

REGULAR ARBITRATION PANEL

 In the Matter of the Arbitration *
 *
 between: * Grievant: E. Gay
 *
 United States Postal Service * Post Office: Gainesville, GA
 *
 and * USPS Case No: K11N-4K-D 17475129
 *
 National Association of * Branch Case No: EGPRKF
 Letter Carriers, AFL,CIO *

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Charlene Cammons

For the Union: Robert Covina

Place of Hearing: Gainesville, GA

Date of Hearing: October 5, 2017

Date of Award: November 20, 2017

Relevant Contract Provision: Article 16

Contract Year: 2011

Type of Grievance: Discipline

Award Summary:



The Grievant in this case was issued a Notice of Removal alleging "Improper Conduct." The Union challenged the discipline rendered by Management in this case. The instant grievance is granted in part and the Grievant shall be returned to work with the condition of a successful EAP completion and in accordance with the Discussion and Findings below.

A handwritten signature in blue ink that reads "Lawrence Roberts".

Lawrence Roberts, Panel Arbitrator

Kenneth R. Gibbs, Jr., NALC
 National Business Agent

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SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 5 October 2017 at the postal facility located in Gainesville, GA. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a digital recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

The Grievant in this matter is employed as a Letter Carrier working at a Gainesville GA postal facility, the Main Delivery Unit. The Grievant's employment with the Postal Service began in January 1995.

On or about 31 March 2017, the Grievant received the following Notice of Proposed Removal Letter, signed by a Supervisor, Customer Service and with concurrence by the Officer In Charge at Gainesville. That document reads as follows:

"I. Action and Bases for Action:

This is advanced written notice that it is proposed to remove you from the US Postal Service no sooner than 30 calendar days from your receipt of this notice. If a grievance is initiated, the effective date of your removal will be deferred until after a decision has been rendered at Step B of the grievance procedure or (14) fourteen days after the appeal is received at Step B, whichever comes first.

This removal action is based on the following reason(s):

CHARGE 1: IMPROPER CONDUCT

On February 1, 2017 Postmaster Paul Deleon received an anonymous tip from a customer and passed it on the Office of Inspector General (OIG) that you might be using narcotics and riffling through mail in a secluded area on your route.

As a result of that information, the OIG initiated an investigation that began on February 7, 2017. During their surveillance of you on February 7, 2017, you were observed leaving your route and traveling to a known drug area. Following that observation, the OIG decided to place a surveillance camera in your LLV 0209040.

On February 22, 2017 the OIG Special Agent (SA) in charge of the case retrieved and reviewed the surveillance footage. As listed in the OIG's Report of Investigation (ROI), you can be seen on the video footage:

1. On February 15, 2017 preparing a pipe three times with what appears to be cocaine. The first time you then climbed into the back of your LLV. The other two times you smoke the pipe while seated in front of the surveillance camera.
2. On February 22, 2017 you can be seen loading a handgun and then placing it in your left pants pocket before exiting the LLV. Following that incident, you can be seen preparing a pipe with what appears to be cocaine and then smoking it while in front of the camera.
3. On February 23, 2017 you were observed preparing the pipe and then climbing into the cargo area of the LLV.
4. In addition to the incidents listed in the ROI, you can also be seen on the video operating your LLV with your door open and seatbelt off.

Ten minutes after you are seen preparing the pipe and going into the back of your LLV on February 23, 2017, you were stopped by the Hall County Sheriff's Office (HCSO). As a result of the traffic stop, you were subsequently arrested for failure to signal, possession of cocaine, and driving under the influence of cocaine.

During the investigative interview that I conducted with you and your union steward, Karen Franklin, on March 16, 2017, you were afforded the opportunity to review the video. As we reviewed the video together, I frequently paused the video in order to give you the opportunity to explain what you could be seen doing.

