

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration *
*
between: * Grievant: D. McKenzie
*
United States Postal Service * Post Office: Montgomery, AL
*
and * USPS Case No: G06N-4G-D 12179809
* G06N-4G-D 12225699
National Association of * NALC Case No: LP04272012
Letter Carriers, AFL,CIO * LP06122012

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Scott Brimer
For the Union: Steve Vadorsky
Place of Hearing: Postal Facility, Montgomery, AL
Date of Hearing: May 9, 2013
Date of Award: June 4, 2013
Relevant Contract Provision: Article 16 - 16.7
Contract Year: 2006
Type of Grievance: Discipline

Award Summary:

The Grievant in this case was issued an Emergency Placement and a subsequent Notice of Removal. The Employer failed to meet the required burden of proof in both instances. The grievances are sustained and the Grievant shall be reinstated immediately and made whole in every respect.



Lawrence Roberts, Panel Arbitrator

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 9 May 2013 at the postal facility located in Montgomery, AL beginning at 9 AM. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a tape recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

The Grievant in this case is employed as a Letter Carrier at a Montgomery, AL Postal facility, the Lagoon Park Branch. The Grievant has been employed by the Agency since 1990.

The Grievant was placed in an "Emergency Placement in Off Duty Status." And by Letter dated 17 April 2012, the reason for this action, according to that document was:

"You are hereby notified that you were placed in an off-duty (without pay) status effective April 13, 2012 and will continue in this status until you are advised otherwise.

The reasons for the action are:

On Friday, April 13, 2012, you were loud and argumentative with Postmaster Donnie Snipes while on the workroom floor. Your actions and comments were improper and violated the Joint Statement on Violence in the Workplace.

A further decision shall be made as to whether or not discipline shall be forthcoming in the near future.

You have a right to file a grievance under the grievance/arbitration procedure set forth in Article 15 of the National Agreement within 14 days of your receipt of the letter."

Regarding a Removal, a Letter of Decision was then issued to the Grievant on or about 28 June 2012. That document reads as follows:

"On or about May 30, 2012, you were issued a notice proposing to remove you from the Postal Service no sooner than 10 calendar days from your receipt of that letter.

In the notice of proposed removal you were instructed when and where you could review the material related to the action. You were also afforded the right to respond to the proposal to me in person or in writing within 10 days of your receipt of the letter. You did not respond within the 10 day time frame as instructed. I must therefore render my decision.

I have given careful consideration to all the evidence in the record. I find the charges as stated in the Notice of Proposed Removal dated May 30, 2012, to be fully supported and warrant your removal from the Postal Service.

You were charged with Unacceptable Conduct and I considered the nature and seriousness of the offense and their relation to your duties, position, and responsibilities.

Records indicate that on April 13, 2012, Donnie Snipes, Postmaster, informed you that Management was not conducting a formal route count and he instructed you - at least twice - to stop counting DPS mail. You became loud and argumentative, stared hard at Snipes and said something to the effect of "come on over here." When you were instructed to get off the clock, you walked by Snipes and Julius

Williams, Manager, Customer Service, LPS, again stared hard and said something to the effect of, "You want some?"

On April 24, 2012, you reported to the MPO for an investigative interview, as instructed. During the Investigative Interview, when asked, you admitted to J.D. Tynan, Postal Inspector, that you had a loaded firearm in your car and that your car was parked on the MPO customer parking lot. Inspector Tynan advised you that he would have to remove the loaded gun from your car and instructed you to wait in the conference room. When Inspector Tynan left the conference room, you informed your representative that you were going to the restroom; instead, you fled the building, went to your car and drove away.

On May 4, 2012, an investigative interview was held regarding your actions of April 24, 2012. During the investigative interview, you admitted telling Inspector Tynan, on April 24, 2012, that you then had a loaded firearm in your car and that your car was parked in the MPO parking lot. You admitted that you assumed you were not supposed to have done that. You also admitted to driving away.

The charges are supported by the evidence.

