Burden of Proof

Level of proof necessary for USPS to establish *Just Cause* in discipline cases that include an element of moral turpitude or criminal intent

National Level Award

Arbitrator Mittenthal, Washington DC (Nederland, TX)
H4N-3U-C 58637, H4N-3A-C 59518 (C-10146)
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One important caveat should be noted. "Just cause" is not an absolute concept. Its impact, from the standpoint of the degree of proof required in a given case, can be somewhat elastic. For instance, arbitrators ordinarily use a "preponderance of the evidence" rule or some similar standard in deciding fact questions in a discipline dispute. Sometimes, however, a higher degree of proof is required where the alleged misconduct includes an element of moral turpitude or criminal intent. The point is that "just cause" can be calibrated differently on the basis of the nature of the alleged misconduct.

Supporting cases: C-01220, Arbitrator Dash, April 29, 1982
C-02007, Arbitrator Holly, February 21, 1983
C-07490, Arbitrator Purcell, October 1, 1987
C-09250, Arbitrator J. Earl Williams, March 24, 1982
C-13319, Arbitrator Deitsch, December 20, 1933
C-15714, Arbitrator Goodman, August 7, 1996
C-20842, Arbitrator Deitsch, June 27, 2000
C-25512, Arbitrator Gamser, June 12, 1976

C # 10146
A + B

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS and AMERICAN POSTAL WORKERS UNION Intervenor	GRIEVANTS: John Burch Nederland, Texas, and John Ferrell Dallas, Texas CASE NOS.: H4N-3U-C 58637, and H4N-3A-C 59518

BEFORE: Richard Mittenthal, Arbitrator

APPEARANCES:

For the Postal Service:	David A. Stanton Grievance & Arbitration Division Washington, D.C.
For the NALC:	Keith Secular Attorney (Cohen Weiss & Simon)
For the APWU:	Robert L. Tunstall Assistant Director Clerk Craft
Place of Hearing:	Washington, D.C.
Date of Hearing:	May 8, 1990
Date of Post-Hearing Briefs:	July 16 & 17, 1990

AWARD: The grievances are remanded to Step 3 of the grievance procedure for further consideration in light of the views expressed in this opinion.

Date of Award: August 3, 1990.

Richard Mittenthal,
Arbitrator

BACKGROUND

These grievances raise several questions with respect to the interpretation and application of Article 16, Section 7 (Emergency Procedure) of the National Agreement. The Unions believe that an employee placed on non-duty, non-pay status pursuant to 16.7 has been disciplined, that such discipline, if challenged, can be affirmed only through a Management showing of "just cause", that an employee cannot be suspended under 16.7 without first having been provided written notice of the charge made against him, and that an employee suspended in this manner must be paid for his lost time until he actually receives such written notice. The Postal Service disagrees with each of these propositions. It argues that placement of an employee on non-duty, non-pay status pursuant to 16.7 is an administrative action rather than discipline, that Management need only show "reasonable cause" rather than "just cause" to support its action, that no written notice of a 16.7 administrative action is required, and that therefore an employee placed on this non-duty, non-pay status is not entitled to be paid until written notice is given.

The key provision in this case is of course Article 16, Section 7. Because this section is part of Article 16 (Discipline Procedure) and because both the Unions and the Postal Service rely on other provisions of Article 16 as well, a substantial portion of the entire article should be quoted:

> Section 1. Principles
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> 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...which could result in reinstatement and restitution, including back pay.
>
> Section 2. Discussion
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> For minor offenses by an employee, management has a responsibility to discuss such matters with the employee... Such discussions are not considered discipline and are not grievable... However, no

notation or other information pertaining to such discussion shall be included in the employee's personnel folder...

Section 3. Letter of Warning

A letter of warning is a disciplinary notice in writing...which shall include an explanation of a deficiency or misconduct to be corrected.

Section 4. Suspensions of 14 Days or Less

In the case of discipline involving suspensions of fourteen (14) days or less, the employee against whom disciplinary action is sought to be initiated shall be served with a written notice of the charges...and shall be further informed that he/she will be suspended after ten (10) calendar days during which ten day period the employee shall remain on the job or on the clock (in pay status) at the option of the Employer.

Section 5. Suspensions of More Than 14 Days or Discharge

In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to 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...either by settlement with the Union or through exhaustion of the grievance procedure... 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... The employee is immediately removed from a pay status at the end of the notice period.

Section 6. Indefinite Suspension - Crime Situation

A. The Employer may indefinitely suspend an

employee in those cases where the Employer has reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed. In such cases, the Employer is not required to give the employee the full thirty (30) days advance notice of indefinite suspension, but shall give such lesser number of days of advance written notice as under the circumstances is reasonable... The employee is immediately removed from a pay status at the end of the notice period.

