

C-29327

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration)	Grievant: Graland Rogers
	(
Between)	Post Office: Fort Worth, Texas
	(
UNITED STATES POSTAL SERVICE)	USPS Case No: G06N-4G-D 10360352
	(
And)	NALC Case No: 2261075D
	(
NATIONAL ASSOCIATION OF LETTER CARRIERS UNION,)	
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BEFORE: PETER J. CLARKE, Arbitrator

MAR 17 2011

APPEARANCES:

For the U.S. Postal Service:	Raquel T. Castillo, Labor Relations Specialist
For the Union:	Shawn Boyd, NALC Advocate

Kathy Baldwin
National Business Agent
N.A.L.C.
Dallas Region #10

Place of Hearing: Fort Worth, Texas

Date of Hearing: February 9, 2011

Date of Award: March 11, 2011


Relevant Contract Provisions: Articles 16.1 & 19, ELM 511.41, 511.43, 515.43, 665.15 & 665.42

Contract Year: 2006-2011

Type of Grievance: Removal

Award Summary:

The grievance is sustained. The Notice of Removal (NOR) was written in a manner that it could not be reasonably determined whether the Grievant's protected Family and Medical Leave Act (FMLA) absence was part of the basis for the removal. As the Grievant was afforded protection under Federal law and the National Agreement for FMLA leave, the NOR's unambiguous language had to indicate that the Grievant was not penalized for taking FMLA leave. That did not happen and the removal could not be upheld.


PETER J. CLARKE
Arbitrator

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NALC HEADQUARTERS

ISSUE

Whether the Postal Service had just cause to issue the Grievant a Notice of Removal for Unsatisfactory Attendance? If not, what shall the remedy be?

STATEMENT OF THE CASE

The hearing opened as scheduled on February 9, 2011 at 9:00 a.m. at the Ft. Worth, Texas Postal facility located at 4600 Mark IV Parkway. The parties submitted a Joint Exhibit (JX-2) containing 135 pages. The Postal Service also submitted one exhibit (MX-1). Both parties were afforded time for opening, direct and cross-examination of witnesses and closing arguments. The proceedings were taped to ensure the accuracy of the record.

RELEVANT CONTRACT PROVISIONS

Based on the facts adduced at the hearing, the Arbitrator has determined that the relevant contract provisions are the following:

Article 16.1 of the National Agreement provides that "...No employee may be disciplined or discharged except for just cause..."

Article 19 incorporates into the National Agreement, "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 the [National] Agreement."

Section 511.41 (Unscheduled Absence-Definition) of the Employee and Labor Relations Manual (ELM) provides, "Unscheduled absences are any absences from work that are not requested and approved in advance."

Section 511.43 (Employee Responsibilities) of the ELM states, "Employees are expected to discharge to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required."

Section 515.43 (Authorized Hours) of the ELM provides, "Eligible employees are entitled to 12 workweeks per leave year of FMLA-protected absences."

Section 665.15 of the ELM states, "Employees must obey the instructions of their supervisors."

Section 665.42 of the ELM states, "Employees failing to report for duty on scheduled days, including Saturdays, Sundays, and holidays, will be considered absent without leave except in actual emergencies which prevent obtaining permission in advance."

RELEVANT FACTS

The Grievant is a thirteen-year Postal employee and a Letter Carrier at the Seminary Hill Station in Fort Worth, Texas. He was absent on Family and Medical Leave (FMLA) beginning on March 15, 2010. His FMLA leave was exhausted on April 27, 2010. Following the exhaustion of his FMLA leave, the Grievant remained out of work prompting the Postal Service to send him an absence inquiry (AI) letter on April 27, 2010. JX-2 at 115-117. The Grievant failed to respond to the AI and on May 11, 2010 a letter was sent to the Grievant to report for an Investigative Interview (II) on May 17, 2010. JX-2 at 118-119. The Grievant responded to that letter on May 12, 2010 and stated he was having mental issues and would return to work on May 17, 2010. However, also on that day, the Grievant's physician faxed a letter to the Postal Service that indicated that the Grievant was hospitalized and would not be released until May 21, 2010 and could return to work on May 24, 2010. On May 24, 2010, the Grievant was sent another letter requesting the Grievant's attendance at an II scheduled for June 2, 2010. JX-2 at 120-121. The Grievant's physician faxed another letter dated May 27, 2010, stating that the Grievant was hospitalized and would return to work on June 2, 2010. The Grievant failed to report to work on June 2, 2010 and on June 8, 2010, the Postal Service sent him another letter to attend an II scheduled for June 16, 2010. JX-2 at 122-123. The Grievant failed to attend the II on June 16, 2010. On June 17, 2010, the Grievant contacted his Station and informed Postal management that he had been kicked in the chest by his horse and was seeking medical attention. On June 24, 2010, the Grievant again contacted his Station and informed Postal management that he was still ailing from the kicking incident and would inform Postal management of his medical progress. Finally, on July 28, 2010, the Grievant was issued a Notice of Removal (NOR). The NOR read as follows:

