

C-23229

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REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

GRIEVANT: James E. Gehman

POST OFFICE: Omaha, Nebraska

USPS CASE NO: E98N-4E-D 02023642
E98N-4E-D 02035849

NALC CASE NO: DRT# 05-038718
DRT# 05-038719

BEFORE: David A. Dilts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Coleen McMurphy
 For the Union: Michael J. Birkett
 Place of Hearing: U.S. Post Office, 1124 Pacific Ave., Omaha, Nebraska

Date of Hearing: March 22, 2002
 Date of Award: April 7, 2002

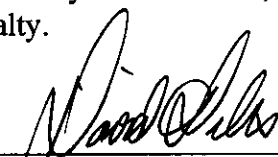
Relevant Contract Provision: Article 16
 Contract Year: 1998

Type of Grievance: Emergency Placement and Subsequent Discharge

AWARD SUMMARY

The grievance concerning the emergency placement is denied as being without merit. Dishonesty was involved in this matter, and emergency placement for dishonest conduct is clearly authorized by Article 16.7 of the 1998 National Agreement.

The grievance concerning the grievant's removal from the Postal Service is denied in all respects save the penalty is hereby ordered to a long suspension, and the grievant is ordered reinstated to his former position without back pay or benefits, but without loss of seniority. The penalty management assessed in this case was not in keeping with other penalties assessed for dishonesty in this Office, further the long service of the grievant also serves to mitigate the penalty.



 David A. Dilts, Arbitrator

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N.A.L.C. HDQTRS., WASHINGTON, D.C.

ISSUE

Was the grievant placed in an emergency placement status pursuant to Article 16.7 of the 1998 National Agreement? Was the grievant subsequently discharged for just cause? If not, what shall be the appropriate remedy?

BACKGROUND

James E. Gehman (herein the grievant) began his employment with the U.S. Postal Service on November 25, 1985 as a City Letter Carrier. On October 22, 2001 the grievant was assigned to route 3424, a route which was relatively new to the grievant. On October 22, 2001 the weather was overcast and it was raining.

When the grievant returned to the Northwest Station in Omaha, Nebraska on October 22, 2001 he approached his supervisor and inquired as to whether the vehicle maintenance shop was still open. When the supervisor informed the grievant that vehicle maintenance was still open, he also inquired of the grievant why he had wanted to know about vehicle maintenance. The grievant then explained that his vehicle had been hit by a hit and run driver in the parking lot a Walgreen Drug Store while he was in the store purchasing a soda. The supervisor then requested that the grievant complete a P.S. Form 91, a Motor Vehicle Accident Report.

While the grievant filled out the form, the supervisor telephoned vehicle maintenance and reported the damage. The supervisor then went to the Post Office parking lot to check on the damage to the grievant's vehicle. While the supervisor was engaged in these activities the

grievant completed the Accident Report, P.S. Form 91, but failed to sign the document, and then clocked-out and left the station.

When the supervisor examined the grievant's vehicle he noticed some composite material stuck on the damaged mirror frame, which appeared to be either fibreglass or wood. Because it was getting dark the supervisor decided to wait until the next day to go to the reported accident scene to complete his investigation. In the interim a postal patron, Mr. Witzke, called the Northwest Station and reported that a postal vehicle had damaged his garage door on October 22, 2001. That postal patron's residence is located at 10623 Grand Avenue in Omaha – the address is on route 3424, the grievant's route.

The following day was the grievant's non-scheduled day. The grievant's supervisor took the P.S. Form 91 to the grievant's residence on October 23, 2001 and obtained his signature on the form. The following day, October 24, 2001 the grievant reported to work at his scheduled time and was confronted by his supervisor and in the presence of the grievant's Union steward. The supervisor inquired of the grievant if he wished to add anything or change anything in the Accident Report, P.S. Form 91. The grievant responded that he had nothing to add to the accident report. The grievant was then confronted with the facts as the supervisor knew them. The grievant was given an opportunity to respond or to change his story. The grievant had nothing further to say to the supervisor at that point.