Throughout the interview you frequently starred down at your feet and gave what can only be described as evasive and less than truthful answers. For instance, when I asked you if you had ever left your route to purchase cocaine your response was "No, not to my knowledge". And despite being arrested for both possession of cocaine and driving while under the influence of cocaine, when asked what you are doing in the video while smoking the pipe your response was "Smoking tobacco." Also, when I paused the video a place where you can clearly be seen loading the gun and placing it in your pants pocket, you stated that "It was not a gun." You did not however, provide any kind of explanation as to what the object was. Your denials are not convincing and self-serving. You have more than 22 years of service with the Postal Service and you know or should have known that your actions were severely improper. Yours actions violate the Postal Service standards of conduct and you have irreparably damaged the employer-employee relationship.

For these reasons, a lesser penalty would not be in the best interest of the Postal Service.

Your actions as described above are very serious in nature and are in direct violation of; but not limited to the following U.S. Postal Service regulations:

The Employee and Labor Relations Manual (ELM):

Section 665 .11, Loyalty states, "Employees are expected to be loyal to the United States government and uphold the policies and regulations of the Postal Service."

Section 665.13, Discharge of Duties: "Employees are expected to discharge their assigned duties conscientiously and effectively."

Section 665.16. Behavior and Personal Habits states in part, "Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of good character and reputation. The Federal Standards of Ethical Conduct referenced in 662.1 also contain regulations governing the off-duty behavior of postal employees. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct prejudicial to the Postal Service ... "

The Postal Employee's Guide to Safety (EL-814):

Section 1.A General Rules: "Safety rules are for your benefit; observing safe working practices and Postal Service safety rules is a primary responsibility of all Postal Service employees. General safety rules include, but are not limited to the following rules:

- Never work under the influence of intoxicants.
- Never sell, possess, or use illegal drugs on Postal Service premises. If you are required to take physician-prescribed drugs that could impair your mental or physical abilities, you must notify your supervisor; never drive or work around moving equipment while under the influence of drugs.
- Never keep contraband material such as firearms, dangerous weapons, fireworks, intoxicants, or illegal drugs on postal premises.

Section X.B. Civil Laws: "You must obey all state and local traffic laws when driving any Postal Service vehicle. You will receive no special privileges or rights as a Postal Service driver. Police citations for traffic violations are your personal responsibility. Promptly report them to your supervisor while on duty."

You will remain either on the job or on the clock, at the Postal Service's discretion, for a period of 30 days from receipt of this notice. At the end of these 30 days, you will be immediately removed from pay status (unless otherwise deferred by the grievance process). Thereafter, you will remain on the rolls in a non-pay status until the disposition

of this case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure.

II. Answer

You and/or your representative may respond to this action, either orally or in writing, to the individual named below. If you do respond, you must do so within 10 calendar days from your receipt of this notice. You may present evidence, including affidavits, in support of your answer.

Kenny Marks

Manager, Post Office Operations (A) 101 N Broad ST
Winder, GA 30680
678-425-2594

If you wish to respond in person, please contact the person named above during normal business hours.

You and/or your representative may review the material that was relied on to support the reasons for the action proposed in this notice. You may contact the concurring official during normal business hours to set up a time to do so. You will be given a reasonable amount of official time to review the material relied on to support this proposed notice, to prepare an answer and/or to secure affidavits if you are otherwise in an active duty status.

III. Grievance Rights

In response to this corrective action, you have the following rights:

You have the right to file a grievance under the procedures set forth in Article 15 of the National Agreement within fourteen (14) days of your receipt of this notice.

If you file a grievance, this removal will be deferred - meaning you will remain on the job or on the clock, at the Postal Service's discretion - until after the Step B decision has been rendered, or 14 days after the appeal is received at Step B, whichever comes first.

You are not entitled to a hearing on the merits in both the grievance and MSPB forums. Therefore, if there is an MSPB appeal pending as of the date the grievance is scheduled for arbitration by the parties, then you will waive access to arbitration beyond Step B. Your waived right to an arbitration hearing may be reactivated if your appeal to the MSPB does not result in a decision on the merits or you withdraw your MSPB appeal prior to a decision on the merits being made.

