Regular Arbitration Panel

In the Matter of the Arbitration	)	
	)	
between	)	Grievant: Patel
	)	
United States Postal Service	)	Post Office: Sarasota, FL
	)	
and	)	USPS Case No: G11N-4G-D17528260
	)	
National Association of Letter Carriers, AFL-CIO	)	NALC Case No: 17164
	)	
	)	DRT No: 09-402382

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

Appearances:

For the U.S. Postal Service:	Ms. Kimberly Cribbs
For the Union:	Mr. Bob Covino
Place of Hearing:	Sarasota, FL
Date of Hearing:	November 2, 2017
Date of Award:	November 30, 2017
Relevant Contract Provision:	Articles 15, 16
Contract Year:	2011 - 2016
Type of Grievance:	Discipline

Award Summary:

The Grievant was issued a Notice of Removal after admitting to removing gift cards from the mail stream on two occasions. The Union raised several due process arguments. Based on the testimony and evidence presented, the grievance is sustained and the Grievant is returned to work as set out herein.

Roberta J. Bahakel, J.D.

BACKGROUND

The Grievant, Ms. Patel, who is a letter carrier in Sarasota, FL, was issued a Notice of Removal after she confessed to taking two gift cards from the mail stream, one in 2013 and one in early 2017, and using them for her own benefit. The Union does not dispute the Grievant's actions, but contends that the discipline should be set aside because Management violated the provisions of the National Agreement and the Grievant's due process rights in the processing of the discipline issued to her.

ISSUE

Did Management have just cause to issue a Notice of Removal (NOR) dated May 31, 2016 for Improper Conduct? If not, what is the appropriate remedy?

CONTRACT PROVISIONS

ARTICLE 15

GRIEVANCE-ARBITRATION PROCEDURE

Section 2. Grievance Procedure—Steps

Informal Step A

(b) In any such discussion the supervisor shall have authority to resolve the grievance. The steward or other Union representative likewise shall have authority to resolve the grievance in whole or in part.

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, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Section 8. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

In post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken.

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 just cause to discharge the Grievant in that she admitted that she had stolen mail from the mail stream on two different occasions. Management

contends that the grievance was timely, there were no procedural violations and that the removal should be upheld.

The Union contends that there was no just cause for the discipline and argues that Management violated the Grievant's due process rights in the following ways:

1. The discipline is untimely. Management became aware of the Grievant's actions on March 23, 2017 when the Office of Inspector General (OIG) interviewed the Grievant in regard to the missing gift cards. The Notice of Removal was not issued to the Grievant until May 31, 2017. Management gave the Grievant an Investigative Interview on March 28, 2017 and then a second Investigative Interview on April 26, 2017. The Union argues that no new information was learned from the second Investigative Interview and that it was only given to justify the period of time before the Notice of Removal was issued.
2. There was not a proper review and concurrence as required by Article 16.8. The Union contends that Manager Bednarz prepared the Request for Discipline and then called in supervisor Hedges to sign the request, therefore there was either a command decision from Bednarz to Hedges to issue the discipline or there was a joint decision between Bednarz and Hedges to issue the removal. The Union argues that in either situation there was a violation of Article 16.8.
3. The supervisor who met at the Informal A did not have authority to resolve the grievance. This supervisor, Mr Rose, conducted the two Investigative Interviews but did not issue the discipline. The supervisor, Mr. Hedges, who was present on the day the OIG met with the Grievant, was the supervisor who signed the Request for Discipline on May 12, 2017, but did not meet at Informal A.
4. There was disparate treatment in that the Grievant was given a Notice of Removal while another employee who, while acting as a 204B, paid herself for 10 hours of work while she was not at work. That employee was allowed to pay back the amount taken while the Grievant was not offered the same opportunity.

Based on the foregoing, the Union contends that the discipline should be set aside and the Grievant returned to work.

