REGULAR ARBITRATION

In the Matter of the Arbitration	)	Grievant: Michael Gill
Between	)	Post Office: Airport Station
United States Postal Service	)	Case No.: E11N-4E-D 15025296
And	)	DRT No.: 10-332210
National Association of Letter Carriers, AFL-CIO	)	Union No.: AIR141A14M

BEFORE: ARBITRATOR Joseph W. Duffy

APPEARANCES:

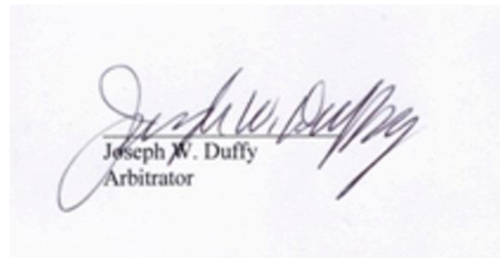
For the U.S. Postal Service:	Timothy M. Felton
For the Union:	Shawn Boyd
Place of Hearing:	Albuquerque, NM
Date of Hearing:	July 10, 2015
Briefs Filed:	None

AWARD:

Date of Award:	July 30, 2015
Panel:	Regular

Award Summary

The arbitrator found that although just cause existed for corrective action the LOW must be reduced to a non-disciplinary official discussion because of the defects in the investigation.



Introduction

The parties submitted this dispute to regular regional arbitration under the National Agreement. The hearing took place at the Postal Facility located at 1135 Broadway Blvd., Albuquerque, NM 87101. At the start of the hearing, the parties agreed that the grievance is properly before me for a final and binding decision on the merits.

The hearing proceeded in an orderly manner. The advocates did an excellent job of presenting the respective cases. Both parties had a full opportunity to call witnesses, to introduce documents into the record and to make arguments. Witnesses were sworn under oath and subject to cross-examination by the opposing party.

The parties introduced three joint exhibits (J1-J3) into the record. A total of three witnesses testified at the hearing, including the grievant, Michael Gill. They were: Supervisor of Customer Service Denise Trujillo, former Acting Station Manager Rana Alexander and Mr. Gill.

Following the testimony, the parties made oral closing arguments and submitted arbitration decisions in support of their positions. After the summations, I closed the record.

Issue for Decision

At Step B, the parties could not agree on a statement of the issue for decision and so I framed the issue based on the parties' proposals. The employer proposed the following:

> Was management within its rights under Article 16 of the National Agreement when Letter Carrier Michael Gill was issued a Letter of Warning for Failure to Follow Instructions?

The union proposed the following:

> Did management violate the National Agreement when the grievant was issued a Letter of Warning that was not for just cause? If so what is the remedy?
>
> Did management violate the National Agreement when the Union, during the Fact Finding/Investigative Interview requested the scope, nature and rule violation that the grievant had committed, in order to have a Pre-investigative interview and management refuse to state neither the nature of the investigation, the violation committed nor the scope of the investigation? If so what is the remedy?
>
> Did management further violate the National Agreement at Article 15, 17 and 31 when information requested by the union was not provided? If so what is the remedy?

Based on the record and the proposals of the parties, I have framed the issue as follows:

> Did the Postal Service have just cause to issue a Letter of Warning dated November 10, 2014 to the grievant for Failure to Follow Instructions? If not, what is the appropriate remedy?

The remaining issue proposals raised by the union will be mentioned in this Opinion and Award, but the central issue in this case is whether just cause existed to issue the Letter of Warning ("LOW").

Background

The grievant, Michael Gill, has been employed by the Postal Service as a Letter Carrier in Albuquerque, NM for twenty-two years. The record shows that prior to 2014, the grievant had a clean disciplinary record. He has also served as a Shop Steward for the union.

On November 6, 2014, the employer conducted a fact finding interview with the grievant, with union representation present. The interview involved certain events that allegedly occurred on October 24 and October 30, 2014. On November 10, 2014, the employer issued a LOW to the grievant charging him with Failure to Follow Instructions on October 24 and 30, 2014.