In arriving at this decision, I considered a number of factors, including, but not limited to: (1) the nature and seriousness of the offense; (2) the nature of your position as a Letter Carrier; (3) the effect of the offense on your supervisors' trust and confidence in your ability to perform your assigned duties; (4) your work record, including your length of service, job performance, and dependability; (5) the fact you were clearly aware that the conduct you engaged in was wrong; (6) your potential for rehabilitation; and (7) the adequacy and effectiveness of alternative sanctions to deter such conduct by you or other employees in the future.

In addition to what has been discussed above, I have also considered your tenure with the Postal Service and your time in the Armed Forces. I am compelled to treat you the same as I would any other similarly situated employee. Based on your actions, I do not believe that there is any potential for rehabilitation.

I believe your actions violated the Code of Conduct which requires employees to be honest, reliable, trustworthy, and of good character and reputation. I do not believe you can be trusted to uphold the policies of the Postal Service. It is essential to the mission of the Postal Service that employees conduct themselves in a manner which reflects favorably upon the Postal Service, regardless of duty status. You have failed to do this.

I considered alternate sanctions for your actions, but find a lesser penalty would not be conducive to the integrity and/or efficiency of the Postal Service or serve as a deterrent of similar misconduct by you or other employees. Therefore, it is my decision to sustain the penalty of removal as outlined in the Notice of Proposed Removal. Your removal will be effective July 10, 2012."

Both documents were signed by a Supervisor.

The above resulted in the filing of two grievances, one protesting the Emergency Placement and the second raising opposition to the Notice of Removal.

The Parties were unable to resolve either of the disputes mentioned above. The Step B Team declared an impasse in each and both issues were then combined for the purpose of arbitration.

It was found both matters were properly processed through the prior steps of the Parties Grievance-Arbitration Procedure of Article 15, without resolve. Therefore, the matter is now before the undersigned for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. The record was closed following the presentation of oral closing arguments by the respective Advocates.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.
- 2A. Notice of Removal Package (C06N-4G-D 12225699)
- 2B. Emergency Placement Package (G06N-4G-D 12179809)

COMPANY'S POSITION:

Management contends it will show via evidence that both the Emergency Placement and Notice of Removal in the instant case were both with just cause. Both Letters, according to the Agency were a result of unacceptable conduct.

According to Management, as a twenty two year Employee he should have been aware of the rules concerning his conduct while at work and prohibitions of firearms while on Postal property.

The Service contends the Grievant openly admits to challenging the instructions and authority of the Postmaster while making threatening comments.

Management also claims the Grievant admitted to having a loaded gun in his vehicle while on Postal property.

The evidence, according to the Employer will show the Grievant changed his story regarding his conduct in both instances. The Employer claims as a result, his integrity is subject at best in this matter. It is the opinion of the Agency that the Grievant changed his story several times to reflect a positive image upon himself.

The Union, according to the Service, acknowledges the fact the Grievant did have a gun in his vehicle, but instead, indicates that he was mistaken.

From Management's perspective, both actions were with cause and, accordingly request that both grievances be denied in their entirety.

UNION'S POSITION:

It is the opinion of the Union that just cause does not exist in this instant case. Being a matter of discipline, the Union points out the burden of proof in this matter is that that of the Employer.

And with that in mind, the Union points out that each one of the issues cited in the respective cases must be decided in favor of the Union.

It is the assertion of the Union that Management must prove just cause in both instances; this is something they will not be able to do.

The Union insists the testimony and evidence contained in the case file will show that it was Management in this case that were the aggressors at the Lagoon Park Station.

The Union suggests that it was Management that violated the Joint Statement of Violence in the Workplace in this particular instance.

The Union also mentions the Grievant has acted as a Union Representative on and off for many years. And according to the Union, the Grievant continues to be a Union activist and a source of information for other Letter Carriers at the Lagoon Park Station.

The Union has concluded that Management's actions in this matter are nothing more than retaliation against the Grievant for his Union activities.

The Union asks that both grievances be sustained, the Grievant be reinstated and made whole in every respect.

