
IN THE MATTER OF THE ARBITRATION BETWEEN:

United States Postal Service

-and-

National Association of Letter Carriers, AFL-CIO

Grievant: Patricia Ramirez

Post Office: Germantown, MD

USPS: K06N-4K-D10039181

DRT: 13-151105

BEFORE:

Mollie H. Bowers

APPEARANCES:

For the Union:

Delano M. Wilson

For the Service:

Anita Crews

Place of Hearing:

Damascus, Maryland

Date of Hearing:

January 27, 2010

Date of Award:

February 6, 2010

Relevant Contract Provisions:

Articles 8.5, 15, and 16, and MOU

Contract Year:

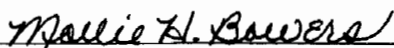
2006-2011

Type of Grievance:

Contract Interpretation/Discipline

AWARD SUMMARY

The grievance is sustained. The facts show that Management used non-scheduling of the Grievant as "pretextual" to taking the action it could have by rights; but did not. The remedy requested is granted and the Arbitrator will retain jurisdiction.


Mollie H. Bowers, Arbitrator

ISSUE

Did Management violate Articles 15 and 16 of the National Agreement and the MOU Re: Transitional Employees when they stopped working the Grievant, a Transitional Employee (TE), without explanation or a removal notice before her appointment was over when work was available at the Damascus Post Office and, if so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

Article 8 Hours of Work

Section 5. Overtime Assignments

G. Full-time employees not on the "Overtime Desired" list may be required to work overtime only if all available employees on the "Overtime Desired" list have worked up to twelve (12) hours in a day or sixty (60) hours in a service week. Employees on the "Overtime Desired" list:

1. may be required to work up to twelve (12) hours in a day and sixty (60) hours in a service week (subject to payment of penalty overtime pay set forth in Section 4.D. for contravention of Section 5.F); and
2. excluding December, shall be limited to no more than twelve (12) hours of work in a day and no more than sixty (60) hours of work in a service week.

However, the Employer is not required to utilize employees on the "Overtime Desired" list at the penalty overtime rate if qualified employees on the "Overtime Desired" list who are not yet entitled to penalty overtime are available for the overtime assignment.

Article 15 Grievance-Arbitration Procedure

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

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, . . . 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.

Memorandum of Understanding

Re: Transitional Employees – Additional Provisions

Article 16

Transitional employees may be separated at any time upon completion of their assignment or for lack of work. Such separation is not grievable except where the separation is pretextual.

Transitional employees may be otherwise removed for just cause and any such removal will be subject to the grievance-arbitration procedure, provided the employee has completed ninety (90) work days, or has been employed for 120 calendar days, whichever comes first. Further, in any such grievance, the concept of progressive discipline will not apply. The issue will be whether the employee is guilty of the charge against him or her. Where the employee is found guilty, the arbitrator shall not have the authority to modify the discharge. In the case of removal for cause, a transitional employee shall be entitled to advance written notice of the charges against him/her in accordance with the provisions of Article 16 of the National Agreement.

Date: September 11, 2007

BACKGROUND

The chief controversy in the instant case is whether it should be characterized as a contract interpretation or as a discipline case and, thus, which party has the burden of proof. The Union agreed to go forward, without prejudice to its claim that the Service

violated Articles 15 and 16, and the MOU. The facts of this case are largely undisputed. The Grievant was hired as a Transitional Employee (TE) on January 30, 2009, at the Germantown Post Office. The appointment expiration date listed on the PS Form 50 is January 24, 2010. There is no dispute that she had completed ninety (90) days or had been employed for 120 calendar days when the events that gave rise to this proceeding occurred.

Those events began on October 17, 2009, when the Grievant was interviewed, via telephone, by Manager of Post Office Operations (MPOO) Toni Fossett, who inquired why the Grievant had returned to the office late that day. The Grievant responded that she returned later than scheduled because of her workload, "That's how long it takes". (UX-2) "The case file shows that the Grievant had been averaging approximately 47 hours of workhours for the last four weeks while significant amounts of overtime were worked by the regular carrier force during that period". (JX-2, p. 2) Two things happened directly thereafter. First, Ms. Fossett directed 204B Dheman Kumar to send the Grievant home. Second, the Grievant was put in a non-scheduled status, but remained on the rolls, until the expiration of her appointment. There is no dispute that work was available.