July 28, 2010

Notice of Removal

Graland K. Rogers, EIN: 02275769 CERTIFIED # 7008 3230 0000 5710 4448
517 White Oak Ln AND DELIVERY CONFIRMATION
Burleson TX 76028-6248

You are hereby notified that you will be removed from the Postal Service effective Saturday, September 11, 2010.

The reasons for this action:

Charge: Unsatisfactory Attendance – You are charge with failure to maintain attendance requirements and failure to follow postal rules and regulations regarding leave request.

You are in violation of the following Postal Service rules and regulations:

Section 511.41 of the Employee and Labor Relations Manual states:

“Unscheduled absences are any absences from work that are not requested and approved in advance.”

Section 511.43 of the Employee and Labor Relations Manual states:

“Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required.”

Section 665.15 of the Employee and Labor Relations Manual states:

“Employees must obey the instructions of their supervisors.”

Section 665.42 of the Employees and Labor Relations Manual states:

“Employees failing to report for duty on scheduled days, including Saturdays, Sundays, and holidays, will be considered absent without leave except in actual emergencies which prevent obtaining permission in advance.”

Mr. Rogers, you have been continuously absent and have not reported to work since March 15, 2010, and have used your entire annual and sick leave, and FMLA protected hours. An absence inquiry letter was mailed to your residence

on April 27, 2010. You did not contact the Attendance Control Supervisor, Del Gilliam, as indicated. A letter was mailed to you on May 11, 2010, which was instructing you to report for an Investigative Interview scheduled for May 17, 2010, at 11:00 am. A union representative was made available for this meeting. You contacted us and stated you were having mental issues and would return to work on May 17, 2010, yet you did not report to work. A letter was received from your physician, Robert J. Pitre, stating you were hospitalized and could return to work on May 24, 2010. You did not report to work on May 24th; therefore, we sent you a letter on May 24th scheduling you again for an Investigative Interview for June 2, 2010 at 11:00 am. You did not appear for this meeting. Your physician faxed a letter which we received on June 2, 2010, stating that you were hospitalized and would return to work on June 2, 2010.

You did not report to work on June 2nd; therefore, a third letter was mailed to you scheduling an Investigative Interview for June 16, 2010. You contacted our office on June 16th and stated you had been kicked in the chest by one of your horses and you would be going to the doctor that week to see if you would be released. On June 24th, 2010, you contacted us and stated that you were still injured from the horse kick and would let us know of your progress. Mr. Rogers, you have been released by your physician to come to work by June 2, 2010. No other medical documentation has been provided to justify your absence.

The Postal Service cannot operate efficiently when its workforce cannot be dependent upon to report for work as schedule. You are expected to regular in your attendance, but you have failed to meet Postal Service expectations. Furthermore, adhering to Postal Service rule and regulations condition of employment and is not optional. Your continued failure to maintain attendance requirements provides the Postal Service just cause for your removal.

* * *

_____/s/_____
Jorge Galvan
Supervisor, Customer Services

A grievance was filed contesting the removal. Having no resolution at the lower grievance levels, this matter was appealed to arbitration to be heard by this duly appointed arbitrator.

DISCUSSION AND OPINION¹

Postal Service's Position

The Postal Service argues that the Grievant has been placed on notice several times regarding the requirements of regular attendance for postal workers yet he has felt that he can play the system and choose when he would like to report to work. The Grievant, just as all employees of the Postal Service, is required to maintain the attendance requirements of his position as well as to follow rules and regulations regarding leave requests. The Grievant has been absent from work for over three months straight. On April 27, 2010, Mr. Dale Gilliam, Attendance Control Supervisor, mailed the Grievant a letter instructing him to provide documentation for his absence. No documentation was submitted nor did the Grievant contact Mr. Gilliam as instructed in the letter; therefore, Mr. Gilliam sent a letter for an Investigative Interview (II) to be held May 17, 2010. This letter specifically instructed the Grievant to contact Kaye Nolen, Manager of Seminary Hills, the station where he worked, and provide documentation to support his absence. He provided documentation stating he could not return until May 24, 2010. Thereafter, the Grievant failed to report and he failed to call Postal management to inform them that he would not be returning on May 24, 2010. As a result, a second II was set up for June 2, 2010. The Grievant provided documentation stating that he could return on June 2, 2010. Once again he failed to appear and failed to inform Postal management that he would not report as per his documentation. On June 8, 2010, when Postal management did not hear from the Grievant, a third letter was mailed to the grievant setting up a third II for June 16, 2010. Once again the Grievant failed to appear and he failed to inform Postal management that he would not be returning to work. He submitted no documentation covering his absence since June 2, 2010. On June 17, 2010, a day after his II was scheduled, he called Kaye Nolen and informed her that he had been kicked in the chest by one of his horses and was going to the doctor. She instructed him to provide documentation to support his absence since June 2. No documentation was provided.

