REGULAR ARBITRATION PANEL

In the Matter of the Arbitration
between
UNITED STATES POSTAL SERVICE
and
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

GRIEVANT: Steven Schaefer
POST OFFICE: Kansas City, Missouri
USPS CASE NO: E01N-4E-D 04196956
NALC CASE NO: 05-041470

BEFORE: David A. Dilts, Arbitrator

APPEARANCES:
For the U.S. Postal Service: Nels Truelson
For the Union: J. Mark Sims
Place of Hearing: 1700 Cleveland Ave., Kansas City, Missouri
Date of Hearing: March 16, 2005
Date of Award: April 15, 2005
Relevant Contract Provision: Articles 16 and 35
Contract Year: 2001
Type of Grievance: Removal

AWARD SUMMARY

There is no doubt that the grievant reported for work under the influence of alcohol, and that he is admitted alcoholic. Management clearly had the right, under Article 16 of the 2001 National Agreement to issue discipline for the grievant’s misconduct. However, this Arbitrator does not agree that there are no mitigating circumstances in this matter. The grievant is a letter carrier of 19 years service, and has been, since this aggrieved action, been actively participating in EAP and Alcoholics Anonymous. Article 35 of the National Agreement binds the parties to “consider favorably in disciplinary action proceedings” the grievant’s participation in EAP. Therefore, the grievant’s removal is ordered reduced to a long suspension. He is ordered reinstated to his former position as a City Letter Carrier, without back pay or benefits, but without loss of seniority.

David A. Dilts, Arbitrator

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The Step B Team framed the issue in this matter as:

Does Management have just cause to remove (the) employee?

BACKGROUND

The grievant, at the time of the aggrieved disciplinary action, was a City Letter Carrier assigned to the Waldo Carrier Annex in Kansas City, Missouri. At the time of his removal, the grievant had approximately nineteen years of service. Three prior disciplinary actions were live in August of 2004, one letter of warning and two seven calendar day suspensions. One of these prior disciplinary suspension was for being under the influence of alcohol when he reported to work.

The record shows that the grievant reported for work under the influence of alcohol on August 16, 2004. The grievant was given a Breathalyzer test for blood alcohol which showed that he was legally intoxicated (.135%). The grievant admits that he is an alcoholic.

At present, the record shows that the grievant is participating in Alcoholics Anonymous and that he sought assistance through the parties’ EAP when this disciplinary action was taken against him.

The Union filed a timely grievance protesting the removal of this grievant which was denied. The parties at Step B of the grievance procedure declared this matter to be at impasse.
and the parties stipulated that the present matter is properly before this Arbitrator pursuant to Article 16 of their 2001 National Agreement.

**POSTAL SERVICE’S POSITION**

The position of the Postal Service is that it had just cause to remove this grievant from his position as a City Letter Carrier. There is no dispute that the grievant was legally intoxicated, while on the clock, on August 16, 2004. There is also no dispute that this misconduct was clearly known to the grievant to be unacceptable conduct in violation of 661.54 of the Employee and Labor Relations Manual (and other regulations). There is also no dispute that the grievant had prior discipline in his record, including a seven calendar day suspension for being under the influence of alcohol.

A pre-disciplinary interview was conducted on August 31, 2004, during which the grievant indicated that he could handle a few beers, but could not drink hard liquor because his liver did not function properly. He went on to say that he would have to reserve his drinking for when he was on vacation. When challenged, the grievant then changed his position to say that he could not drink at all.

The Union has raised a couple of meritless defenses. The Union contends that progressive discipline was not followed in this matter and was therefore not corrective. In fact, the grievant was given a fourteen day suspension, which was subsequently reduced to seven days for having reported to work intoxicated. Further, reporting for work under the influence of alcohol is a very serious matter for which removal is appropriate for the first offense and does not
require progressive discipline to be corrective.

The Union also claimed the grievant did not know of his liver condition, and therefore did not intend to report for work drunk. Frankly, this Union contention is utterly without merit. The grievant simply could not have missed the fact that he was impaired by alcohol, and it was clear that he was seriously impaired by the blood alcohol levels he was experiencing on August 16, 2004.

Further, the Union argues that management failed to follow proper procedures in sending the grievant for a blood alcohol test on August 16, 2004. The fitness for duty procedures urged by the Union in this matter require a matter of days, not minutes to implement and are simply not applicable to matters where alcohol use is reasonably expected, as was the case in this matter. Management is confident that the Union’s absurd contentions with respect to this matter will be dismissed by the arbitrator.

In assessing the propriety of a particular penalty, it has been held that an arbitrator’s role is not to second-guess management’s reasonable and good-faith attempts to arrive at the appropriate measure of discipline. Clearly the arbitrator should hesitate to set aside or reduce a penalty in the absence of a showing that the penalty was arbitrary, made in bad-faith, or clearly wrong. The Union has failed to show that management erred in any fashion in determining that removal was the appropriate penalty in this case. Therefore, this Union contention must also be dismissed.