The union filed a grievance and when the parties reached an impasse at Step B, this arbitration followed.

Discussion

The JCAM contains the following discussion of the term "just cause":

> The principle that any discipline must be for "just cause" establishes a standard that must apply to any discipline or discharge of an employee. Simply put, the "just cause" provision requires a fair and provable justification for discipline. (JCAM, p. 16-1)

The Alleged Misconduct

The LOW issued to the grievant, dated November 10, 2014, describes the charge of Failure to Follow Instructions as follows:

> On October 24, 2014 at approximately 7:40 AM, I observed you away from your case and passing out fliers. I instructed you to return to your case. You did not follow my instructions and continued passing out fliers. On October 24, 2014 at approximately 7:55 AM I observed you again away from your case and passing out fliers. I instructed you a second time to return to your case. You failed to follow the instruction to return back to your case and continued passing out fliers. I observed you a third time that same morning passing out fliers and I instructed you to return to your case. After the instruction was given the third time you finally returned to your case.

> On October 30, 2104 at approximately 8:24 AM you yelled “Hey old Geezer” on the work room floor. After you yelled the second time “Hey Old Geezer” I went to your case and instructed you to stop yelling “Old Geezer” across the work room floor. When I walked away from your case area, you yelled “Hey Old Geezer” again and also said “What you can’t shut me up. I can talk to my neighbors.” (J2, p. 26)

The Rules Allegedly Violated

The employer cited the following rules that the grievant allegedly violated: 1.) ELM 665.15 – “Employees must obey the instructions of their supervisors….” 2.) ELM 665.16 – “Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorably upon the postal service….” 3.) M-41 Section 112.25 - “Be prompt courteous and obliging in the performance of duties. Attend quietly and diligently to work and refrain from loud talking and the use of profane language.” (J3)

No dispute exists that the rule requiring compliance with the reasonable and lawful instructions of supervisors is a reasonable rule and the grievant had knowledge of the rule. Therefore, failing to follow the instructions of a supervisor, if proven, is a basis for disciplinary action.

The Investigation

The investigation in this case had significant defects. First, although probably twenty-five to thirty employees were present in the workroom on both October dates, the employer did not obtain statements from or interview any of those employees. Ms. Trujillo testified that she saw the events with her own eyes and therefore did not need to obtain any statements from employees. Although her conclusion may be based on a sincere belief in her observation skills, corroboration through other disinterested observers strengthens eyewitness evidence in an arbitration. In addition, eyewitness testimony has limitations. The ability of individuals to perceive, to remember and to recount events can be greatly influenced by emotional responses to the situation or, at times, to pre-conceived ideas about people or events. A leading textbook on labor arbitration contains the following:

> Eyewitnesses can tell conflicting stories because they confuse what they saw with what they believe happened. Or they can have motives that lead them to forget parts of what they saw happen. (Brand & Biren, *Discipline and Discharge in Arbitration, 2nd Ed.*, p. 8 (ABA; 2008)

More importantly, the fact finding interview did not comply with ordinary standards for conducting a fact finding. A supervisor would not conduct a fact finding unless the supervisor had confidence that something occurred that needed further investigation. Nevertheless, the fact finder must approach the process with an open mind in an effort to find the facts, not to confirm pre-conceived conclusions. Questions must be structured in a way to elicit information about the events in question in an objective manner.

In this case, the questions posed to the grievant in the investigative interview asked for confirmation of conclusions already reached rather than asking the grievant questions designed to bring out the details of his version of what happened on the two days in October.

For example, the first question asked was as follows:

> On 10/24/2014, I noticed you were away from your case and handing out fliers. I instructed you to return to your case, and you did not return to your case. Why did you fail to follow my instructions when I asked you to return to your case the first time? (J2, p. 37)

The first problem with this question is that it does not conform to Ms. Trujillo's own testimony about what happened. Ms. Trujillo testified that soon after the grievant clocked in at 7:30 a.m., she saw the grievant "hand Connie Burns a flyer." In addition, the question is prefaced by several assertions of fact, without any attempt to first confirm whether or not the grievant agrees with the assertions. And, the question assumes that the grievant failed to follow instructions without leaving any room for the possibility that another version of events might be possible.