The evidence presented showed that on March 23, 2017 OIG agents interviewed the Grievant, at which time she admitted to taking gift cards from the mail on two separate occasions. After that interview the OIG agents spoke with station manager Bednarz about the Grievant's interview and their investigation. The Grievant's supervisor on the floor that day was supervisor Hedges, who was scheduled to transfer to another station in May. An Investigative Interview was conducted on March 28, 2017 by the Grievant's other supervisor in the office, supervisor Rose. The completed OIG investigation was sent to Management on March 30, 2017. A second Investigative Interview was held on April 26, 2017 by supervisor Rose. On May 12, 2017, which was supervisor Hedges last day before his transfer, he received a call from manager Bednarz asking if he would stop by the station for a Letter of Removal. Hedges went to the station where he reviewed and signed the Request for Discipline that had been already filled out by Manager Bednarz. Hedges testified that he also reviewed a proposed letter of removal and, after making some changes in that document, he signed the Letter of Removal that was issued to the Grievant. He also testified that after reviewing the Investigative Interviews he agreed that the discipline issued to the Grievant was appropriate.

The Union raised due process concerns about Management's compliance with the provisions of Articles 15 and 16 in its processing of the grievance. The Union argues that Article 16.8 was violated when supervisor Hedges did not initiate the discipline request for the Grievant. The Union contends that it was manager Bednarz who actually initiated the discipline by filling out the Request for Discipline (Form 278E), and then directed Hedges to sign the request before ultimately concurring in the Request for Discipline. The due process arguments raised by the Union will be discussed before addressing the merits of this matter.

In regard to the Union's arguments concerning the alleged violations of Article 16.8, the evidence showed that supervisor Hedges, except for being present on the floor on the day the OIG interviewed the Grievant, never had any involvement with the investigation of the Grievant's actions. Both Investigative Interviews were done by supervisor Rose. Rose never initiated any discipline against the Grievant and Hedges, while he testified that he agreed that a removal was the proper discipline to be issued to the Grievant, did not initiate any discipline against the Grievant until he was asked to stop by the station by manager Bednarz for the purpose

of a Notice of Removal. The evidence was clear that even though supervisor Rose was in the office on May 12, 2017, manager Bednarz prepared the request for discipline and called Hedges to ask him to come by for the removal. When asked by the Union if it was his decision to remove the Grievant, Hedges replied "Yes, it would be appropriate after reading the II's".

Based on the evidence presented I cannot determine that there was a command decision from Bednarz that the discipline should be issued. However, I do find that the evidence supports the Union's contention that Hedges and Bednarz, as the initiating and concurring officials, jointly made the disciplinary action decision. Supervisor Rose, who conducted the investigation, was present in the office on May 12, 2017 but had not yet initiated a discipline request for the Grievant. Hedges had no incentive to issue a request for discipline as he was transferring to a different station and had not been involved in the investigation of the Grievant's actions. Manager Bednarz filled out the Request for Discipline for Hedges before Hedges came into the station and then Bednarz concurred with the signed request. The evidence also showed that Hedges stated that he "agreed" with the discipline. Hedges testified that he, Rose and Bednarz ran the office as a team and that they had previously talked about the Grievant's actions and what discipline would be appropriate. This is not inappropriate, and there is no prohibition against a lower level supervisor consulting, discussing, communicating with or jointly conferring with the higher reviewing official before deciding to propose discipline. However, in this instance, there is no evidence to show that either supervisor independently decided to initiate a request for discipline against the Grievant and then submit that request to Bednarz for his review and concurrence. The evidence does show that the discipline request to remove the Grievant was initiated by the manager and then signed off on by the supervisor who "agreed with the discipline" after reviewing the Investigative Interviews. This is not the process the parties agreed to in Article 16.8 of the National Agreement. Therefore, after considering all of the evidence presented regarding the day Hedges came to the office and signed the Request for Discipline, there is sufficient evidence to establish that there was a joint decision made to discipline the Grievant.