Management has discharged its burden to prove with a preponderance of the credible evidence that the grievant committed the offenses for which he was removed. The record of evidence also clearly shows that there was no violation of any due process requirements and that
the penalty assessed in this matter was appropriate to the grievant's offense and record. Therefore, management respectfully requests that the arbitrator sustain the removal of this grievant as being for just cause, and to deny the Union's grievance in its entirety as being without merit.

**UNION'S POSITION**

Management has failed to show that it had just cause for the removal of this grievant. The record shows that the grievant's actions of August 16, 2004 lacked intent, and that management made several serious errors with respect to the grievant's contractually guaranteed due process rights. Management also failed to consider the 19 years of service the grievant had, and the other mitigating circumstances in this record.

The grievant in this case, as of August of 2004, was going through a difficult domestic division. He is the father of two children, of whom he has custody, and that their primary residence was with the grievant. Add to these difficulties the fact that the grievant is an alcoholic, and that he suffers from serious health problems associated with his alcoholism -- cirrhosis of the liver and Hepatitis C. It is within this context that the events of August 16, 2004 transpired.

The grievant reported for work, after having drank a few beers the day before, and was required to take a Breathalyzer test, in which it was determined that his blood alcohol level was .135%. It was not then known to the grievant that his cirrhosis and Hepatitis caused alcohol to not metabolize normally. He did not drink immediately before coming to work, or at work, but
rather the day before. A reasonable man would have believed that having drank in the afternoon of the day before reporting for work, that the alcohol would have metabolized and he would have been alright to work. There was simply no intent on the grievant’s part to violate the rules proscribing intoxication at work or drinking.

Further, there is a particular process to be followed in requiring an employee to submit to a fitness for duty physical, and that process was not followed in this case. That failure to follow the proper process in determining the grievant’s fitness for duty resulted in obtaining evidence subsequently used against this grievant that was improper.

Management also failed to follow progressive discipline in this case. Alcoholism is a disease, and as such, requires assistance from management in rehabilitating the employee. Article 35 of the parties’ National Agreement makes clear that management is to give favorable consideration to any employee who voluntarily enters the EAP program in an attempt to salvage his Postal career, as this grievant did. Further, the grievant only had a seven calendar day suspension on his record, and management choose to skip the fourteen calendar day step and improperly proceed to the removal of this grievant. This removal therefore is not progressive and violates the parties’ mutual understanding as expressed in Article 16 of their 2001 National Agreement.

Finally, management also cited prior discipline that has not yet been adjudicated in arriving at the decision to remove this grievant. This is improper, and the Arbitrator ought not consider that suspension in determining the propriety of this aggrieved removal.

The grievant is a recovering alcoholic. He has come to grips with the fact that he is saddled with this disease for a lifetime and is he working diligently to overcome this serious
handicap and maintain his sobriety. The Union submits his actions, while serious, do not rise to the level of removal considering the procedural errors made by management in this case and the clear mitigating circumstances that exist in this matter.

The Union respectfully requests that the Arbitrator sustain this grievance, and return him to his former bid position as a City Letter Carrier, and make him whole in every respect for this wrongful removal.

ARBITRATOR'S OPINION

The record in this matter shows that the grievant was, in fact, on the clock in the Waldo Carrier Annex in Kansas City on August 16, 2004 and was under the influence of alcohol. This fact is not disputed by the parties, and it is also not seriously disputed that the grievant was aware, or should have been aware, that such conduct was proscribed by the Employee and Labor Relations Manual, as cited in the Notice of Removal (Joint exhibit 3). In this Arbitrator's considered opinion, these undisputed facts demonstrate that there is just cause for disciplinary action against this grievant.

The only challenge offered by the Union was that there was no intent by the grievant to violate the ELM's proscription of being under the influence of alcohol while on the job. This Arbitrator rejects that argument – the grievant is an alcoholic, knew he was an alcoholic, and admits to having drank alcohol on the day before he was scheduled to work. Whether this is negligence or intent is irrelevant, it is sufficient that he reported to work under the influence for a finding of misconduct in this matter.
The controversy between these parties concerning the removal of this grievant focuses on several issues. The parties are at odds as to whether progressive discipline must be used in matters involving intoxication during working hours and on Postal property. The Union alleges that Management's requiring the grievant to submit to a Breathalyzer test was inconsistent with the proper process used in fitness for duty examinations. Finally, the Union claims that Management ignored the numerous mitigating circumstances which the Union alleges exist in this case. This Arbitrator will examine each of these issues, in turn, in the following paragraphs of this opinion.

**Progressive Discipline**

The Union argues that management is obliged to follow the Letter of Warning, Seven Day Suspension, Fourteen Day Suspension, and then Removal progression of discipline in this case. There is a lack of unanimity among arbitrators concerning whether discharge is the appropriate penalty for being under the influence of alcohol while on the job. The Postal Service provided several citations of cases where an employee was under the influence of alcohol while on duty and was discharged for the offense. The reasoning in these cases is cogent, and specific to the facts in those cases.