The grievant was then given a notice of emergency placement because of an investigation was pending concerning his ability to perform his work in a safe manner and that he had “. . . falsely reported information regarding the accident (of October 22, 2001) (Joint exhibit 3). Subsequently, in the following month, the grievant was given a Notice of Removal dated

November 20, 2001. The cause for the Notice of Removal was “Unacceptable Conduct – Providing False Information Regarding a Motor Vehicle Accident on PS Form 91 / Failure to Immediately Report an Accident / Failure to Perform Your Duties in a Safe Manner (Joint exhibit 5).

The parties stipulated that the present matter is properly before this Arbitrator pursuant to Article 15 of the 1998 National Agreement. The record in this matter was closed upon receipt of the Postal Service’s case citations on March 26, 2002.

POSTAL SERVICE’S POSITION

It is the position of the Postal Service that it had proper cause to put the grievant on an emergency placement status and to subsequently discharge him for his misconduct. There are two grievances, one protesting the grievant’s emergency placement, and one protesting his subsequent removal from the Postal Service. Both management actions arise from the grievant’s conduct on October 22, 2001.

It is the Postal Service’s position that there is simply no doubt that the grievant falsified P.S. Form 91 and that he was dishonest concerning the accident he had on October 22, 2001. In fact, the grievant admitted at the hearing that he was dishonest with management concerning these events. Further, he admitted culpability to management in writing, unfortunately, some 43 days too late. The record clearly shows that the grievant fabricated a story, involving some fantasy driver hitting his vehicle and leaving Walgreen’s parking lot while the grievant was away from the vehicle. The Postal patron whose property the grievant damaged with his vehicle reported the

matter, otherwise, the grievant's story may never have been revealed for what it was – a lie. Even so, Postal management gave this grievant every opportunity to redeem himself by coming clean and telling the truth. Unfortunately, this the grievant did not do until after the decisions to place him in emergency status, and remove him from Postal employment had been made by management.

Management has the right to expect Letter Carriers to be honest and trustworthy. Letter Carriers are entrusted with the U.S. Mail and they work on the public streets without close supervision. It is axiomatic that without an ability to rely upon a Carrier's honesty and integrity, management cannot entrust to that Carrier the public's property in the form of the U.S. Mail. The facts clearly demonstrate that this Carrier betrayed that managerial trust. However, this Carrier did more than betray that trust. This Carrier was involved in a vehicular accident that resulted in damage to a Postal patron's residence, and to a Postal vehicle. Upon investigation it appears that the preponderance of the credible evidence demonstrates that the accident on October 22, 2001 was an "at fault" accident, hence an unsafe act. Further aggravating the grievant's misconduct is that the accident occurred early on the afternoon of October 22, 2001 and that the grievant waited approximately four hours to report the accident to management. The Postal regulations clearly and unambiguously require that an accident be immediately reported, a fact undisputed by the Union. By the time the grievant did report the accident, it was too late for the grievant's supervisor to conduct an immediate examination of the accident scene.

The Union has raised several smoke-screens in an attempt to preserve this grievant's job, none of which are sufficient to hide the merit in the Service's case against this grievant. The Union's contention that the grievant panicked and told the fabricated story in order to preserve his

employment has no merit as mitigation whatsoever. The Union's contentions that there is disparate treatment is absurd, there are no similar cases in the Omaha area which resulted in a lesser penalty being assessed. Finally, the Union argues that the grievant's long and faithful service should serve as a mitigating factor in this case. The fact is there is no basis for mitigation based on the grievant's length of service. The grievant, at best, is a marginal employee and his record does not serve to mitigate his misconduct in this matter.

Section 7 of Article 16 provides guidance for when emergency placement is proper; to wit:

Section 7. Emergency Procedure

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves . . . failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U. S. Postal Service property, loss of mail or funds, . . .