If this action is reversed or modified on appeal, back pay may be allowed unless the award or decision specifies otherwise and ONLY IF YOU HAVE MADE REASONABLE EFFORTS TO OBTAIN ALTERNATE EMPLOYMENT DURING THE RELEVANT NON-WORK/POTENTIAL BACK PAY PERIOD. The documentation that you must maintain and present to support a back pay claim is described in Subchapter 436 of the Employee and Labor Relations Manual. (emphasis in original)

The Grievant, as well as the Union, refute the discipline. The instant grievance was filed in protest. The Union asks the Grievant be returned to work and made whole. In rebuttal, the Agency argues the evidence supports their removal action and requests their initial decision to remove the Grievant from Postal employment be upheld.

Obviously, the Parties were unable to resolve this dispute during the prior steps of the Parties Grievance-Arbitration Procedure of Article 15. An impasse was declared by the Step B Team on 27 June 2017.

It was found the matter was properly processed through the prior steps of the grievance procedure. Therefore, the dispute is now before this arbitrator for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. The record was closed on 22 October 2017 following the receipt of written closing briefs from the respective Advocates.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.
2. Grievance Package

COMPANY'S POSITION:

Prior to the Employer making an opening statement, a surveillance video showing the Grievant performing acts as alleged in the Notice of Proposed Removal was viewed at the hearing.

The Service reiterates this to be a video of the Grievant smoking cocaine several times while in the performance of his duties as a City Letter Carrier and operating an LLV.

Management mentions the testimony in this case will show how the Postal Inspection Service coordinated their investigation with the Sheriff's Office.

The Agency points out the Grievant was arrested by the Sheriff's Office for driving under the influence, possession of cocaine and failing to signal a lane change.

The Employer adds the Grievant was also observed handling a gun while on duty inside of a Postal vehicle.

The Service also notes the Grievant was issued an Emergency Placement that was upheld by the Step B Team and subsequently issued a Notice of Proposed Removal.

The Postal Service requests the instant grievance be denied in its entirety and that the Notice of Proposed Removal that was issued to the Grievant be upheld.

UNION'S POSITION:

First, the Union points out the Grievant has a drug problem. The Union insists the Grievant is also working to overcome the problem and that is the whole issue in this case.

The Union mentions that most of the facts of this case are undisputed as the Grievant used crack cocaine while on duty.

The Union states there is video evidence of it and the Grievant has acknowledged having done so. But the Union interjects the Grievant was issued a Notice of Proposed Removal based on this fact alone.

However, according to the Union, this grievance has nothing to do with whether the Grievant used drugs on duty. The dispute here, according to the Union, is whether eliminating any chance for the Grievant to correct his misconduct is within the bounds of the National Agreement. The Union believes that not to be so.

The Union claims that Management in this case ended its investigation once it learned the Grievant used drugs on the job. The Union completely agrees that this revelation was certainly reason to begin an investigation.

However, according to the Union, Management's conduct after learning of the problem revealed its ultimate goal, that being, to punish the Grievant for his drug use.

The tests of just cause, according to the Union, requires management to do more than simply show the facts of the charge letter are true. The Union claims such a point is outlined in Article 16 of the JCAM. Additionally, it is the argument of the Union that the Employer must also prove that firing the Grievant was necessary. And the Union believes this is where the Agency fell short.

As the Union explains, it has already been acknowledged by the Grievant, as well as the Union that he used drugs on duty, so the testimony that Management will elicit to prove it is unnecessary.

Instead, the Union asks the arbitrator to pay very close attention to see if any evidence is offered that Management made any effort at all to correct the Grievant's problem.

The Union relies on the Handbook M-39 claiming the language contained therein requires Management to make every effort to resolve situations prior to resorting to disciplinary action. It is the perspective of the Union that in this case, Management made absolutely no effort at all.

The Agency's excuse, according to the Union for not bothering to try to help the Grievant is that his offense was so egregious that there is no possible way he can be trusted to discharge his duties for the Postal Service. However, the Union asks the Arbitrator to evaluate how Management went about making that decision.

The Union suggests it is certainly not because of his interactions with his co-workers. To that end, the Union mentions the file is bursting with statements from Carriers attesting to the Grievant's work ethic and their trust in him to turn his life around if given the opportunity. In fact, the Union points out that even his Supervisor submitted a statement on the Grievant's behalf.