On November 21, 2009, the Union timely filed a grievance stating the issue as:

Did Mgt. violate Art. 15.1 & 16 (pages 16-12 & 16-13) of the National Agreement when [it] stopped working TE Ramirez on Oct. 26, 2009 without an explanation, discipline or notice of Removal before her assignment was over when work was available for her at the Damascus Post Office. If so, what is the appropriate remedy? (JX-2, p. 5)

Steward Stephen Thompson represented the Union at the informal first step of the grievance procedure. He testified that the grievance was filed because the Grievant was

not scheduled to work. Amy Campaign, vice president, Branch 3825, represented the Union at the Formal Step A meeting. According to her testimony, Management said repeatedly that the Grievant was not fired and insisted that she was still an employee, but they were just not scheduling her.

Kathryn Harris, Post Master of Rockville, Maryland, was the Management official who denied the grievance on December 16, 2009. At the Hearing and in her denial, Ms. Harris stated that the National Agreement does not guarantee a TE any work “unless they are scheduled”, or “prohibit management from non-scheduling a TE, even if work might exist”. (JX-2, p. 6) She further stated that the Mittenthal award, C13837, is irrelevant to the instant case because there was no 30-day written Notice of Removal and, thus, this was not a disciplinary matter. In her denial, Ms. Harries went on to write:

Ms. Ramirez is not scheduled to work due to her inconsistent work performance. The union argues that they would need to see proof of that, to which I say I do not have to prove that. The union argues that if she were a poor performer, then she should have been disciplined. Management’s position is that discipline is one of management’s options and although the shop steward at Informal A wrote a statement that he spoke to Damascus Supervisor, Angel Reid, and she allegedly said that her orders come from the MPOO, Toni Fossett. This is not supported by a statement from Angel Reid either denying or affirming. Management presents a statement from MPOO Fossett that she did not dictate that Supv (sic) Reid non-schedule the grievant. Even if this were the case, the fact remains that the National Agreement does not prohibit this type of direction. Since non-scheduling an employee is just that, and not discipline, there is no violation of the contract. Only in cases of discipline is the decision to take action required to be made by the immediate supervisor.

The union raised the TE MOU Article 16 language that “Transitional employees may be separated at any time upon completion of their assignment or for lack of work”. Again, management contends that she is not separated and there is no provision in the National Agreement that stipulates that management cannot non-schedule a TE. (JX-2, pp. 6 and 7)

Ms. Harris went on to address the Union's contention that a violation of Article 8.5.g.2 had occurred. Her response was that this is a separate issue and should be the subject of a separate grievance. Finally, Ms. Harris asserted that it is a management right "to schedule and staff their operations, as it deems appropriate and necessary; management contends that it has the right to spread the workhours among its employees and assign workhours, as it sees fit". (JX-2, p. 7)

Right after the Formal Step A meeting, the Grievant was issued a Notice of Removal, dated December 16, 2009, for Improper Conduct. In addition to the initial exchange between the Grievant and Ms. Fossett, the Notice goes on to state:

. . . Ms. Fossett informed you that you can not go out there and stay for 6 and 7 hours on the route. You replied, that you can if that is how long it takes. Ms. Fossett said that you could not. You then proceeded to tell Ms. Fossett to organize her time so that she can come to Damascus and walk with you and see for herself. Until she dose that, she can't tell you anything because she doese not know. Ms. Fossett asked you, who you thought you was (sic) talking to and you said, "I know, my bosses, boss and I'm going to tell you the truth. Until you come here, you can't tell me, and then you hung the phone up on Ms. Fossett. Your behavior was rude and disrespectful. In addition to your lack of respect for authority, to hang up the phone was disgraceful and very unprofessional. (UX-2)

The Notice went on to say that a pre-disciplinary interview (PDI) was conducted on October 23, 2009. The Postal Service rules and regulations alleged to have been violated by the Grievant were as follows:

M-41 – City Delivery Carrier's Duties and Responsibilities, Section 112.23, reads, "Display a willing attitude and put forth a conscientious effort in developing skills to perform duties assigned".

M-41 – City Delivery Carrier's Duties and Responsibilities, Section 112.25, reads "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".

Employee and Labor Relations Manual (ELM), Section 665.13, Discharge of Duties, reads “Employees are expected to discharge their assigned duties conscientiously and effectively”.

Employee and Labor Relations Manual (ELM), Section 665.16, reads “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”.