The Union has not seriously challenged the propriety of placing this grievant in an emergency placement status. Clearly this record shows the Service had the right to place this grievant in an emergency placement status. Therefore, the Service asks that this grievance be denied in its entirety as being without merit.

The Postal Service has proven its case that the grievant engaged in the unsafe act, failed to timely report the accident, and then falsified the Accident Report, P.S. Form 91. In fact, the grievant now admits his misconduct in every respect. It is also the position of the Postal Service that the penalty assessed was proper and none of the defenses raised by the Union have any merit whatsoever. Therefore the Postal Service respectfully requests the Arbitrator to deny the

grievance concerning the removal as being without merit.

UNION'S POSITION

The Union respectfully requests that both grievances be sustained, and that the grievant be reinstated to his Letter Carrier position and be made whole in every respect for these wrongful disciplinary actions. There are two separate grievances in this matter, one protesting the wrongful imposition of an emergency placement status upon this grievant, and the other for the wrongful discharge of the grievant.

The emergency placement of this grievant is without merit. Article 16, Section 7 authorizes emergency placement only in the case that an employee is a threat to the Service or to persons. This grievant's alleged misconduct did not result in any threat to Postal property or to the mails; and in no respect was he a safety hazard. This emergency placement was a clear over-reaction by management and must be rescinded.

Clearly management had no just cause for the discharge of this grievant. The grievant was involved in a vehicle accident, and the grievant readily admits that he was not forthcoming on the Accident Report, P.S. Form 91. However, the Postal Service denied this grievant his due process rights, and failed to consider the length of service when determining the penalty to be assessed this grievant.

The Union requested information concerning a non-career rural carrier, and a local supervisor, both of whom were involved in situations similar to that of this grievant. The requested information was not provided to the Union until approximately one month before the

date the arbitration hearing was scheduled, and well after the fact of the case being certified to arbitration. Clearly, both cases were similar in that there was a vehicle accident and the other employees were also less than forthcoming. In fact, a supervisor, who actually worked in the same station as this grievant, attempted to cover for another employee and even lied about who was involved in the accident. This employee was suspended for less than a month, and this person is still a supervisor responsible for Letter Carriers. The dispute resolution team representatives did not have this information to consider in their deliberations and therefore the grievant did not receive procedural due process in this case. Clearly this is disparate treatment and this aggrieved discipline cannot be permitted to stand on this basis alone.

Further, this grievant has a long and good service record with the Postal Service. This grievant had, at the time of his discharge, sixteen years of service with the Postal Service. He had no active discipline and the record clearly shows he was a faithful and dedicated Letter Carrier for those sixteen years. The Postal Service has done no more than character assassination in claiming that the grievant in any respect was anything but an excellent employee. If the Service relied on a less than excellent record in determining the appropriate penalty in this case, there would have been evidence entered into this record to show the grievant's failings – no such evidence was proffered at the arbitration hearing. Should the Arbitrator find, *arguedo*, that the Grievant engaged in any misconduct, then his record of service should mitigate any penalty that may be due.

The Union respectfully requests that the Arbitrator sustain both grievances in this matter. Further, the Union contends that the grievant should be reinstated to his Letter Carrier position and be made whole for these wrongful actions assessed against him by management.

ARBITRATOR'S OPINION

There are two grievances in this matter. The first involves the grievant being put off work through the emergency placement status provisions of Article 16, Section 7 of the 1998 National Agreement. The second grievance protests the removal of the grievant from employment as a City Letter Carrier by the United State Postal Service. Each of these grievances arise from events that occurred on October 22, 2001 and each will be examined, in turn, in the following paragraphs of this Arbitrator's opinion.

Emergency Placement

Article 16, Section 7 of the parties' 1998 National Agreement authorizes Postal management to put employees in an off-duty status under specific emergency circumstances, to wit:

Section 7. Emergency Procedure

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or *failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U. S. Postal Service property, loss of mail or funds*, or where the employee may injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance.