It is the belief of the Union there is a grand total of zero evidence that the Grievant cannot perform his duties conscientiously and effectively. Instead, according to the argument presented by the Union, Management's only justification for firing the Grievant is "It's against the rules."

Based on the charge letter and the decision letter, the Union implies that Management's position is that violating this rule automatically constitutes just cause for removal.

It is the conclusion of the Union that firing the Grievant only on the basis that he violated a rule is the very definition of punitive. The Union argues that Management must attempt to make discipline corrective.

As indicated by the Union, the Grievant has taken steps to get the help he needs to overcome this problem. The Union implies that Article 35 requires Management to consider the Grievant's efforts to obtain counseling favorably. The Union asks that, based on the Grievant's work record, how can Management possibly say they considered his participation in EAP favorably and still issue this removal.

The Union believes this case file shows that Management never considered lesser discipline. In the opinion of the Union, once the Employer established the Grievant used drugs on duty, the die was cast. The Union claims the deciding official made a remark, almost as an afterthought, acknowledging the Grievant's EAP participation, but by then, the decision had been made.

The Union argues the Grievant never had a chance once the Employer learned of the drug use. From the Union's perspective, rather than give the Grievant an opportunity to clean up his act and resume an otherwise exemplary career, Management cut him loose.

The Union believes this is deplorable treatment of a Marine Corps veteran with the Grievant's years and quality of service.

The Union requests the Grievant be returned to work and given an opportunity to let his counseling have the desired corrective effect. The Union also requests that the Notice of Removal be modified to reflect an appropriate level of corrective action.

THE ISSUE:

Did Management violate Article 16 of the National Agreement when issuing the grievant a Notice of Proposed Removal dated March 31, 2017 charging the Grievant with Improper Conduct? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 16
DISCIPLINE PROCEDURE

DISCUSSION AND FINDINGS:

This matter involves an issue of removal wherein the burden of proof falls on Management to establish just cause for their actions.

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

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

In addition, the just cause standard cannot be gauged in the same matter in all cases since each discipline case is unique to its own set of facts and circumstances.

The chief negotiators of Article 16 suggest progressive discipline. In many cases, that guideline prevails and progressive discipline works to serve both the Employer and Employee. As an example, absenteeism is oftentimes corrected with progressive discipline. The Employee retains their position and the Employer retains an experienced employee.

But, each matter of discipline rests solely on its own merits. What is found to be applicable in this case cannot be applied evenly to other similar issues. In fact, this case is certainly unique when compared to other matters of discipline that I've decided throughout my arbitral career.

The one constant is the burden of proof in any discipline matter rests with the Postal Service. It's their obligation to establish just cause or, at the very least, via their case in chief, demonstrate a valid reason via clear and convincing evidence.

It is not up to the Union to prove innocence, instead, for the moving party to establish guilt. In order to prevail however, Management need not prove their case beyond a reasonable doubt.

Instead, in arbitral matters, the preponderance of evidence rule applies. Clear and convincing evidence is proof via the preponderance. Regardless of the specific term employed, this Agreement, like most others, requires a showing, via evidence, that, more likely than not, the Grievant is guilty as charged. And all of this must be accomplished through sound reasoning.

This is based on the probability of the evidence, its probable truth and accuracy, not necessarily the quantity. In any case, the meaning is somewhat subjective and this forum lacks a steadfast rule that can be applied to all cases. Instead, only a guideline delineates the evaluation of the evidence and accordingly, is considered on a case by case basis.

This particular Article 16 case involves allegations of **"Improper Conduct"** There are acts that are certainly dischargeable offenses; this could very well be one of them.

There was no doubt the Grievant was guilty as charged. The Union stipulated to the content of the video. It is a fact the Grievant had a drug problem and had been seen with a gun in his postal vehicle. In fact, the Union stipulated the initial allegation made by the Service were true.