By your actions, you have demonstrated an inability to abide by postal rules and regulations. The charge against you is very serious and your failure to Follow Official Instructions violation provides just cause to issue you the Notice of Removal. You have the right to appeal this action under the Grievance-Arbitration procedure set forth in Article 15 of the National Agreement within (14) days of your receipt of this notice”.
(UX-2)

The document went on to explain what the Grievant would be entitled to and under what circumstances if the termination action was “reversed or modified on appeal”. (UX-2)¹

The parties were unable to agree on a resolution of this matter. The grievance was submitted to Step B on December 18, 2009. On December 22, 2009, the Step B team issued a decision declaring that an impasse existed. The case is now before this Arbitrator for a final and binding decision.

POSITIONS OF THE PARTIES

Union Position:

The Union is adamant that Management violated Articles 15 and 16 of the National Agreement when it put the Grievant in a non-scheduled status between October 17, 2009 and January 24, 2010. She had been averaging about forty-seven hours per week for two to four weeks prior to being non-scheduled. Work was available. The

¹ Union Exhibit 2 was not part of the grievance package. It was allowed into the record because it was tendered by the Union in response to matters raised by the Service, thus opening the door for its admission.

trigger for the Grievant being non-scheduled was a telephone call from MPOO Fossett, on October 17, 2009, inquiring why she had returned late to the office that day. Prior to that date, the Grievant had received no indication that her performance was in question. Subsequent to that call, the Grievant was never scheduled to work again for the duration of her assignment. The Union contends that this action was a “pretext”, as described in the Mittenthal award, C13837, because, in effect, the Grievant was ‘separated’ from the Service and denied the right to grieve because she still remained on the rolls.

Management claims that it has the absolute right to put a TE in a non-scheduled status at any time, for any reason, and for any period of time. The Union disagrees. It maintains that the Mittenthal award makes it clear that TE’s can be separated at any time. Thus, all that Management had to do if it was dissatisfied with the Grievant’s work was to separate her. This action is not grievable **unless** it is “pretextual”. According to the Union, the facts that the Grievant had a PDI, on October 26th, and then was issued a Notice of Removal, on December 16th, is clear proof that Management’s intent in not scheduling her was disciplinary in nature. By pursuing the course that it did, the Union argues, Management deprived the Grievant of her due process rights in violation of Articles 15 and 16 of the National Agreement, and of the “Special Transitional Employee Rules” derived from the Mittenthal award. Those Rules do not tie Management’s hands in separating an employee, but also do not give Management the right to non-schedule a TE, especially when work is available, for the remainder of her/his assignment.

Therefore, the Union maintains that the Grievant is entitled to a ‘make whole’ remedy, meaning that she should be compensated for every day that she was not scheduled to work from October 26, 2009 through January 24, 2010.

Service Position:

The Service argues that this case is neither contractual nor disciplinary in nature. Article 3 of the National Agreement reserves to Management, *inter alia*, the rights to assign and retain employees, and “To determine the methods, means, and personnel by which such operations are to be conducted”. TE’s are not guaranteed any hours of work. Rather, the only guarantee a TE has is that if she/he is scheduled and reports for work, then four hours of work are guaranteed. The Grievant was not scheduled to work during the period in question. Whether or not work was available is irrelevant because Management has the right to determine the personnel through which the mission of the Service shall be accomplished. Thus, the Service maintains that there was no violation of Articles 15 and 16 of the National Agreement. The Service presented the following arbitral awards in support of this position: E90N-6E-C94021412 (Snow, 1966);E4C-2D-D3169 (Kasher, 1985); and C00C-4C-D04143612 (Parkinson, 2004).

Furthermore, the Service stresses that the Grievant was not “separated” from the service and, thus, that the Mittenthal award has no application to the instant case. The PDI and the Notice of Removal should not be considered here because this information is not contained in Joint Exhibit 2, the grievance package. If the Union wishes to address these matters, it should do so through a separate grievance. The Service is emphatic that the Union’s attempt in this arbitration is to get that which it was not able to at the negotiating table. It asks that the Arbitrator prevent that from happening by denying this grievance in its entirety.

Finally, the Service asserts that the remedy requested by the Union is inappropriate and should not be granted. To reiterate, there is no contractual obligation

for Management to schedule a TE. Article 8 is clear in showing that TE's can be non-scheduled at any time at Management's discretion. The only guarantee that TE's have is for four hours of work **If** they are both scheduled and report for work. These are not the facts of the instant case and, thus the grievance must be denied.

DISCUSSION AND ANALYSIS

This grievance had its origin in the Union's complaint that Management violated Articles 15 and 16 of the National Agreement, and the MOU, when it stopped scheduling the Grievant, a TE, on October 26, 2009, and continued her in that status until the end of her assignment on January 24, 2010. The Service is correct that nothing in the National Agreement requires Management to schedule TE's even when work is available and even though the right to utilize TE's was negotiated specifically to provide assistance when the workload could not be covered otherwise. It is equally clear that TE's can be separated 'at will', or for lack of work, without the benefit of due process, **unless** such separation is "pretextual".