B. The just cause of an indefinite suspension is grievable. The arbitrator shall have the authority to reinstate and make the employee whole...

* * *

D. The Employer may take action to discharge an employee during the period of an indefinite suspension whether or not the criminal charges have been resolved, and whether or not such charges have been resolved in favor of the employee. Such action must be for just cause, and is subject to the requirements of Section 5...

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 be 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.

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...

* * *

(Emphasis added)

The essential facts are not in dispute. J. Burch was a part-time flexible letter carrier in the Nederland, Texas post office in 1987. Management placed him on non-duty, non-pay status on June 26, 1987, pursuant to Article 16.7. It believed that he had discarded deliverable mail and that his retention on duty "may result in...loss of mail..." It did not provide Burch with advance written notice of this removal. A grievance was filed in Step 1 on July 9, 1987, protesting his placement in non-pay status. Management advised him in writing on July 27, 1987, that he was being discharged for discarding deliverable mail. Another grievance was apparently filed protesting his discharge. Arbitrator P. M. Williams ruled on September 28, 1988, that the discharge was not for "just cause" and that Burch should be reinstated with full back pay.

J. Ferrell was a full-time regular letter carrier in the Dallas, Texas post office, Spring Valley station, in 1987. Management placed him on non-duty, non-pay status on June 16, 1987, pursuant to Article 16.7. It believed that he had committed a theft of mail and that his retention on duty "may result in...loss of mail..." It did not provide Ferrell with advance written notice of this removal. A grievance was filed in Step 1 on June 26, 1987, protesting his placement in non-pay status. Management advised him in writing on June 25, 1987, that he was being discharged for theft of mail. Ferrell protested the discharge through an appeal to the Merit Systems Protection Board (MSPB). His appeal was settled by an agreement with the Postal Service on October 26, 1987, his discharge being reduced to a disciplinary suspension from July 30 through October 26, 1987. He was then returned to work, evidently without back pay.

Neither the Williams award nor the MSPB settlement appear to have resolved the claim made in these grievances that Burch and Ferrell were, prior to their discharges, improperly placed on non-duty, non-pay status under Article 16.7. NALC asserts that this claim should be sustained and the two men made whole for their loss of pay attributable to the 16.7 "emergency procedure" on the ground that they "were not served with

written notice of the reasons for Management's action."[1] In the alternative, NALC urges that the grievances be remanded to the parties with instructions that Management "has the burden of proving that its action met the standard of just cause for discipline." APWU has intervened in this arbitration in support of NALC's claims. The Postal Service insists, on the other hand, that there is no merit in the Unions' argument.

DISCUSSION AND FINDINGS

Three distinct issues are raised by these grievances. The first concerns the nature of Management's action under Article 16.7, namely, whether placement of an employee on non-duty, non-pay status through this "emergency procedure" constitutes discipline. The second concerns the level of proof necessary to validate Management's action in invoking 16.7, namely, whether it must show "just cause" or whether a mere showing of "reasonable cause" (or "reasonable belief") will suffice. The third concerns the existence of a notice requirement, namely, whether an employee can properly be placed on non-duty, non-pay status under 16.7 without first being provided with written notice of the charge made against him.

I - Nature of Management's Action

The Unions assert that an employee placed on non-duty, non-pay status pursuant to Article 16.7 has been disciplined. The Postal Service insists that this action is essentially investigatory or administrative in nature and cannot properly be viewed as discipline.

Article 16 establishes a comprehensive discipline system for postal employees. Section 1 identifies some basic disciplinary principles, for instance, that discipline should be "corrective" rather than "punitive" and that discipline can be imposed only for "just cause." Section 2 states that when an employee commits a "minor offense", supervision may "discuss" the matter with him but that such "discussion" shall not be considered discipline. Sections 3, 4 and 5 are the typical levels of discipline - from a letter of warning (16.3) to a suspension of 14 days or less (16.4) to a suspension of more than 14 days or discharge (16.5). Section 6 contemplates an indefinite suspension in a crime situation and is plainly a

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[1] Arbitrator Williams, in granting Burch full back pay in the discharge case, may already have made him whole for the time he was on non-duty, non-pay status under 16.7.

permissible variation in the range of available discipline. Section 7, the subject of this dispute, is an "emergency procedure" which allows Management to place an employee "immediately" on non-duty, non-pay status in certain specified situations. Sections 8, 9 and 10 refer to a necessary internal managerial "review of discipline", a "veteran's preference" in the choice of a forum for contesting discipline, and a statute of limitations as to "employee discipline records."

Given this structure, the strong presumption must be that all of Article 16 relates to discipline. When the parties intended some procedure to be outside the scope of Article 16, to be beyond the disciplinary principles of Article 16, they said so. Thus, Section 2 expressly provides that supervisory "discussions" of the "minor offenses" of employees "are not considered discipline..." No such disclaimer is found in Section 7. Nowhere did the parties state that placement of an employee on non-duty, non-pay status pursuant to Section 7 "is not considered discipline..." Had that been their wish, it would have been a simple matter to write those words into the "emergency procedure."

