

Regular Arbitration Panel

In the Matter of the Arbitration)	
)	
between)	Grievant: Montgomery
)	
United States Postal Service)	Post Office: Jacksonville, FL
)	
and)	USPS Case No: G11N-4G-D 16041038
)	
National Association of Letter Carriers, AFL-CIO)	NALC Case No: JX53-1502-15-D
)	
)	DRT No: 09-356529

Before: Roberta J. Bahakel, J.D., Arbitrator

Appearances:

For the U.S. Postal Service:	Mr. Greg Holland
For the Union:	Mr. Robert Covino
Place of Hearing:	Jacksonville, FL
Date of Hearing:	April 7, 2016
Date of Award:	May 4, 2016
Relevant Contract Provision:	Article 16
Contract Year:	2011 - 2016
Type of Grievance:	Discipline

Award Summary:

The Grievant was placed on Indefinite suspension following her arrest. Based on the testimony and evidence presented at the hearing, the grievance is sustained.



Roberta J. Bahakel

BACKGROUND

The Grievant, Ms. Montgomery, has been a letter carrier in Jacksonville for approximately 10 years and is currently assigned to the Lake Forest station. On November 3, 2015 she was arrested in a domestic dispute when she allegedly shot her ex-boyfriend in the leg. There had been no resolution of her case at the time of the hearing. The Grievant was jailed on November 3 and 4, 2015. On November 3rd the Grievant was scheduled to work, but because the police took her cell phone she was unable to call in. Her mother went by the station that day and spoke with the Grievant's supervisor, Ms. Norris, and told her the Grievant had been arrested. The Grievant was also off work on November 4th because she was still in jail. On Friday, November 6, 2015 the Grievant went into the station around 5:30 a.m. and spoke with manager Smith. The Grievant testified that she told Smith what had happened and showed him the tracking device she was required to wear. Smith testified that he talked with the Grievant about returning to work, but that she did not tell him why she had been arrested.

The Grievant returned to work and delivering her route on November 6, 2015. Sometime shortly after returning to work the Grievant reported to Smith that she had seen her ex boyfriend, Mr. Sherrer, while she was on her route and that she was concerned that he was stalking her. Smith went out on the Grievant's route for several days to see if he saw Mr. Sherrer. Smith testified that he never saw Sherrer while he was out on the Grievant's route. Smith contacted the postal inspectors to inquire if he was doing what needed to be done in such a situation. He was later informed that the Grievant had been arrested for shooting Sherrer on November 3, 2015 and was provided with the arrest and court records that were a result of the incident. The records showed that the Grievant had been arrested for Battery with a Deadly Weapon, a felony that carries a term of imprisonment up to 15 years. On November 17, after receiving this information, Smith testified that he went out to the Grievant's route and placed her on Administrative leave while he investigated the matter. Smith later conducted a fact finding interview with the Grievant, during which the Grievant stated only that she did not invite Sherrer to her house and that since she didn't have counsel yet she wasn't sure that she could tell him

anything. Management issued the Grievant an Indefinite Suspension under Article 16.6 of the National Agreement on November 23, 2015. This grievance followed

ISSUE

Did Management have just/reasonable cause to issue the Grievant a Notice of Indefinite Suspension - Crime under Article 16.6 of the National Agreement? If not, what is the appropriate remedy?

CONTRACT PROVISIONS

ARTICLE 16

DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilfer- age, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Section 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 and can be justified. 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 for the entire period of the indefinite suspension.

C. If after further investigation or after resolution of the criminal charges against the employee, the Employer determines to return the employee to a pay status, the employee shall be entitled to back pay for the period that the indefinite suspension exceeded seventy (70) days, if the employee was otherwise available for duty, and without prejudice to any grievance filed under B above.

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 of this Article.

DISCUSSION

I have reviewed the testimony and evidence presented at the hearing and considered the closing arguments of the parties. No issue was raised as to the arbitrability of this matter, therefore it is properly before me for decision.

Management contends that it had reasonable cause to issue the Grievant an Indefinite Suspension in that the evidence, arrest records, court records, and a judge's finding of probable cause to detain were sufficient to give Management a reasonable belief that the Grievant was guilty of a crime for which a term of imprisonment can be imposed. Management also argues that in August of 2015 there was another incident with the Grievant and her ex boyfriend where, while on the clock and in a postal vehicle, the Grievant assaulted Sherrer and was arrested. It is Management's position that this prior, similar instance provides a nexus between

the Grievant's off duty actions and the Grievant's employment with the Postal Service. Management argues that the Grievant is out on her route unsupervised and that it feels it cannot trust that she will not be involved in another incident.

