

C-25994

REGULAR ARBITRATION PANEL

 In the Matter of Arbitration)
)
 between)
)
 UNITED STATES POSTAL SERVICE)
 (hereinafter "USPS"))
)
 and)
)
 NATIONAL ASSOCIATION OF)
 LETTER CARRIERS, AFL-CIO)
 (hereinafter "NALC")

Grievant: Lnenicka

Post Office: Yakima, WA

Case No: EO1N-4E-D 05044299
Local No: MMB-2005-04
DRT No: 02-042309

BEFORE: Janice S. Irving, Arbitrator

APPEARANCES BY:
For USPS: Susan Houser, Labor Relations Specialist
 Seattle Customer Service & Sales District
 P.O. Box 90204
 Seattle, WA 98109-9401


For NALC: Mary Martinez, Regional Administrative Asst.
 NALC of the USA (AFL-CIO)
 P. O. Box 87386
 Vancouver, WA 98687

Place of Hearing: USPS
 205 W. Washington Ave.
 Yakima, WA 98903

Date of Hearing: May 10, 2005

AWARD: The grievance is sustained without back pay and a time served suspension. This award serves as a notice to the Grievant that removal will follow any future failure to follow safety procedures.

DATE: June 10, 2005
Compton, CA


 Janice S. Irving, Ph.D.

RECEIVED
 JUN 13 2005
 PAUL PRICE, NBA
 National Association Letter Carriers

RECEIVED
 JUN 20 2005
 VICE PRESIDENT'S
 OFFICE
 NALC HEADQUARTERS

CONTRACT PROVISIONS

AGREEMENT

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

Article 3: Management Rights

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties.

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.

Section 5: Suspension of More Than 14 Days or discharge

In the case of suspension of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of grievance-arbitration procedure. A preference eligible who chooses to appeal a suspension of more than fourteen (14) days or his/her discharge to the Merit systems Protection Board (MSPB) rather than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement or through exhaustion of his/her MSPB appeal. When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the employer is not required to give the employee the full thirty (30) days advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

Section 8: 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.

In post offices of twenty (20) or less employees, or where there is no higher-level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken.

Section 10: Employee Discipline Records

The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years.

Upon the employee's written request, any disciplinary notice or decision letter will be removed from the employee's official personnel folder after two years if there has been no disciplinary action initiated against the employee in that two-year period.

Article 19: Handbooks and Manuals

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

BACKGROUND

This Arbitration proceeding was convened by the parties pursuant to Article 15 Section 4 of the National Agreement between United States Postal Service and National Association of Letter Carriers, AFL-CIO. The grievance that led to this proceeding stems from Management issuing a Notice of Proposed Removal charging Failure to Operate a Motor Vehicle in a Safe Manner dated, January 12, 2005.

The record from the Arbitration Hearing comprises testimony from two (2) witnesses called by the USPS, and two (2) witnesses called by NALC. In addition to the witnesses there were nineteen (19) Joint Exhibits entered. There were thirteen (13) Arbitration Awards submitted.

Both parties submitted closing briefs. The hearing officially closed on May 17, 2005.

I tape-recorded the hearing solely as an extension of my personal notes and not as an official record.

ISSUE

Did just cause exist for the Notice of Proposed Removal charging "Failure to Operate a Motor Vehicle in a Safe Manner" issued to David Lnenicka on January 12, 2005? If not, what is the appropriate remedy?

STIPULATIONS

1. This involves an at-fault accident and the facts of the accident are not in dispute.
2. Handbook EL-921: Supervisor's Guide to Handling Grievances is Management's instructions to Managers, is not an agreed upon document.

POSITION OF THE PARTIES

USPS

The Service reviewed the accident in question and called attention to the Grievant's past history of conduct infractions of various kinds, cited a 7-day Suspension for Misconduct; Letters of Warning for Safety Infraction, and a Proposed 21-day Suspension. In this instant case the Service called attention to the Grievant's entire record which was considered prior to making the decision to remove him. In addition, the Service called to attention the Grievant's credibility in this instance and prior instances.