Postal management was never provided any documentation to support the Grievant's

¹ Even though some arguments of the parties may not be listed or discussed, the Arbitrator considered all of the parties' contentions before rendering this decision.

absence after June 2, 2010. Postal management worked with the Grievant, giving him several opportunities to provide documentation and allowing him the opportunity to explain his absence and his failure to follow the instructions given to him on all the letters mailed to him. The Postal Service cannot afford to employ an employee who does not care about his job as the Grievant clearly has demonstrated. ELM Section 665.41 clearly states, "Employees are required to be regular in attendance." This means to be regular in reporting to work not regular in failing to report to work. This portion of the ELM does not read employees can be regular if they choose or employees might be regular in attendance. No it reads required – to command, to demand as necessary or essential. Working and delivering mail is essential to the survival of the Postal Service. The Postal Service cannot work efficiently when its workforce is undependable.

The Postal Service will show that the Grievant is clearly aware of his responsibilities and his attendance history will clearly reveal that he is not willing to fulfill these duties and responsibilities as a Postal employee. Contrary to the Union's inferences, the Postal Service had just cause to issue the Grievant a Notice of Removal in accordance with the National Agreement. Postal management exercised their exclusive rights, as afforded in Article 3C, 3D and 3E of the National Agreement, "To maintain the efficiency of the operations entrusted to it; To determine the methods, means, and personnel by which such operations are to be conducted; and To take whatever actions may be necessary to carry out its mission in emergency situations." The Union will try through various means to manipulate the information relied upon in order to sway the Arbitrator that there was not just cause for this removal. The Union will try and drill in that the discipline is not progressive yet the Grievant was AWOL several times and has been absent from duty over three months. With these actions it is clear that the level of discipline applied was appropriate. It is therefore respectfully requested that the grievance be denied and dismissed in its entirety.

Union's Position

The Union counters that the burden of proof is on the Postal Service to show just cause existed for removal of the Grievant and that the discipline was corrective in nature, rather than punitive as outlined in the JCAM and National Agreement. The Union believes that the Postal Service did not establish just cause for the removal for the charge of "Unsatisfactory

Attendance” and also that ELM 515, which covers FMLA provisions, was violated.

The Union acknowledges that the Grievant did miss a number of days due to an FMLA covered condition and a traumatic injury. The Postal Service failed to list specific time periods in the NOR; therefore, the Union can only speculate that the time period in issue covers March 15, 2010 through July 16, 2010 (when some form of discipline was requested). *See* JX-2 at 111-112. Nevertheless, part of this time period includes FMLA protected leave according to the Postal Service’s own internal records (from March 15, 2010 through April 27, 2010). *See* JX-2 at 24-25. In accordance with the Federal Law, any FMLA condition that requires an employee to use leave is protected leave. It was improper to include any FMLA leave and the union will show through testimony and the case file that management did use FMLA protected leave in a disciplinary action for removal. This is a violation of Federal Law. If a letter of charges is a foundation for going forward with discipline, those charges should be corrected. Using FMLA leave for discipline was incorrect and the Service was made aware of this at the early stages of the grievance process.

The Grievant’s absence from April 27, 2010 through June 2, 2010 was due to a documented serious medical condition, and finally his absence from June 4, 2010 through August 9, 2010 was the result of a traumatic injury involving his horse. In addition, when documentation was requested the Grievant complied and called in the ERMS absence system and called his managers. The Grievant did not fail to keep Postal management informed about his medical condition and recovery as the Postal Service argues.