An effective fact finding interview can be constructed in a variety of ways and no set formula for the ideal interview exists. Ms. Trujillo, however, could have better accomplished her objective of obtaining the grievant's version of events by asking such questions as the following: 1.) Did you pass out flyers while on the clock on October 24? 2.) Why? 3.) How many flyers did you pass out? 4.) Did you hand a flyer to Connie Burns at about 7:40 a.m. 5.) Did I instruct you not to hand out flyers while on the clock after you gave the flyer to Ms. Burns? 6.) Did you give a flyer to Michael Brill at about 7:55 a.m. near case 661on October 24? 7.) Was that after I had previously instructed you not to hand out flyers on the clock? 8.) Did I again instruct you not to hand out flyers while on the clock? 9.) A little later were you again away from your case with a flyer in your hand? 10.) Did I give you a direct order not to pass out flyers while on the clock?

11.) Were you on union time at any time on the morning of October 24? 12.) If so, from when to when?

The questions for October 30 followed a similar pattern of stating assertions of fact and then asking a question that assumed the alleged misconduct conformed to the asserted facts without making any attempt to test her conclusions. For example, Ms. Trujillo asked:

> After I walked away you also said "What you can't shut me up. I can talk to my neighbors." This is very disruptive behavior to the work room floor. Why are you being disruptive on the work room floor? (J2, p. 39)

The way that Ms. Trujillo posed the questions put the grievant in an impossible position in that he had to cooperate in the interview yet he was being asked to address questions that were not really fact finding questions but were assertions of fact followed by a question that assumed that the asserted facts were true and that misconduct occurred.

The investigation did not meet the most basic standards of just cause.

The Alleged Misconduct

October 24, 2014

Concerning October 24, Ms. Trujillo testified she saw the grievant hand a flyer to Ms. Burns and Ms. Trujillo instructed the grievant not to hand out flyers while on the clock and told him to return to his case. She testified that shortly thereafter on the morning of October 24 she saw the grievant pass a flyer to Mr. Brill by hiding the flyer under an empty tub. She testified she again told him not to pass out flyers and to return to his case. She testified that soon after she saw him again away from the case with a flyer in his hand, and she instructed him to return to his case and not pass out flyers while on the clock.

The grievant testified that he was following his flow chart after he clocked in at 7:30 a.m. on October 24. He testified that he called Ms. Burns over and he handed her a flyer and they had a short conversation. He testified that Ms. Trujillo told him not to hand out flyers and to go back to his case. He testified that he was in the process of going out to check his vehicle and so he did that prior to returning to his case, but he did not hand out any more flyers.

The grievant testified that later in the morning he took an empty tub to where the tubs are stored near the case for Route 661. He testified that the Carrier assigned to Route 660, Hector Delgado, asked the grievant what had occurred between the grievant and Ms. Trujillo. The Grievant testified that, as he talked with Mr. Delgado, Ms. Trujillo came up and told the grievant

not to pass out flyers. He testified he told Ms. Trujillo he wasn't and he then went back to his case. He testified that at no time later did he have a flyer in his hand ready to hand it out as Ms. Trujillo asserted.

No other witness besides Ms. Trujillo and the grievant testified to the events of October 24. Therefore, I have to assess the credibility of the testimony of the two witnesses who testified. Such credibility judgments are among the most difficult decisions an arbitrator has to make. When different people give opposing and directly conflicting testimony about the same events no method exists to determine with absolute certainty which testimony should be believed. (see Mittenthal, Richard, *Proceedings of the National Academy of Arbitrators, 1979*, p. 61-74; and see Hill and Sinicropi, *Evidence in Arbitration,2nd Ed.*, Ch.8, p. 108 (BNA Books; 1987))

Arbitrator Fleming wrote the following comment on the difficulty of making credibility judgments:

> Arbitrators are not equipped with any special divining rod which enables them to know who is telling the truth and who is not where a conflict in testimony develops. They can only do what the courts have done in similar circumstances for centuries. A judgment must finally be made, and there is a possibility that the judgment when made is wrong. (*General Cable Co.*, 28LA97, 99 (Fleming; 1957)

In situations like this one, employers often contend that the supervisor lacks an incentive to fabricate and the grievant has a clear incentive to deny the charges. Therefore, the theory is that these conflicting incentives weigh in favor of the credibility of the supervisor over the grievant. Unions, however, generally argue in cases like this one that the supervisor has an incentive to prove at the arbitration that his/her statements were true. Unions often argue that witnesses sometimes become captives of statements they made in the early stages of an investigation that may have been exaggerated. Therefore, unions argue that the interests of both the grievant and the supervisor are equal and the employer's case therefore fails because the employer cannot meet its burden to prove that one is more credible than the other.

Arbitrator Mittenthal wrote the following on this subject:

> Arbitrators find this kind of case perplexing. We recognize that the foreman has no interest in making the charge in the first place unless the misconduct has actually occurred. We know this reality is not diminished by the foreman's interest at the arbitration hearing in proving that his initial charge was correct. We hence tend to side with management, for if interest is the only available means of comparing witness credibility, the foreman will appear more

> convincing. His word will frequently prevail. Unions have harshly criticized arbitrators for accepting the foreman's word over the employee's word.
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> A number of comments seem appropriate. First, the employee who denies wrongdoing has a clear interest in avoiding punishment. That interest, by itself, is no basis for discrediting his testimony. But it does serve to weaken his credibility just as the foreman's lack of interest serves to strengthen his credibility. The real issue becomes one of relative credibility. Only if the foreman's credibility is substantially greater than the employee's should management win. Interest alone may tilt the scales in some cases but not in others. There are, after all a myriad of factors to be evaluated in each dispute. Not the least of them is the arbitrator's own intuitions, his feelings about the evidence, the arguments, and the very texture of the case. What must be avoided is an uncritical adoption of interest as a decisive factor in the close case, for that would mean that the foreman's accusation would always prevail over the employee's denial. (*Credibility—A Will-"O-the-Wisp*, 1978 Proceedings of the National Academy of Arbitrators, p. 61, 68)

In my judgment, the evidence presented does not meet the employer's burden to prove that the grievant engaged in misconduct on October 24. A more careful investigation might have produced a different result, but this evidence is not sufficient to establish that the supervisor is substantially more credible than the grievant. If the investigative interview with the grievant had been conducted differently, the interview would have revealed that the grievant had a different version of what happened. Essentially, then, the situation after the investigative interview would be a "he said/she said" situation and the next step would be to investigate further to try and find corroboration for one or the other version of events. No further investigation occurred, however.

<u>October 30, 2014</u>

Concerning October 30, 2014, some background information is helpful. Chuck Araiza was a Letter Carrier until he retired in 2015. He worked at Highland Station when the grievant started there with the Postal Service and the grievant testified they have been friends and have worked together for twenty years. Mr. Araiza is in his eighties and had about fifty-five years of service with the Postal Service, making Mr. Araiza the most senior Carrier in Albuquerque. The grievant testified that friendly banter often occurred among the grievant, Mr. Araiza and other Carriers. The grievant testified that other Carriers and the grievant referred to Mr. Araiza sometimes as "old geezer" and Mr. Araiza was not offended by the term. The dictionary defines

"geezer" as a term used to refer to an elderly man and also as a term used to describe an odd or eccentric person.