To the issue of disparate treatment the Service maintains that progressive discipline was predicated on the two (2) carriers' live record of discipline. The level of discipline imposed in the Carrier Fischer case was progressive with an active Letter of Warning, which then called for a 7-day Suspension. In the case of the Grievant, his entire record of live discipline was considered and the next level of progressive discipline was removal. The Service maintains that the next level of progressive discipline was still removal, even though the infractions are unrelated.

In regards to the issue of Review and Concur the Service argued that Supervisor Perron testified that he proposed the decision to remove the Grievant and Manager Shields reviewed and concurred the proposed decision to remove the Grievant as requested by Supervisor Perron.

Consequently, the Service is asking for a finding against separate discipline tracks, a finding that the concurrence was proper, that there was no showing of disparate treatment and ask to carefully consider the credibility concerns.

NALC

The Union argued that the Service has not shown that moving from a Letter of Warning for the Grievant's last vehicle infraction to a Notice of Proposed Removal is justified. The Union noted that for discipline to be properly progressive and corrective the charges must be similar and notes that the Service is obligated under the "Just Cause" standard to impose discipline of increasing degree for like infractions prior to removing an employee, unless the infraction is so egregious. The Union maintains that the Service has relied upon dissimilar charges to support the removal of the Grievant and thereby has failed to issue the Grievant progressive and corrective discipline.

The Union further asserts that the Grievant and Carrier Fischer had similar records and notes that the discipline issued to Carrier Fischer for the similar accident (7-day Suspension vs Removal) was disparate.

The Union argued throughout the moving papers that a proper review and concurrence did not take place and the Service did not take advantage of a full opportunity at hearing to clear the record nor prove that a proper review and concurrence took place.

The Union request that the discipline must be overturned for the failure of the Service to show due process which was not afforded the Grievant as required by the Collective Bargaining Agreement. The Union asked that the Notice of Proposed Removal dated, January 12, 2004 be rescinded and expunged from all Postal records and files.

SUMMARY OF TESTIMONY

ANDREW PERRON

Perron testified that he was on high-level detail as a 204B Supervisor Trainee at the time the Grievant's accident occurred. Perron stated he had been in his assignment in the Yakima, WA installation for about three weeks before the accident occurred. Perron testified that he was promoted to Supervisor upon completion of his four-month training on April 29, 2005. He testified that he was the Grievant's immediate supervisor. Perron testified that after conducting an on-scene investigation, driving the Grievant back to the facility, completing the required Accident Report Form, having the Grievant review some training videotapes, entering into the room came his Supervisor (Leslie Shields) asking to speak with him, stepping outside the room with his supervisor and speaking with her about the Grievant's accident. Perron testified that Manager Shields instructed him to send the Grievant home on an Emergency Placement. Perron testified in regards to Grievant's prior discipline record there were Letters Of Warning, a 7-day Suspension, and he did not see a 14-day Suspension, only a 21-day Suspension. Perron stated that he reviewed the Grievant's OPF on the date of the accident which was December 17, 2004, and later held an investigative interview on December 21, 2004. Perron concluded that the Grievant was at fault for the accident by failing to use safety procedures and he determined that some formal discipline was necessary, so the next progressive step for action was removal. Perron testified he would have recommended a 14-day Suspension had he not seen the 21-day Suspension was active.

LESLI SHIELDS

Shields was Manager of Customer Services at Yakima, WA Post Office on December 17, 2004. Shields testified that on the day of the accident which was

December 17, 2004, she was concerned about what had happened in regards to injuries or damages. Shields testified that she went to speak with Supervisor Perron after his return from the accident scene. Shields stated that she had Perron step out of the room, asking him to tell her about the accident, Perron stating that there were no injuries, but there had been quite a bit of damage to both vehicles, Perron telling Shields that the Grievant had been cited by the Yakima Police.