THE ISSUES:

(Emergency Placement - G06N-4G-D 12179809)

1. Did Management have Just Cause to place letter carrier James McKenzie in an Article 16.7 Emergency Placement (Without Pay) status on April 13, 2012 and if not, what is the proper remedy?

2. Did Management retaliate against letter carrier James McKenzie for conducting Union activity by conducting a mail count on his route on April 13, 2012 and if so, what is the proper remedy?

3. Did Management violate Handbook M-39 Section 115.1-115.4 and / or the ELM Section 651.4 via Article 19 of the National Agreement when they placed letter carrier James McKenzie in an Article 16.7 Emergency Placement (Without Pay) status on April 17, 2012 and if so, what is the proper remedy?

4. Did management violate Article 16.7 of the National Agreement when they provided written notice of the Article 16.7 Emergency Placement five (5) days after he was verbally informed of such, and if so, what is the proper remedy?

5. Did Management, specifically Postmaster Donnie Snipes violate the Joint statement on Violence and Behavior in the Workplace or handbook M-39 Section 115.4 with his actions on April 13, 2012 and if so, what is the proper remedy?

(Notice of Removal - C06N-4G-D 12225699)

Did Management have Just Cause to issue letter carrier James D. McKenzie a Notice of Proposed Removal on June 2, 2012 (dated May 30 2012) for Unacceptable Conduct and subsequent Letter of Decision, and if not, what is the proper remedy?

PERTINENT CONTRACT PROVISIONS:

**ARTICLE 16
DISCIPLINE PROCEDURE**

**SECTION 1. Principles
SECTION 7. Emergency Procedure**

DISCUSSION AND FINDINGS:

This case involves two separate issues, the first being an Emergency Placement, the second, a subsequent Notice of Removal. Both issues were merged into this single case. While the

quantum of proof may differ between the two matters, most of the facts and circumstances remain the same, even though the Parties seem to be in disagreement over the occurrence of events. Additional charges were also added to the Notice of Removal document that was not a part of the Emergency Placement charge.

Both cases involve an issue of discipline, wherein the conclusions drawn, remain contrasting between the Parties. Regardless of circumstance or respective argument, the burden of proof falls on Management to establish reason for their actions.

While Article 3, Management Rights, provides the Employer with the power to "suspend, demote, discharge, or take other disciplinary action...", the Employer is limited in any decisions as restricted by other Articles or Sections of the Agreement.

According to the Agreement, no Employee may be disciplined or discharged except for just cause. In my view the "just cause" provision is ambiguous, however, its concept is well established in the field of labor arbitration. The Employer cannot arbitrarily discipline or discharge any Employee. The burden of proof is squarely on the Employer to show the discipline imposed was supported with sound reasoning. Initial

allegations must be proven, clearly and convincingly, through the preponderance of the evidence.

And that same just cause provision outlined in Article 16.1, carries forward to Article 16.7, the Emergency Placement provision, albeit, less demanding.

Article 16.1 requires that all discipline meet a just cause standard. The criteria varies from case to case, but, in most circumstances, just cause is met via the preponderance of evidence rule.

Conversely, Article 16.7 requires a less stringent gauge, something less than the preponderance of evidence. Nonetheless, the Employer is required to show their Emergency Placement decision, made on the facts of the case available at the time of their decision, was reasonable. And in this case, my findings are based solely on the facts and circumstances, available to the Employer at the specific time of the Emergency Placement.

And with that in mind, each Emergency Placement rests on its own set of facts and circumstances. Since this case does involve discipline, the Employer retains the burden to show just cause for the Emergency Placement. However, given the language

of Article 16.7, the requirements in meeting that burden of proof are somewhat lessened.

Nonetheless, that Article 16.7 language allows the Employer to immediately place an Employee in a non-pay, off-duty status, when allegations meet certain criteria. And that standard must show the conclusions reached by Management, at that time, with the information available, was with reason and not arbitrary or capricious.