In his opinion in Case No. E95R-4E-D 01027978, National Arbitrator Eischen specifically addressed such a situation when he determined what actions violate a review of

discipline. While that opinion was in regard to Rural Carriers, the requirement in Article 16.8 for a review and concurrence before discipline is issued is much the same. In that opinion Arbitrator Eischen ruled that Article 16 is violated if there is a command decision from a higher authority to impose discipline, or *if there is a joint decision by the initiating and reviewing officials to impose a suspension or discharge*. It is my determination that, based on the evidence presented, the decision to remove the Grievant was in fact a joint decision between the initiating and concurring officials and violated Article 16.8 of the National Agreement.

Arbitrator Eischen went on to address the appropriate remedy where a violation of the review and concurrence provisions are proven. He stated:

"The operative language of Article 16.6 provides (emphasis added):

> *In no case* may a suspension or discharge be imposed upon an employee unless the proposed disciplinary action has first been reviewed and concurred in by a higher authority.

This language clearly and unambiguously mandates that compliance with the two-step, two-stage process set forth in Article 16.6 is a condition precedent to the imposition of a removal or suspension. Accordingly, I concur without equivocation with those many area arbitrators who have concluded that the substantive violations of Article 16.6 set forth in Issues 1(b), 1(c) and 1(e)[1] invalidate the disciplinary action. Because these are substantive violations which effectively deny an employee the due process rights granted by Article16.6, persuasive proof of such fatal violations requires arbitral reversal of the improperly imposed suspension or discharge, without consideration of the underlying merits of the disciplinary action, i.e., reinstatement with "make whole" damages.

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[1] Issues 1(b) -- Is violated if there is a "command decision" from higher authority to impose a suspension or discharge,

1(c) – Is violated if there is a joint decision by the initiating and reviewing officials to impose a suspension or discharge

1(e) – Is violated if there is a failure of either the initiating or reviewing official to make an independent substantive review of the evidence prior to the imposition of a suspension or discharge

In my considered judgement, those relatively few area arbitration decisions which have engrafted onto the condition precedent language of Article 16 .6 an additional requirement of proof of "actual harm", notwithstanding persuasive proof of a "command decision", a "joint decision"or that the reviewing/concurring official merely "rubber-stamped" the proposed disciplinary action, are just plain wrong. Under different contract language, arbitrators might properly overlook procedural defects in administration of discipline which do not unduly compromise the rights of an employee whose suspension or discharge is otherwise justified on the record. However, the precise terminology of Article 16 .6 precludes recourse to that "harmless error" argument. If this plain language of Article 16.6 occasionally produces a manifestly unfair result, as undoubtedly it has in some cases, the proper recourse is renegotiation at the bargaining table, not arbitral legislation of "actual harm" or "harmless error" rules which are at odds with the express wording of Article 16.6.

... For Issue 1(b), 1(c) and 1(e) violations, however, Article 16 .6 requires reversal of the disciplinary action and reinstatement with remedial "make-whole" damages."

Based on the above ruling, where there is proof of a fatal violation, as there is in this case, (i.e., a joint decision by the initiating and reviewing officials to impose a suspension or discharge), then such a violation requires arbitral reversal of the improperly imposed discharge without consideration of the underlying merits of the disciplinary action. Therefore, there is no need to address the remaining contentions raised by the Union or the merits of this case. Based on the foregoing discussion the grievance is due to be sustained.

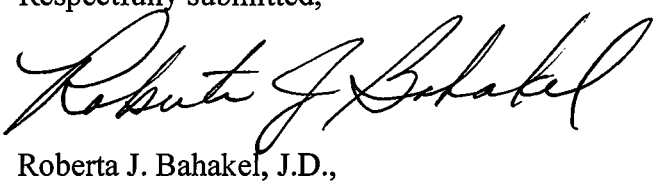
DECISION

The grievance is sustained and the Grievant is to be returned to work with back pay and no loss of benefits. No overtime is awarded in that there was no evidence presented that

the Grievant was on the overtime desired list or regularly worked overtime. I will retain jurisdiction over this matter for a period of 120 days as to the calculation of remedy only.

Done this 30th day of November, 2017.

Respectfully submitted,



Roberta J. Bahakel, J.D.,
Arbitrator