The case against this grievant involves an at-fault vehicle accident and dishonesty concerning that incident. The grievant is alleged to have falsified a P.S. Form 91, Accident Report, and to have engaged in an unsafe driving act resulting in damage to a Postal patron's residence and to a Postal vehicle. It appears that if the allegations against this grievant are factual, then his conduct may fit well within the intended meaning of Article 16, Section 7. Clearly, the language of Article 16, Section 7 seems to contemplate actions, such as the grievant's, as cause for emergency placement in an off-duty status. The purpose is simply to protect the interests of the Service until such time as the threat no longer exists, or an investigation of the events may be completed.

The Union contends that the emergency placement of this grievant in an off-duty status was lacking in cause, and was disparate treatment. In examining, the record of evidence Joint exhibit 16 contains the disciplinary actions taken against two other individuals involved in allegedly similar actions (vehicle accidents). The case of a rural carrier involving unsafe backing, and leaving the scene of an accident, resulted in that employee receiving placement in an emergency off-duty status – the case of the Postal Supervisor did not result in an emergency placement. It is clear that there are several aspects of the conduct of these two employees that are similar to the grievant's conduct. They are all Postal employees in the Omaha area, and there were vehicle accidents involved in all three cases. The rural carrier and supervisor are not subject to the parties' 1998 National Agreement, however the supervisor is charged with the authority to manage persons under that Agreement. The Rural Carrier's situation is the most similar to that of this grievant and that resulted in emergency placement, which is consistent with the grievant's treatment. On the other hand, the supervisor was not placed in emergency placement status, but

his only misconduct was dishonesty. A dishonest act he admitted to when challenged by management. The grievant was not forthcoming, and was involved in an accident, hence the threat to Postal Service interests. Clearly the contract and just cause demands consistency of treatment, but the clear intent of Article 16, Section 7 makes it impossible to find cause to set aside the emergency placement on this inconsistency.

It is this Arbitrator's considered opinion that the grievance concerning the emergency placement must be denied as being without merit.

Removal Grievance

The record of evidence clearly demonstrates that the grievant committed the actions with which he stands accused. There is no doubt that the grievant had the accident as reported by the Postal patron, that he falsified the P.S. Form 91, and that he stuck to that fabricated story for several weeks until he finally recanted. It is also clear that the accident the grievant had was an at-fault accident which involved an unsafe act.

The Union's contention that the grievant's long service should have resulted in a bank of goodwill that should have resulted in a penalty less than discharge. The Postal Service argues that this grievant's record was less than exemplary and that there was no bank of goodwill because he was a marginal employee. Even so, there is nothing in this record that is convincing that his work record was somehow less than good and faithful service. The Postal Service offered nothing credible save argument that the grievant's record cannot be the basis of mitigation of the assessed penalty. This grievant has no live discipline, or any other record that supports the Postal

Service's contentions that he is a marginal employee. For the Postal Service to prevail in thwarting consideration of the grievant long service as mitigation, it is obliged to show that an discipline free record is somehow tarnished in some other respect. Allegation without supporting evidence is not something which may be considered by this Arbitrator as controlling in this forum.

Disparate treatment is argued by the Union, charging that two other employees did essentially the same thing as this grievant and these two employees received lessor penalties. The Union contends that there was a request for information concerning the matters of two employees that may be similarly situated to the offenses of which this grievant stands accused. It is clear that management did not honor those requests until after the case was certified to arbitration – and the Union only received this information about a month before the arbitration hearing. This is not exemplary grievance processing. The information did eventually become available to the Union, but only after the grievance was processed through the steps of the dispute resolution process and was therefore denied to the persons charged with the attempts to resolve the grievance short of arbitration. This is serious, however, cannot serve as the basis of setting aside the discipline assessed in this matter. The Union could only hope to convince this Arbitrator to remand the matter to the parties' dispute resolution mechanisms. This the Arbitrator considered, however, such a remand is unlikely to result in anything save the delay of the final outcome of this case through the arbitration process. Therefore, remand is not a viable result for this case, and does nothing save delay justice. The Arbitrator is obliged to provide for the parties a final and binding resolution to this dispute, and that obligation is not served by remanding this case.