The Union argues that Manager Smith violated the Grievant's due process rights when, as written in his timeline of events, he went out to the route and suspended the Grievant on November 17, 2015, which was prior to any fact finding held with the Grievant. The Union contends that it doesn't matter that the Grievant was placed on administrative leave instead of LWOP, the Grievant was taken off the job before Management gave her a chance to tell her side of the story, thereby violating her due process rights. The Union further contends that Management did not have reasonable cause to believe that the Grievant was guilty of a crime for which a sentence of imprisonment could be imposed because Management relied solely on the statements in the arrest record when it issued the Indefinite Suspension. The Union also argues that there was no nexus between the Grievant's actions and her work, in that the Grievant was not on the job or in her postal uniform at the time of the incident, nor was the arrest published in the media. The Union argues that nothing in the incident demonstrates a nexus to the Postal Service, therefore the grievance should be sustained.

The evidence presented at the hearing showed that the Grievant had experienced domestic issues prior to the shooting incident on November 3, 2015. The evidence showed that the Grievant was involved in an altercation with her ex-boyfriend, Mr. Sherrer, in August of 2015. After that incident, where the Grievant was arrested for battery after using her dog spray on Sherrer, the Grievant petitioned for and was granted a Domestic Violence Protective Order against Sherrer. On September 14, 2015 this protective order was extended by the Court until December 14, 2015. Accordingly, this Protective Order was in effect at the time of the November 3, 2015 incident which is the basis of this grievance. On November 3, 2015 the police were called to the Grievant's residence by Sherrer, who stated to the police that the Grievant had invited him to her home for sex and then shot him in the leg. The police did not question the Grievant because she asked for her attorney. The police searched the Grievant's home and found a revolver in the home with one spent casing. Based on this the Grievant was arrested and charged with Aggravated Battery -Domestic - With a Deadly Weapon which is a second degree

felony. If convicted of this charge the Grievant could face imprisonment. When she was arrested the Grievant's cell phone was taken by the police so she asked her mother to go to the post office and tell her supervisor why she would not be at work. The Grievant's mother talked with supervisor Norris on November 3, 2015 and told her the Grievant had been arrested and would not be in to work for a couple of days. The Grievant did not report for work on November 4, 2015 because she was still in jail. On November 6, 2015 the Grievant came in early to talk with Manager Smith. The Grievant testified that she told Smith that she had been arrested and showed him her ankle bracelet. Smith testified that he did talk with the Grievant on the morning of November 6, 2015 but that the Grievant only talked about the fact that she was able to return to work. Smith also testified that the Grievant did not mention that she had been arrested and charged with a crime and did not show him her ankle bracelet. The evidence showed that the Grievant returned to work on November 6, 2015.

At some point after the Grievant's return to work on November 6, 2015, the Grievant reported to Smith that she thought that Sherrer was following her on her route. Smith went out on the Grievant's route to see if he could spot Sherrer and contacted the Postal Inspection Service to make sure he was doing what he needed to do in such a situation. As a result of this inquiry Smith testified that he then received information and documentation from the Postal Inspectors which showed that on November 3, 2015 the Grievant had been arrested and charged with a crime for which a sentence of imprisonment could be imposed. Smith testified that this was the first time he was aware of that information. On that day, November 17, 2015, he went out to the Grievant's route and placed her on Administrative leave while he investigated the incident. He held a fact finding interview with the Grievant on November 19, 2015. At that interview Smith asked the Grievant several questions. In regard to the incident itself Smith inquired "The same police report [that showed that the Grievant was arrested] has a narrative that reads that you invited Mr. Omar Sherrer to your house located at [Grievant's address] on November 3, 2015. It continues to read that at some point you approached Mr. Sherrer and shot him in the left thigh. Is this narrative true as I have stated it?" The Grievant's answer to that question was "No, sir" Smith asked her to elaborate and she stated "I don't have

proper counsel thus far and I'm not sure how much I can elaborate on that but I did not invite him to my house".

In the grievance file is an undated timeline of events prepared by Manager Smith. It states as follows:

"Re: Denena Montgomery

11/3/15

Date of incident Failed to report as scheduled

11/4/15

Failed to report as scheduled

11/6/2015 - 11/16/2015

Worked as scheduled

Montgomery communicated to me that she was concerned for her safety and that she felt that her ex was stalking her on the route. I actually went out several days at various times to see if I could witness this person stalking her or at least his presence on her route. I did not see him.

At some point during this week I contacted the inspection service to inquire about my responsibilities concerning carrier security. At this time, I am under the impression that whatever happened away from the post office has her concerned for her well being. After speaking with Inspector Britt, a decision was made to determine what might be causing the concern. Inspector Britt acquired a police report that showed that Montgomery was arrested.

11/17/2015

Received arrest report from Gregg Holland in Labor Relations

Personally traveled to the route to remove Montgomery from the street and placed her on suspension.