The employee misconduct which may trigger Management's use of Section 7 is "intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules or regulations." The very same acts of misconduct are cited in Section 1 as constituting "just cause" for discipline. It is difficult to understand the Postal Service view that a suspension for such misconduct is discipline when Management invokes Section 4 or 5 but is not discipline when Management invokes Section 7. The impact on the employee is much the same in all three situations. The employee is taken off of the job against his will and placed on non-duty, non-pay status because of such misconduct. He is denied work and wages. He is punished, that is, suspended, because Management believes he is intoxicated or has stolen something or has ignored safety rules. Indeed, the suspension under Section 7 is more burdensome for the employee because its length is indeterminate and because he may not have been given written notice of the charge against him, conditions which can only serve to heighten his sense of concern.

The Postal Service sees Section 7, the "emergency procedure", as an independent provision unrelated to the typical suspension arrangements found in Sections 4 and 5. However, when one reviews the history of this provision and the overall structure of Article 16, it seems to me that Section 7 should more appropriately be construed as a broad exception to Sections 4 and 5. The "emergency procedure" is,

as those words indicate, a recognition that situations do arise where supervision must act "immediately" in suspending an employee because of immediate risks or dangers which do not allow the more time-consuming procedures of Sections 4 and 5. Thus, Section 7 is a permissible variation from the conventional suspensions contemplated by the parties. But it is a suspension nonetheless, one which must be considered an integral part of the Article 16 "discipline procedure."

My conclusion, accordingly, is that a Section 7 suspension should in appropriate circumstances be regarded as discipline. I emphasize "appropriate circumstances" because of one other significant factor. Not all of the Section 7 situations which prompt Management's use of the "emergency procedure" involve employee misconduct. Management can invoke Section 7 when the employee's retention on the job (1) "may result in damage to...property or loss of mail or funds" or (2) "may be injurious to self or others." These situations may or may not involve employee misconduct. Suppose, for example, an employee drives a postal vehicle on a delivery route and suffers from a physical ailment which is ordinarily kept under control through medication. Suppose further that, notwithstanding the medication, he suddenly loses control and can no longer drive the vehicle safely although he is unaware of this reality. No doubt Management would invoke Section 7 because the employee "may be injurious to self or others." But because there is no real misconduct, he is not subject to discipline. He is placed on non-duty, non-pay status in the interest of safety. The "emergency procedure", in other words, is broad enough to encompass displacement from the job for non-disciplinary reasons.

These observations suggest the answer to the first issue. When Management places an employee on non-duty, non-pay status because of misconduct covered by Section 7, the employee has been disciplined. That would be true of both grievants in this case, Burch and Ferrell. But when Management places an employee on such status for reasons stated in Section 7 which do not involve misconduct, the employee should not be regarded as having been disciplined. With this distinction in mind, I turn to the next issue.

II - Level of Proof Necessary

The Unions assert that any Management action taken pursuant to the Section 7 "emergency procedure" must be supported by "just cause." The Postal Service insists that "reasonable cause" (or "reasonable belief") is all that need be shown.

My response to this disagreement depends, in large part, upon how the Section 7 "emergency" action is characterized. If that action is discipline for alleged misconduct, then Management is subject to a "just cause" test. To quote from Section 1, "No employee may be disciplined...except for just cause." If, on the other hand, that action is not prompted by misconduct and hence is not discipline, the "just cause" standard is not applicable. Management then need only show "reasonable cause" (or "reasonable belief"), a test which is easier to satisfy.

One important caveat should be noted. "Just cause" is not an absolute concept. Its impact, from the standpoint of the degree of proof required in a given case, can be somewhat elastic. For instance, arbitrators ordinarily use a "preponderance of the evidence" rule or some similar standard in deciding fact questions in a discipline dispute. Sometimes, however, a higher degree of proof is required where the alleged misconduct includes an element of moral turpitude or criminal intent. The point is that "just cause" can be calibrated differently on the basis of the nature of the alleged misconduct.

By the same token, "just cause" may depend to some extent upon the nature of the particular disciplinary right being exercised. Section 7 grants Management a right to place an employee "immediately" on non-duty, non-pay status because of an "allegation" of certain misconduct (or because his retention "may" have certain harmful consequences). "Just cause" takes on a different cast in these circumstances. The level of proof required to justify this kind of "immediate..." action may be something less than would be required had Management suspended the employee under Section 4 or 5 where ten or thirty days' advance written notice of the suspension is given. To rule otherwise, to rule that the same level of proof is necessary in all suspension situations, would as a practical matter diminish Management's right to take "immediate..." action.

