case, the Union submitted 13 awards concerned only with problems with Management's implementation of Article 15, Section 2, Step 2 of the grievance procedure. Further, the cases indicated the importance of the step 2 meeting in the grievance process and the timely issuance of a Step 2 decision by Management. In addition, the cases indicate that the step 2 meeting is the stage where both parties are to make full and detailed statements of facts and contractual provisions involved or relied upon in the matter. Thus, it is clear that both parties after a Step 2 meeting should have knowledge of the other's full position in the case.

The evidence in this case suggests that because no Step 2 meeting was held, the Union was not fully aware of Management's position and needed information to process the grievance for a Step 3 meeting. The Union's May 9, 1993 letter to the Postmaster

appealing the grievance to Step 3 indicates items needed to appeal the case to Step 3. Thus, from a review of the evidence presented in this case, it does suggest that Management's neglect to schedule a Step 2 meeting did leave the Union without significant information to pursue the grievance at Step 3. In addition, Dale Van Dereaa, president, Local 1902, testified at the arbitration hearing that he contacted the Postmaster concerning the discipline issued to the Grievant, and he was told that the "paperwork" concerning the matter had been lost. Thus, it is not unreasonable to suggest that the lost "paperwork" may have contributed to Management not scheduling a Step 2 meeting. Further, in reviewing the "moving papers" (joint exhibits #2) submitted by the Service at the arbitration hearing, only four (4) documents were presented, namely: the "Standard Grievance Form," "Grievance Appeal to 3," Step 3 answer, and the "Request for Arbitration." Thus, the evidence does suggest that there were other significant documents pertaining to this matter that should have been furnished to the Union at Step 2.

The evidence does suggest that Management's neglect to schedule a Step 2 meeting appears to be contrary to the parties' reason for establishing a Step 2 stage in the grievance procedure. Likewise, the neglect to schedule a Step 2 meeting involving a Removal action, the most serious disciplinary penalty, does suggest that the Grievant may not have been afforded adequate due process, as suggested by the Union in this

matter. Further, the evidence does not give any reason why Management failed to schedule the Step 2 meeting.

Although the Grievant may have been at fault for not notifying the Union that he received the Removal letter on March 11, 1997, it does not appear that such neglect on the Grievant's part contributed to Management's neglect to schedule a Step 2 meeting. Therefore, based on the evidence developed in this case, it is found that the Service waived the timeliness issue by not scheduling a Step 2 meeting and rendering a Step 2 decision.

In reviewing the merits of this case, it appears that the Service based its decision to charge the Grievant with falsifying PS Form 2485 on the medical information it received from Kemper, and the "Index System" used to investigate worker's compensation claims filed. The information concerning the Grievant's August 31, 1993 knee injury obtained by the service through its research indicated to it that he had sustained a tear of the medial meniscus cartilage in his knee. However, in reviewing the evidence presented in this matter concerning the Grievant's August 31, 1993 injury, it is revealed that Management, after receiving the information from Kemper, did not verify the nature and extent of the Grievant's August 31, 1993 knee injury by following up and contacting the treating physician, Dr. Bonatus. In reviewing Dr. Bonatus' "chart notes," it is indicated that the Grievant did not sustain a torn cartilage, and surgery was not performed. Dr. Bonatus' "chart notes" do indicate that the Grievant sustained a significant sprained knee, with no

indication of a permanent condition. Since the Grievant appeared to make a full recovery from the August 31, 1993 injury, it is not unreasonable to conclude that he credibly could have considered that injury to be minor. Further, as suggested by the Grievant during his testimony, when he completed the PS Form 2485, the evidence does not indicate that what was considered as a minor injury was not defined. Likewise, the Union's assertion that an applicant for employment with the Service may omit minor health items, as done by the Grievant in this matter, was not challenged by the Service.

The Service also claimed in its charge of falsifying the PS Form 2485 that the Grievant received worker's compensation payments for the August 31, 1993 injury and neglected to list such funds. However, the Grievant testified that he did not recall the exact amount of funds he was paid while off work for the August 31, 1993 injury, and he considered such payment at the time as reimbursement for his lost wages. Nonetheless, reviewing the evidence submitted by the Service indicating the payments received reveals that the Grievant was paid \$184.12 for the period from September 9, 1993 to September 12, 1993. Thus, based on the amount of funds paid to the Grievant, it may reasonably suggest that he could have forgotten the amount of the payment and could have credibly thought that such payments represented lost wages. The evidence in this matter does not suggest that the Grievant was aware at the time he received the funds that the payments were worker's compensation payments for the injury he

sustained. Therefore, the evidence presented in this case does not credibly suggest that when the Grievant completed PS Form 2485, he intentionally neglected to list the August 31, 1993 injury in order to gain employment with the Service. Further, based on the record of evidence developed in this case, it is found that the Service has not established by clear and convincing evidence that the Removal of the Grievant was for just cause.

AWARD

The grievance is sustained. The Grievant shall be reinstated to full employment with back pay and all applicable benefits.

April 15, 1995
DATE


EDWARD E. HALES, Arbitrator