Black's Law Dictionary defines "pretext" as "Ostensible reason or motive assigned or assume as a color or cover for the real reason or motive; false appearance, pretense". (fifth edition, p. 1069) According to the Service, the language contained in the Mittenthal award, C13837, memorialized in the "Special Transitional Employee Rules", has no bearing on the instant case because the Grievant was given no 30-day written Notice of Removal nor was she "separated" from employment, but rather she was simply not scheduled to work after October 26, 2009. Based on the totality of the record, which includes that the Grievant received a PDI and was issued a Notice of Removal, on

December 16, 2009, the Arbitrator has determined that the Service's representation is disingenuous.

The record supports that there was not only work available for the Grievant, but also that she had been working approximately forty-seven hours per week for two to four weeks before she was not scheduled to work again. There was no showing that the Grievant's work had ever been complained about prior to October 17, 2009. After the Grievant's conversation with MPOO Fossett, on that date, a PDI was held on October 26th, and the Grievant was put in a non-scheduled status thereafter. The Service contends that this is neither a contract interpretation nor a discipline case. The Arbitrator disagrees.

The only two reasons that the record reveals as to why the Grievant was non-scheduled after October 26th are, first, that the Grievant returned to the office late on October 17th, and that she was allegedly rude and disrespectful to MPOO Fossett as a result of the telephone interview on that date. If Ms. Fossett believed that this was behavior that the Grievant should be separated from the Service for, then the Arbitrator is at a loss to understand why she did not simply exercise her management right to do so? The Arbitrator believes that this did not occur because Ms. Fossett and Management thought that they could accomplish the same result, **and** circumvent any possibility that the action would be grievable, simply by not scheduling the Grievant to work.

Management has the right to schedule and to assign personnel, and TE's are only guaranteed four hours of work **if** they are both scheduled and do, in fact, work. However, the circumstances of this particular case belie the defense that the Service offered. The Management rights enumerated in Article 3 of the National Agreement are limited in so

far as they must not be exercised in an arbitrary and capricious manner. Based on the record, the Arbitrator has concluded that this exactly how Management made the determination to put the Grievant in a non-scheduled status after October 26, 2009. While it is true that the Grievant returned late to the office on October 17th, it is clear from the Notice of Removal that this was not the primary reason why she was not scheduled. Rather, MPOO Fossett was obviously miffed by the Grievant's alleged responses during the telephone interview on the 17th. Again, Management could have exercised its right to separate the Grievant; but it did not.

Equally telling are the facts that, on October 26, 2009, there was a PDI meeting with the Grievant and her Union representative, and on December 16th a Notice of Removal was issued to her. The Service would like the Arbitrator to believe that this occurred separate and distinct from the events of October 17th. The Arbitrator was not persuaded. Because the Grievant was not separated at any time during the term of her assignment, the Service claims that this is not a disciplinary matter and, thus, has no standing in the instant proceeding. The Arbitrator disagrees for reasons set forth in the foregoing analysis and because the Grievant was unaware of any problems with her work until October 17, 2009. By not scheduling the Grievant, Management thought that it had found a means to simply make the problem go away without any possibility that the action could be challenged through the grievance procedure.

Obviously, it did not. Since the Service opened the door, the Notice of Removal was admitted into the record. As far as the Arbitrator could discern, the Grievant was never shown to be guilty of a violation of M-41, 11.23, and M-41, 112.25, and ELM 665.13 and 665.16 as charged. Management's record says that the Grievant was rude and

discourteous to Ms. Fossett on October 17th. Again, and if true, there is nothing in the National Agreement, or otherwise, that would have prohibited the Grievant's separation at that time. The Arbitrator has concluded that Management's untimely action to separate the Grievant, on December 16th, after arbitrarily and capriciously keeping her in a non-scheduled status, was "pretextual"; a subterfuge for its attempt to circumvent the "Special Transitional Employee Rules". It follows, therefore, that the grievance must be sustained.

AWARD

The grievance is sustained.

The Grievant shall be made whole for four hours for every day, between October 26, 2009, and January 24, 2010, when she was available to work and when work was available for a TE at the Germantown Post Office.

The Arbitrator will retain jurisdiction over this dispute until the parties notify her, in writing, that this matter has been resolved.

Date: February 6, 2010

Mollie H. Bowers
Mollie H. Bowers, Arbitrator