However, it was the contention of the Union that Management did not do a proper investigation, did not consider the Grievant's length of service, his exemplary record and the fact the Grievant acknowledged a drug problem and voluntarily sought help from the EAP. The Grievant's wife even testified that she asked postal managers to help her husband and they failed to do so.

First, I would mention the Grievant is a long term postal Employee with an exemplary record, as the Union initially pointed out. There was extensive testimony on record to that end.

The just cause standard of this Wage Agreement is not simply a black and white issue. The matter of proving guilt is only the first aspect. The second phase is a showing that the discipline rendered was appropriate given the circumstances of any particular case. And in this matter, I am of the considered opinion the Employer failed to consider other relevant factors and that provides reason for mitigation in this instance.

As I've stated many times, there are certain deeds that certainly deserve removal action, even on the first occurrence. Acts such as theft or involving physical violence provide only a few examples. And based on the language of the Parties Agreement, I am of the considered opinion that not every case involving drug and/or alcohol abuse necessarily fit into that same category.

At first blush, the acts of the Grievant appear heinous in this particular work environment. And Management's reaction was immediate removal. However, in my view, the chief negotiators

would have considered this particular case just a little differently.

The very first sentence in that Article 16 language defines the basic principle of discipline to be corrective in nature. And, as a more specific reinforcement of that language is the entire content of Article 35. Specifically, those same chief negotiators included this very specific language stating that:

"The Employer and the Union express strong support for programs of self-help. The Employer shall provide and maintain a program which shall encompass the education, identification, referral, guidance and follow-up of those employees afflicted by the disease of alcoholism and/or drug abuse. When an employee is referred to the EAP by the Employer, the EAP staff will have a reasonable period of time to evaluate the employee's progress in the program. This program of labor management cooperation shall support the continuation of the EAP for alcohol, drug abuse, and other family and/or personal problems at the current level.

An employee's voluntary participation in the EAP for assistance with alcohol and/or drug abuse will be considered favorably in disciplinary action proceedings."

The above language is paramount and controlling of my decision in this matter. Management in this case considered the actions of the Grievant atrocious and comparable to either the aforementioned acts of theft or violence. And the action of removal was immediately applied.

However, the unambiguous language of Article 35 clearly defined, in no uncertain terms, drug abuse as being a disease rather than a crime. And that certainly changes the whole perspective in this matter.

The record shows the Grievant voluntarily participated in the EAP. The same record also shows Management failed to even acknowledge the fact that the Grievant sought help on his own.

Based on the fact that the Grievant recognized he had a problem and voluntarily sought help from the EAP, I am convinced the discipline was punitive and Management should have first attempted corrective action. In my view, the Employer simply ignored the language of Article 35.

This Agreement is not prioritized. Articles 3, 16, and 35 are of equal weight. And in this case, I was not convinced the proven guilt and its subsequent penalty meted out by the Agency outweigh the unequivocal language of Article 35.

Based on the convincing evidence introduced in this case, I am of the considered opinion that while the acts committed by the Grievant were egregious, his exemplary long term service is deserving of a final opportunity. I was convinced by the evidence introduced in this case the Grievant is in a recovery

process and deserving of a last chance to salvage his Postal career.

My Findings certainly do not overlook the acts committed by the Grievant. However, the Article 35 language, as applied to all the facts of this case, are certainly applicable to the Grievant. Management shall work with the EAP Staff to ensure the Grievant is in full compliance with all the mandates of that particular Program. Lack of participation or failure to successfully complete any phase of that process by the Grievant will be just cause for removal without any further mitigation.

It is my order, the removal action will be reduced to a fourteen (14) day suspension, however, the Grievant will not be made whole. The Grievant will be assigned to a non-driving assignment, and as previously mentioned, he must continue to participate in EAP and be subjected to random drug testing until such time that Management is assured that he no longer has a drug problem.

If after sixty (60) days the Grievant is not drug free or no longer participating, this removal action will be re-visited and possibly reinforced. I will retain jurisdiction over the matter for ninety (90) days from the date of this decision.

AWARD

The grievance is resolved in accordance with the above.

Dated: November 20, 2017
Fayette County PA