The investigation concerning October 30 had similar problems to the investigation related to October 24. The manner in which the questions were asked did not elicit the grievant's version of events. For example, the first question asked about October 30 was the following:

> On October 30, 2014, at 8:24 a.m. you were yelling out Hey Old Geiser, while at your case. After the second time I went over and told you to stop yelling Old Geiser. Then when I walked away, you said Hey Old Geiser again. It was loud enough that I could hear it at the supervisor's desk. Why did you fail to follow my instructions and continue yelling out Old Geiser? (J2, p. 39)

In his testimony at the hearing, the grievant stated that on October 30 he had not seen Mr. Araiza at the beginning of the day. He testified that when he walked by Mr. Araiza's case he said "Good morning old geezer." He testified that Ms. Trujillo told him to stop saying old geezer. He testified that as he again passed by Mr. Araiza's case, which is near Ms. Trujillo's desk, Mr. Araiza asked the grievant what Ms. Trujillo said to him. The grievant testified that he told Mr. Araiza that Ms. Trujillo said don't call you old geezer. Ms. Trujillo again told the grievant to stop saying that. The grievant testified she said that even if Mr. Araiza is okay with it, she finds the term offensive.

The LOW states, and Ms. Trujillo testified to, the following:

> When I walked away from your case area, you yelled "Hey Old Geezer" again and also said "What you can't shut me up. I can talk to my neighbors." (J2, p. 26)

The grievant testified he did not make the above-quoted statements.

Ms. Alexander wrote some notes dated 10/20/2014. The notes included the following:

> Denise Trujillo had just instructed Mike Gill to not yell out Old Geiser, he said it again, as she walked away from his case. I could hear it at my desk, and Denise went to him and stated he will be having a fact finding. Denise said stop saying that, and he said what I didn't yell it out. Denise again told him to stop. Denise walked away again.
>
> Mike Gill then said "What you can't shut me up. I can talk to my neighbors." (J2, p. 40)

Ms. Alexander's statement and her testimony at the hearing corroborate Ms. Trujillo's allegation that the grievant yelled "Hey Old Geezer" again after she instructed him not to do so and the grievant said to Ms. Trujillo "What you can't shut me up. I can talk to my neighbors." I have therefore resolved the credibility issue on this point in the employer's favor.

The record shows that Ms. Trujillo gave the grievant an instruction and he failed to follow it. Failure to follow instructions is a serious offense. If the grievant felt that Ms. Trujillo's instructions were improper, then the appropriate action for him to take was "comply now, grieve later". (ELM 665.15) The fact that he is a Shop Steward did not immunize him from the requirement to follow the "comply now, grieve later" rule.

Conclusion

The record shows that the grievant failed to follow the supervisor's instructions on October 30. The investigation in this matter, however, was fatally flawed. The grievant did not receive due process by the manner in which the interview questions were posed to him in the investigative interview. In addition, both the thoroughness and the objectivity of the investigation are open to question.

Based on all the circumstances, I find that, although just cause existed for corrective action, the LOW must be reduced to a non-disciplinary official discussion because of the defects in the investigation.

The union contended that at the beginning of the November 7 fact-finding interview Mr. Pratt requested "the scope, nature and rule violation that the grievant had committed, in order to have a Pre-investigative interview and management refuse to state neither the nature of the investigation." (J2, p. 93) Ms. Trujillo testified that the interview was a fact finding and since there were no charges as yet, she could not state to the union what the charges were. She testified that she told Mr. Pratt that the fact-finding would focus on incidents that occurred on October 24 and 30. The JCAM states that: "Employees also have the right under *Weingarten* to a pre-interview consultation with the steward." (JCAM, p. 17-7) That right, however, does not extend to full disclosure prior to the fact finding interview of all the facts that the employer has in its possession. Ms. Trujillo testified that she gave the grievant and Mr. Pratt five minutes to confer prior to the start of the interview and she provided Mr. Pratt with the list of questions at

the beginning of the interview. Because of my ruling on the LOW, I do not believe any finding on this issue is warranted.

The record in this case does not identify the information that was not received or how any information not received prejudiced the union's ability to process the grievance and defend the case in arbitration. When asked about the information request during his testimony at the hearing, the grievant stated that he received seven pages of information, but he did not identify the information he did not receive or indicate how his defense was impeded by information that was not produced. Therefore, no action is appropriate concerning the alleged failure to respond to an information request.

Many other issues were brought up during the grievance procedure in this case, but the focus here is on the LOW for Failure to Follow Instructions.

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