Shields testified that she was not the driving force behind the Grievant's proposed removal and did not make the decision to remove the Grievant. Shields testified that Perron did the on-scene investigation, conducted the investigative interview, and she believes he reviewed the Grievant's OPF. Shields stated that Perron, who was the Grievant's supervisor, made the decision to remove him, and she received the request for discipline. Shields testified that she reviewed the documentation that Perron submitted. Shields further stated that when she received the request for personnel action from Perron she believes he provided her a copy of the discipline which she reviewed, along with the investigative interview. Shields stated that she did review and concur the proposed removal as she felt that the documentation Perron provided was in order and she did not feel that his request was out of line. Shields felt that Perron was being progressive and she felt he had made the right decision.

Shields testified that she believes that the 21-day Suspension was in the packet that she received from Perron to review, however, she cannot remember if the 21-day Suspension was in the packet.

Shields confirmed that Perron was a 204B Acting Supervisor at the time of his decision to remove the Grievant. Shields stated that Perron as a 204B Supervisor could issue discipline.

DAVID LLENICKA

The Grievant, David Lnenicka was an 18-year Letter Carrier in Yakima, WA Post Office at the time of the accident on December 17, 2004. The Grievant stated that after the on-scene investigation was completed Supervisor Perron drove him back to the facility and had him to review some training video-tapes. The Grievant testified that Manager Shield entered the room during the time that Perron had him watching the training tapes. The Grievant stated that Perron left the room for 4 to 5 minutes to speak with Shields. The Grievant stated that Perron returned, asking for his badge, keys, reading a letter to him, placing him on Emergency Suspension, escorting him out of the building and telling him to call the next morning at 10:00 a.m. The Grievant testified that on December 21, 2004, he was told to come in for an Investigative Interview. Following that interview the Grievant stated he was told that he was sent home based on the letter Perron had received from Manager Shields, which he later received a copy in the mail.

MARY BRASHER

Brasher testified that she was a 20-year Postal Employee in December 2004, and also a Union Representative, in Yakima, WA. Brasher testified that she discussed the case with Supervisor Perron regarding progressive discipline. Brasher stated that on Saturday, December 18, 2004, she spoke with Supervisor Perron and he told her that when he issued the Emergency Leave to the Grievant he was doing as he was told by Manager Shields. Supervisor Perron also stated that he had not yet looked at the Grievant's OPF.

DISCUSSION

After reviewing the record, it is concluded that the Service has met its burden of establishing that the Grievant is guilty of the offense as charged, Failure to Operate a Motor Vehicle in a Safe Manner. This conclusion is based upon a review of the evidence and testimony provided regarding the Grievant's at-fault accident when he failed to yield the right-of-way, the accident happened on December 17, 2004. In that the Grievant admits he failed to operate his postal vehicle safely by failing to yield the right-of-way to a private owned vehicle, when exiting an alley, causing a collision, being ticketed by Yakima Police Department, and paying the ticket without a challenge. The Grievant is guilty of the offense as charged, however the Arbitrator is not persuaded that the prior safety infractions are sufficient to warrant removal. Nor is the Arbitrator persuaded that the last 21-day Suspension which is unrelated to safety, is sufficient to merit removal.

Of great concern is the Service's belief that they are not bound to separate discipline tracks, the Service lack any proof other than their belief to support this assertion. The Service offered no contract language to guide the Arbitrator in supporting their belief regarding not being bound to separate discipline tracks. There is nothing in Article 16.1 which requires a rigid scheme of progressivity toward discipline tracks. The language in Article 16.1 does not support unrelated discipline tracks. Article 16.1 states that, **the basic principal shall be that discipline should be corrective in nature rather than punitive.** The language mandates corrective discipline which is to call to the attention of the employee his derelictions and to give the employee an opportunity to cure them. There is no presumption that the basic principal shall be that discipline should be corrective regardless of the relativity. The Collective Bargaining Agreement Article 16.1 just does not read that way because the touchstone of Article is "just cause".

Nonetheless, the Service asserts that the Grievant had received the full range of progressive and corrective discipline available to him short of removal, even though the underlying conduct was separate and distinct. The Service asserts they followed the scheme of progressive and corrective disciplinary action, Letters of Warning, a 7-day suspension and a 21-day Suspension which the Service contends these corrective actions were to call to the attention of the Grievant his derelictions and gave him an opportunity to cure them.