11/19/2015

Held Investigative Interview

11/23/2015

Letter of Suspension delivered to Montgomery"

At the hearing Smith testified that when he went out on the Grievant's route on November 17, 2015 he did not place her on suspension as stated in the timeline, but placed her on administrative leave while he investigated the November 3, 2015 incident. Management argues that because the Grievant was placed on paid leave that she was not suspended, and that Smith held an Investigative Interview with the Grievant before he filled out his request for discipline and issued the Grievant an Indefinite Suspension. The Union argues that the Grievant was placed on suspension, as stated by Smith in his timeline, prior to an investigative Interview being given and before the Grievant was offered a chance to tell her side of the story.

The Union presented evidence which showed that Smith was aware of the Grievant's arrest on November 3, 2015 as evidenced by his conversation with the Union steward about the Grievant's absence on that day. Smith testified that he wasn't aware of the charges against the Grievant until he received documentation from the Postal Inspectors on November 17, 2015. The evidence showed that Smith received and reviewed two arrest reports, one from August 26, 2015 and one from November 3, 2015, a judge's finding of probable cause to detain the Grievant for the November 3, 2015 arrest, and the court clerk's records that showed that the Grievant had posted a bond for her release. He also reviewed copies of the Florida Statutes regarding the charge against the Grievant, all of which were provided by the Postal inspector. Smith also testified that he considered the Grievant's responses at the Investigative Interview before requesting an Indefinite Suspension under Article 16.6. Based on the testimony and evidence presented at the hearing, it is my determination that regardless of what Smith might have known on November 3, 2015, he did perform an investigation and asked the Grievant for her side of the story before requesting and issuing her an Indefinite Suspension. The Grievant was placed on Administrative leave prior to her Investigative Interview and was not suspended at that time. Based upon the information reviewed during his investigation, Smith would have had reasonable cause to believe that the Grievant was guilty of a crime for which imprisonment can be imposed.

The test for determining if Management has properly placed an employee on indefinite suspension under Article 16.6 is two fold. Management must first prove that at the time of the suspension it had reasonable cause to believe that the Grievant was guilty of a crime

for which a sentence of imprisonment can be imposed. Secondly, Management must show that it had just cause to issue the suspension. Just cause can be established if a nexus can be shown between the employee's off duty conduct and the effect of that conduct on the Postal Service.

Having determined that Management did have reasonable cause to believe that the Grievant was guilty of a crime for which a sentence of imprisonment can be imposed, the question then arises as to whether Management had just cause to issue the Grievant an Indefinite Suspension. Management argues that a nexus exists between the Grievant's off duty actions and damage to the Postal Service's interests and reputation while the Union argues that no nexus exists in this case. Based on the testimony and evidence presented, I must agree with the Union and find that there was no nexus in this matter to support just cause.

The Grievant's arrest occurred while she was at her home and not in her postal uniform. There was no publication of the Grievant's arrest and there was no evidence that the public or the other employees in the station were aware of the incident. None of the Grievant's co-workers expressed any concern about working with the Grievant after the incident. There was no evidence presented of any other potential adverse effects on the Postal Service. Smith testified that he placed the Grievant on an Indefinite Suspension based on the fact that this was the second time she had been arrested for an incident with Sherrer and he "was just not sure" what would happen if the Grievant were to return to the street. Management argued that the Grievant is unsupervised on her route and based on the prior assault there is a likelihood that the same behavior could reoccur. While there are numerous things that might happen, the evidence presented here does not support Management's nexus arguments. The Grievant has a protective order against Sherrer and all of the Grievant's actions appear to be related to that relationship. Management was aware of the incident that occurred in August of 2015 and, after her return to work on November 6, 2015, the Grievant reported to her manager that she was concerned that she was being followed on her route by her ex boyfriend. The evidence is clear that the Grievant's actions have been solely related to her personal issues with Sherrer. There is no indication that the Grievant has any other history of violence that would lead Management to be concerned for its customers or its reputation.

Management has argued that the Merit Systems Protection Board has recognized a rebuttable presumption of nexus arising in egregious circumstances from the nature and gravity of off duty conduct. The particular facts of this case do not establish such egregious circumstances to support a presumption of nexus. Based on the evidence presented at the hearing it is my determination that Management has not been able to establish a nexus and therefore cannot sustain its burden of proving just cause for the issuance of the Indefinite Suspension to the Grievant.

DECISION

The grievance is sustained. The Indefinite Suspension shall be rescinded and the Grievant returned to work with back pay and no loss of benefits in compliance with the provisions of the ELM . No award is made as to any overtime the Grievant may have been entitled to work during the period she was off work.

Done this 4th day of May, 2016.

Respectfully submitted,



Roberta J. Bahakel, J.D.,
Arbitrator