Furthermore, the discipline action was not taken in a timely manner and Postal management could have issued a lesser form of discipline for the first occurrence of Unscheduled leave Without Pay and progressively built a case against the Grievant while also trying to correct the situation. That was not done and therefore the discipline was punitive in nature and not corrective as called for by Article 16.1 of the National Agreement. This provision of the National Agreement is mandatory. It is not discretionary. Postal management does not have the choice as to whether it will issue corrective discipline. It must ensure that any discipline issued is corrective. Importantly, no previous discipline was cited by the Postal Service against the Grievant in the NOR. Based on all these reasons, the Union requests that the grievance get

sustained and the NOR expunged from all files and records, and that the Grievant be made whole in all respects.

Analysis

This grievance involves whether the Grievant's attendance provides just cause to remove him. The Postal Service contends that the Grievant's attendance record speaks for itself and reveals that he was absent without proper documentation for over three months. The Union, on the other hand, argues, among other things, that the Postal Service cites a time period that includes FMLA protected leave as part of the basis for the removal. Based on a careful review of the evidence, the grievance is sustained for the reasons stated below.

The Notice of Removal

The NOR is the charging document for a removal. As such, the NOR must provide the Grievant with adequate notice of the factual and contractual basis for the removal to enable the Grievant to present a defense. Such requirements are based on fundamental due process principles, which mandate that an accused receive notice of the charges levied against him and an opportunity to present a defense of those charges, among other things. This Arbitrator recently compared an NOR to an indictment in a criminal matter. See H06N-4H-D 10203450 at 11 (2010) (citing H06N-4H-D 10130368 (2010)). In that grievance, this Arbitrator held,

The NOR was analogous to an indictment in a criminal matter in that it was supposed to give notice to the Grievant about the specific charges levied against him to enable him to present a defense. An indictment has two components, the factual basis and the legal basis. If either component to the indictment was inaccurate or omitted entirely, a criminal defendant cannot be found guilty of the charge(s) for which the indictment was brought. Similarly, the NOR was the charging instrument for the removal and, as such, had to comport with due process principles by indicating the factual and contractual bases for the removal. That was not done in the instant case.

H06N-4H-D 10203450 at 11. In that grievance, the Postal Service failed to include what contractual provisions the grievant's actions allegedly violated. The grievance was sustained for due process reasons because the grievant was provided inadequate notice of the charges for the removal. *Id.* at 12.

In the instant grievance, the NOR stated the following:

Mr. Rogers, you have been continuously absent and have not reported to work since March 15, 2010, and have used your entire annual and sick leave, and FMLA protected hours. An absence inquiry letter was mailed to your residence on April 27, 2010.

(Emphasis added).

The crux of the Union's argument is that the wording of the NOR regarding the time period of the Grievant's absence includes FMLA protected leave. This Arbitrator agrees. The phrase, "you have been continuously absent and have not reported to work since March 15, 2010..." serves as a point of reference regarding the beginning of the Grievant's absence that the Postal Service believes is unsupported by documentation. This conclusion is buttressed by the next sentence where the Postal Service writes, "An absence inquiry letter was mailed to your residence on April 27, 2010." This second sentence indicates that because of the absence beginning on March 15, 2010, the Postal Service was forced to send the Grievant an absence inquiry letter on April 27, 2010. This is the most logical conclusion drawn from this language because the absence inquiry could only cover absences that happened preceding its issuance, not subsequent to it and the only absence cited by the Postal Service prior to April 27, 2010 began on March 15, 2010. Unfortunately for the Postal Service, up until April 27, 2010, the Grievant qualified for FMLA protected leave and was in fact on such leave between March 15, 2010 and April 27, 2010. The record clearly supports this conclusion. *See* JX-2 at 24-25. Moreover, the Postal Service never qualified this statement or put it into context anywhere else in the NOR so it was left alone for interpretation. Had the Postal Service qualified it as a point of illustration and carefully acknowledged that such leave was not the reason for the removal because it was FMLA protected, then its inclusion would have been harmless. The Postal Service argues that it qualified the inclusion of March 15, 2010 by adding, "...And have used your entire annual and sick leave, and FMLA protected hours." This argument must fail because this statement does not clearly relate to the previous reference to March 15, 2010 and could easily be construed as relating to a time period prior to March 15, 2010. **It is the Postal Service who authors the NOR and therefore bears the burden to carefully draft the language in the NOR so as to best apprise the Grievant of his wrongful behavior. Any ambiguity as to the meaning of the language in the NOR will be strictly construed against the Postal Service. Therefore, in the absence of clear and**

unambiguous language, the NOR as written violated the Grievant's due process rights and is void.

AWARD

For the foregoing reasons, the grievance is sustained. The Grievant shall be reinstated and shall be entitled to back pay at the straight time. He shall also be entitled to have his seniority and benefits fully restored.

March 11, 2011

PETER J. CLARKE
Arbitrator