Disparate treatment is an affirmative defense and requires the Union to prove that

defense.¹ To withhold information, when properly requested, when a Union bears the burden to prove the affirmative defense is a precarious course of action by management of the Postal Service. The Union must have a full opportunity to investigate the information and form a theory of the case once that information is provided. Article 31, Section 3 clearly contemplates the Service providing the information requested, and the Postal Service is admonished to provide such information when requested.

In this case, the fact that a Postal Supervisor is involved in an act of dishonesty not dissimilar to the one committed by the grievant, and supervised in the very same station as this grievant worked is relevant to this alleged misconduct. A decision letter dated December 1, 2000, in the case of the Postal Supervisor states, in pertinent part (Joint exhibit 16):

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On April 21, a carrier at the Benson Station called to report a vehicle accident. According to the carrier, he struck a tree limb and broke the right side triangular window. You investigated the accident and told the carrier that you would take care of it. When you filed the official accident report, you stated that the damage to the window was the result of vandalism.

Although there was no personal gain in making this false statement in an official matter, it caused me to have serious concerns about your honesty and integrity. This is especially significant considering the position you hold. Not only have you lost my trust, there is evidence that you have lost the trust of some of the

¹ Elkouri and Elkouri, *How Arbitration Works, fifth edition*, Washington, D.C.: Bureau of National Affairs, Inc., pp. 934-36 discusses disparate treatment; and the affirmative defense. Jonathan Dworkin's classic definition of disparate treatment applies here: "In order to prove disparate treatment, a union must confirm the existence of both sides of the equation. It is not enough that an employee was treated differently than others; it must also be established that the circumstances surrounding his / her offense were substantively like those of individuals who received more moderate penalties.

employees who work for you.

I expect no less than the highest moral principles from all postal employees. However, as one of the members of the management team, I expect a higher standard of behavior, honesty, and ethical judgement by you and your peers because your actions set the example for your subordinates. I can not, and will not tolerate any less than the highest standard of conduct from you.

I have noted you seventeen plus years of service with no prior disciplinary action. I have also taken into account your performance accomplishments and dedication to the success of the Postal Service.

After serious consideration of all the facts and evidence in this case along with your employment history, I find that the record of evidence is clear and warrants disciplinary action. My decision is to issue you a thirty (30) day suspension, of which you will serve fifteen (15) days without pay. . . .

Clearly this Postal Supervisor engaged in a false report of an accident; albeit, one of his employees had the accident, and the supervisor falsified the accident report. There are both mitigating, and aggravating circumstances in this case. It was not for personal gain that this supervisor lied, and he was not involved in the accident. However, this supervisor is responsible for the actions of his subordinates, and to lie to cover up those actions, makes this offense no less serious than the elements of untruthfulness performed by this grievant. Worse still, as the decision letter notes, this supervisor sets the example for bargaining unit employees, and his actions prior to the grievant's must be given significant weight in determining the proper penalty for subordinates or for those for whom this supervisor is a model for conduct.

The Postal Service would have this Arbitrator dismiss the grievant's 16 years of service, when the supervisor's 17 years was considered – without evidence clearly to the contrary, this Arbitrator must give equal weight to the years of service, and find there are substantial mitigating circumstances in this matter.

The Grievant's conduct with respect to his dishonesty is substantial and resulted in his removal, the same as the subject supervisor. The contentions about when the individual's "came clean" suggest little concerning the respective honesty of the two individuals. However, the evidence of what were the facts of October 22, 2001 were not available to management until March of 2002. Therefore, in this Arbitrator's considered opinion, the Grievant has forfeited any claim to back pay or benefits by his tardy admission of culpability.

Remedy

The proper remedy in this matter is the reinstatement of this grievant to his former position with the Postal Service, but without back pay or benefits, but without the loss of accrued seniority.