In the case before Arbitrator McAllister, the grievant there had been forewarned that being under the influence of alcohol while on the job was regarded as a serious matter and would

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1 Arbitrator McAllister, *in re* Maidelich, J00R-4J-D 0212597; Arbitrator Dorshaw *in re* Woods, G00C-4G-D 02211588
likely result in termination should it happen again. This is similar to the history of the grievant presently before this Arbitrator, there are both prior warnings and discipline in this grievant's record.

As in the McAllister case, the grievant came to work while under the influence of alcohol, but unlike the McAllister case there is no clear evidence that this grievant had consumed alcohol while on duty or on Postal property. In fact, the facts in this matter are consistent with the grievant's claim that his alcohol consumption was on August 15, 2004. In any event, it is clear that arbitrators view, within context, that being under the influence of alcohol while on the job is a very serious matter, and for more egregious examples of this misconduct, discharge may result for the first offense, and clearly without necessarily following the normal progression of corrective discipline associated with less serious misconduct. However, it is clear that a progression of discipline for less egregious intoxication cases is often required by arbitrators.2

The Union's contentions that management must follow their proposed progression of discipline is not supported by a simple preponderance of evidence. This simple construction of Article 16 also puts to rest the Union's contention that all previous discipline, under these facts and circumstances, must be adjudicated before proceeding to removal for this offense. A removal for an egregious act does not require prior discipline, and without a showing of harm in the citation of such unadjudicated prior discipline, it cannot serve as a basis to overturn this removal.

Fitness for Duty

The Union cites the procedures to be used in requiring an employee to submit to a fitness for duty examination. The process, as the Union correctly points out, requires the approval of Postal Authorities above the Annex's management. However, the management of the Waldo Carrier Annex has the responsibility to assure that employees are not intoxicated. To require the formalities required of a fitness for duty examination under reasonably normal circumstances, in this Arbitrator's considered opinion, is harsh and absurd; in addition, it would deny management the rights guaranteed under Article 3 of the National Agreement to maintain the efficiency (and safety) of operations.

For management to require that the grievant submit to a Breathalyzer test to ascertain whether he is legally intoxicated is not a violation of his contractual rights where there is reasonable cause to believe he may be intoxicated. In this case there was probable cause to suspect the grievant's intoxication. The grievant is expected to operate motor vehicles on the public thoroughfares, and as such, if stopped by law enforcement authorities would be required to submit to the same Breathalyzer test. In this case, the grievant was not required to do anything that would not have been reasonable to expect as a condition of operating a motor vehicle in the State of Missouri.

This Arbitrator finds no merit in the Union assertion that the grievant's contractual rights were somehow compromised by the manner in which he was required to submit to the subject Breathalyzer test.
Mitigating Circumstances

Article 35 of the parties’ 2001 National Agreement states in pertinent part:

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

Arbitrators have given a grievant’s participation in EAP weight as mitigative circumstances which is clearly authorized by Article 35 of the parties’ 2001 National Agreement.\(^3\) Again, the egregiousness of the offense of being intoxicated while on the clock must be considered when applying Article 35, as well as the grievant’s history of previous attempts to control his alcoholism. In this case, the grievant is participating in EAP and AA programs, having failed in at least one previous incident to control his alcoholism. Failure at the first attempt is not uncommon, and when that failure is two years in the past, without intervening failures, it cannot serve to preclude the application of this portion of Article 35 in this specific case.

The grievant is also a long service employee. He has 19 years of service, albeit, with

\(^3\) Arbitrator Stidman, C8N-4T-D 332432, Arbitrator Zack, N8C-1L-D 22078 and this Arbitrator in C4N-4J-D 28090.
three prior live disciplinary actions. There is an element of a bank of good will which must be considered by such long service in these sorts of cases. In this particular case, the history of discipline clouds the issue of whether a bank of goodwill remains with a positive balance. However, given the nature of this particular offense, and the fact that he did not operate a motor vehicle on the clock, or for that matter any other exacerbating facts, the grievant’s long service must be considered a mitigating circumstance.

In this Arbitrator’s considered opinion, Article 35, in conjunction with the grievant’s 19 years of service are sufficient to require that he be given one final chance to remain sober and salvage his Postal career. Therefore, in this Arbitrator’s considered opinion the grievant’s removal must be ordered reduced to a long suspension.

Remedy

The proper remedy in this case is that the grievant be reinstated to his bid position as a City Letter carrier in the Waldo Annex in Kansas City, Missouri. The grievant’s reinstatement shall be without back pay or benefits, but without loss of seniority. The aggrieved removal is ordered reduced to a long suspension. The grievant is hereby forewarned that another incident of intoxication while on the job will result in his removal from the Postal Service.