No generalization by the arbitrator can provide a final resolution to this kind of problem. It should be apparent that the facts of a given case are a good deal more important than any generalization in determining whether "just cause" for discipline has been established.

III - Existence of Notice Requirement

The Unions assert that an employee cannot properly be placed on non-duty, non-pay status under Section 7 without

first being provided written notice of the charge made against him.[2] They contend that because the grievants did not receive such written notice, Management had no right to displace them from their jobs pursuant to Section 7 and they should be paid for the time they were suspended. The Postal Service insists that there is no written notice requirement in Section 7 and that the absence of such notice in this case in no way undermined the propriety of Management's use of the "emergency procedure."

Any analysis of this issue must begin with the suspension rules in Sections 4 and 5. When Management intends to suspend an employee under either of these sections, it must provide him with "advance written notice" of the charge against him. A Section 4 suspension (14 days or less) requires 10 days' written notice during which time the employee remains "on the job or on the clock (in pay status) at the option of the Employer." A Section 5 suspension (more than 14 days) requires 30 days' written notice during which time the employee remains "on the job or on the clock at the option of the Employer." Any suspended employee, even one subject to an indeterminate suspension under Section 7, receives these benefits, according to the language of Section 5, "unless otherwise provided herein." These words acknowledge that a suspended employee could have these notice and pay protections taken away or modified by other provisions of Article 16. That is exactly what happened in Section 7.

When the "emergency procedure" in Section 7 is properly invoked, the employee is "immediately" placed on non-duty, non-pay status. He does not have a right to remain, for any period of time, "on the job or on the clock at the option of the Employer." He suffers an instant loss of pay. In short, the pay protection in Section 4 or 5 is negated by Section 7. The question here is whether the notice protection, the "advance written notice" requirement in Section 4 or 5, is likewise negated by Section 7. Or, to put the question in broader terms, is the employee suspended pursuant to the "emergency procedure" entitled to the "advance written notice" contemplated by Section 4 or 5?

There is no express mention of "advance written notice" in Section 7. Both parties rely on that silence to prove

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[2] The Unions concede that Management may properly displace an employee from his job in an "emergency" and put him on administrative leave. They object, however, to any such displacement pursuant to Section 7 without advance written notice.

their case. The Unions argue that the silence means that the notice requirement of Section 4 or 5 has not been negated by Section 7 and must therefore apply to an employee suspended under Section 7. The Postal Service argues that this silence, when contrasted with the specific notice requirement contained in Sections 4, 5 and 6, means that the parties had no intention of establishing a notice requirement in Section 7.

The critical factor, in my opinion, is that Management was given the right to place an employee "immediately" on non-duty, non-pay status on the basis of certain happenings. An "immediate..." action is one that occurs instantly, without any lapse of time. Nothing intervenes between the decision to act and the act itself. That is what the term "immediately" suggests. If Management were required to provide "advance written notice" of the displacement of an employee under Section 7, it would no longer have the right to respond "immediately." The very purpose of a Section 7 "emergency procedure" is to permit an "immediate..." response by Management. The language of Section 7, by necessary implication, means that no "advance written notice" can be required in a true Section 7 situation. The notice requirement in Section 4 or 5 has indeed been negated by Section 7. Hence, Management's failure to provide such notice to Burch and Ferrell was not a violation of Article 16.

Neither the history of Article 16 nor various Management publications regarding that article convince me that a different result is justified here. There has been a great deal of confusion for years about the meaning of Section 7. That confusion is reflected in the conflicting awards of regional arbitrators.

These findings, however, do not fully resolve the dispute. The fact that no "advance written notice" is required does not mean that Management has no notice obligation whatever. The employee suspended pursuant to Section 7 has a right to grieve his suspension. He cannot effectively grieve unless he is formally made aware of the charge against him, the reason why Management has invoked Section 7. He surely is entitled to such notice within a reasonable period of time following the date of his displacement. To deny him such notice is to deny him his right under the grievance procedure to mount a credible challenge against Management's action. Indeed, Section 7 speaks of the employee remaining on non-duty, non-pay status "until disposition of the case has been had." That "disposition" could hardly be possible without formal notice to the employee so that he has an opportunity to tell Management his side of the story. Fundamental fairness requires no less.

Whether Burch and Ferrell received formal notice of the charges against them is not really clear from the record in this case. Assuming they did, there is no evidence with respect to whether such notice was given within a reasonable period after they were displaced from their jobs. These are fact questions which can best be developed and argued at the regional level. These matters are therefore remanded to Step 3 of the grievance procedure for further consideration.

AWARD

The grievances are remanded to Step 3 of the grievance procedure for further consideration in light of the views expressed in this opinion.

Richard Mittenthal, Arbitrator