However, the just cause standard cannot be gauged in the same matter in all cases since each discipline case is unique to its own set of facts and circumstances. Furthermore the purpose and intent of the Section 7 Emergency Procedure allows the Employer to make an immediate, but reasonable response, based on the evidence available to them, at that given snapshot of time.

First, Management must show that allegations were real based on an analysis of the information available at that very specific point in time. There have been cases wherein Employees were absolved of all charges, but the Emergency Placement stood. It's just a matter of whether or not the evidence, available at the time of issuance, shows the Emergency Placement was reasonable and justified, based on the circumstances appearing at that given time.

After careful review and consideration of all the evidence in this matter, I am of the considered opinion that both the Emergency Placement and the Notice of Removal were improper and certainly without any cause.

Regarding the Emergency Placement, the Employer alleges the Grievant was loud and argumentative while on the workroom floor, violating the Joint Statement on Violence and Behavior in the Workplace. As previously mentioned, the burden of proof is squarely on the Employer, albeit lessened in the case of an Emergency Placement.

Yet, even with that lessened standard, the Employer clearly failed to produce the quantum of evidence necessary in meeting even that lessened standard.

Both the Postmaster and a Supervisor Customer Service provided corroborating testimony claiming the Grievant was both loud and argumentative, as charged in the Emergency Placement document. All of that testimony seemed credible.

However, equally convincing was the testimony of an opposing witness, who was working near the Grievant's case during this alleged occurrence. That testimony, provided via telephone, was equally credible.

And when compared collectively, the Employer witnesses simply failed to tip the scale of preponderance in their favor. Instead, I am of the considered opinion that logic must prevail in this case. Telling was the fact that given the number of Employees in the general locale of the alleged incident, not a single witness came forward to validate Management's version of events.

And this is paramount, in that, the Employer charges a violation of the Joint Statement. And, to the undersigned, the controlling language of that document, relative to this instant case is that:

"We openly acknowledge that in some places or units there is an unacceptable level of stress in the workplace; that there is no excuse for and will be no tolerance of violence or any threats of violence by anyone at any level of the Postal Service; and that there is no excuse for and will be no tolerance of harassment, intimidation, threats, or bullying by anyone."

And again in my considered opinion, based on the evidence presented, given the fact this event occurred on the workroom floor, that, had the Grievant acted as alleged, that another Employee would have come forward on behalf of Management. Instead, the Employer Advocate opted not to cross examine the one Union witness, previously mentioned, that provided opposing testimony to the events that occurred on the work floor that day.

And for the reasoning provided above, it was quite clear to the undersigned that the Employer simply failed in meeting their required burden of proof regarding the Emergency Placement. After listening numerous times to all of the testimony from the various witnesses, I was not convinced the Grievant was loud, argumentative or in violation of the Joint Statement.

As mentioned above, there are also four (4) other issues to be determined in this particular Emergency Placement case.

The second involves retaliation against the Grievant for his Union activities. I ruled in a recent case labeled G06N-4G-D 12225680/12192766, dated 15 February 2013 that:

"Management attempted to invoke discipline upon an Employee, when in fact, at that time, the Grievant was certainly acting in his official capacity of a Union Steward. And given the facts of this case, Management was not within their authority to invoke any type of discipline. The Grievant at that particular time was working under the board umbrella of a protected status category."

And I do subscribe to that statement. However, this case is a little different. The Union, in this case, concludes via the issue presented, the allegations of that day occurred because of the Union activities of the Grievant. And maybe so.

However, the Union simply failed to produce any evidence in that regard. While the issue involves discipline, the allegations made require proof through the preponderance by the Union. However, the evidence presented by their witnesses failed to show any proof whatsoever, of Management's alleged retaliation on 13 April 2012 was in any way a result of Union activities by the Grievant.

The third issue also involves the Emergency Placement which has already been decided.

The fourth issue involves a five day Management delay in providing a written Emergency Placement notice. Here, the Union failed to show how the Grievant was prejudiced by such a delay. And with that as a backdrop, I considered the document that was issued on 17 April 2012. And again, the Union failed to even hint how the defense of the Grievant may have been prejudiced by a five (5) day delay.