The Service contends any discipline can be considered when taking the next step in the line of progressive and corrective discipline, even if the underlying conduct is separate and distinct, but quite the contrary. While Article 16.10 permits the Service to go back two (2) years in reviewing discipline, the language found in Article 16.10 must be read in the light of Article 16.1, which mandates corrective action. It is only logical that a mandate of corrective action requires a general sense of compatible actions. If the Collective Bargaining Agreement Article 16.1 do not read that any discipline can be considered when going to the next step in the process of progressive and corrective discipline, then Service is wrong to adopt this principle and are obligated to prove themselves right. The Service carry the burden of proof. Article 16.1 do not set forth a rigid scheme of progressivity and corrective discipline.

Moreover, in this dispute the Union asserts the defense of disparate treatment. It is concluded that the Union did not establish that the Service treated the Grievant in a disparate manner. In order for comparative evidence relating to other employees to be considered relevant, those employees must be similarly situated, all relevant aspects of the Grievant's grievance must be nearly identical to those of comparative employees. In order to be similarly situated, other comparative employees must have reported to the same supervisor; must have been subject to the same standards governing discipline; and must have engaged in

conduct similar to the Grievant's without differentiating or mitigating circumstance that would distinguish their misconduct or the appropriate discipline from the Grievant. The Union offered Carrier Fischer as a co-worker who was similarly situated in comparison to the Grievant. However, these facts do not indicate that the Grievant was treated disparately.

It is undisputed that the conversation between the Grievant's supervisor and Shields led to the Grievant being placed on an Emergency Placement on December 17, 2004. While the Grievant was placed on an Emergency Placement, there was no clear-cut warning of possible removal. The Union asserts that the review and concurrence was improper, yet the Union allowed Shields' testimony that she was not the driving force behind the Grievant's removal to go unchallenged. Other than an assertion that the review and concurrence was improper, there was insufficient evidence to establish that the Service violated Article 16.8. It is concluded under these circumstances the evidence fails to support the fact that Manager Shields instructed Perron to remove the Grievant. It is concluded that the review and concur was proper.

The greatest concern in this dispute is the cited elements in the Grievant's Notice of Removal which showed a 7-day paper Suspension on December 22, 2001 issued for improper conduct, two (2) prior Letters of Warnings issued against the Grievant for safety infractions. The safety infractions occurred between February 2, 2002 and December 6, 2002. It is concluded that no safety charges other than the two (2) Letters of Warnings had been issued against the Grievant prior to the accident of December 17, 2004, plus the most recent element cited the 21-day Suspension dated September 18, 2003, which was for work-related conduct which had nothing to do with safety.

The Arbitrator was particularly troubled by Manager Shields who apparently held that the damage incurred was the determinant to measure the appropriate

discipline to impose. It must be pointed out it is not the amount of damages, but the amount of negligence on the Grievant's part that must be the foundation of the discipline to impose. Although the Grievant was at fault for the accident for failure to yield the right-of-way, when exiting an alley. The record shows that the Grievant who is an eighteen-year employee who had received numerous safe driving awards prior to the February 2, 2002, safety infraction. It must be concluded that the Grievant's collision was not such an egregious breach of reasonable and prudent conduct to demand his removal. It is concluded that the discipline imposed by the Service was not appropriate. Given the disciplining supervisor indicated that he was considering recommending a 14-day Suspension.

Accordingly, based upon the record, the arguments of the parties, the arbitration awards and the discussion above, the following award is issued, that the grievance is sustained, without back pay, as a time served suspension and the award serves as a notice to the Grievant that removal will follow any future failure to follow safety procedures.

AWARD

The grievance is sustained, without back pay, as a time served suspension and the award serves as a notice to the Grievant that removal will follow any future failure to follow safety procedures.

Date of Award:
Compton, CA

June 10, 2005


Janice S. Irving, Ph.D.