And lastly, the Union alleges a Joint Statement on Violence violation by the Postmaster. Again, the Union failed to produce any evidence in that regard. The brush paints both ways. The Union failed to present a single witness, other than those directly involved in this particular occurrence, stating they

felt threatened in any way, by the actions of the Postmaster that day.

So with respect to all of the above, I am of the considered opinion that all of the events of 13 April 2013 elevated way beyond proportion. The fact of the matter is, both Parties raised allegations, to which neither were able to satisfy through the required preponderance of the Parties Agreement.

The Notice of Removal presents a different turn of events. In addition to the previously discussed charge, the Notice of Removal alleges the Grievant transported a handgun onto Postal property during his participation in an investigative interview. Such an allegation is serious. But even with that as a backdrop, the Employer still retains that Article 16 burden of proof requirement.

And again, the evidence introduced by the Employer simply failed to satisfy that required just cause standard. The allegation of the Employer was that the Grievant possessed a handgun in his vehicle, parked on postal property.

The Grievant told Postal authorities that he believed there was a handgun in his vehicle while it was parked on Postal property during the investigative interview.

According to the testimony, when the Grievant learned that Postal authority was going to inspect his vehicle, he fled the premises, only later to recant his original story by stating the handgun was instead in his wife's vehicle.

Here again, the burden is on the Employer to prove the handgun was brought onto Postal property by the Grievant. And regardless of the Grievant's original statement, the Agency was unable to present any evidence, that the Grievant's version of events was not true.

Testimony indicates that many Postal Employees transport handguns in their work vehicles every day, but park their vehicles on other properties. In fact, the Service did not offer any testimony to the contrary.

The only difference in this particular case is the fact the Grievant parked his vehicle on Postal property. First, he stated that a handgun was in the vehicle, then, later recanted.

It may be suspicious the Carrier immediately exited Postal property upon realization his vehicle may be searched.

Yet, offsetting is the fact the Grievant portrayed that Management was out to get him. And the fact the evidence presented by the Agency regarding the Emergency Placement failed to meet the required standard only supports the Union/Grievant argument in this Notice of Removal.

The fact of the matter remains that the burden of proof is on the Employer to prove the allegation. First, the Employer failed to prove their allegations relative to the workroom floor resulting in the Emergency Placement. Secondly, the Employer failed to prove that the Grievant possessed a weapon while on Postal property. Both allegations were based on mere assumptions at best.

It was telling when the Employer witness was unable to identify the type/make/model of the handgun possessed by the Grievant. It is only reasonable that anyone conducting an investigation would make some attempt to learn more detail about a handgun that was of such a concern to them.

Had it been proven that a handgun was brought on Postal property by the Grievant, I would be of the considered opinion that some form of discipline may be appropriate in this instant case. But the evidence in this case failed to meet the preponderance required.

Paramount is the fact the Employer failed to prove any ill intent, toward anyone, on the part of the Grievant. There was no evidence or even a suggestion that anyone had been threatened during that Investigative Interview. Instead, the Employer's whole case involved a handgun that the preponderance of evidence failed to prove existed.

This entire incident began on the workroom floor. The Union President testified that having three Supervisors overseeing a Letter Carrier's work is intimidating, in and of itself. To that end, I certainly agree.

The President's statement certainly makes sense and detracts from the Employer's case in chief. The Postmaster testified that he was on the work floor to conduct a mail count. Maybe so. But I've previously decided enough cases involving counts to realize that it does not require three supervisors to successfully complete such a process.

Similar to the Emergency Placement, the Agency failed in meeting their required burden of proof regarding this Notice of Removal action.

Therefore, both grievances will be sustained in their entirety. All documentation will be expunged from the Grievant's record. The Grievant shall be immediately reinstated to his former position and made whole in every respect.

AWARD

The Emergency Placement and the Notice of Removal are expunged. Both grievances are sustained and the Union's requested remedies are granted.

Dated: June 4, 2013
Fayette County PA