C#01062

In the Matter of the Arbitration between

UNITED STATES POSTAL SERVICE

- and -

NATIONAL ASSOCIATION OF LETTER CARRIERS AFL-CIO

SZMAJDA GRIEVANCE

NB-E-4311-D

OPINION AND AWARD

Pursuant to Article XV of the Agreement dated July 21, 1973 between the United States Postal Service (hereinafter referred to as the Service) and the National Association of Letter Carriers, AFL-CIO (hereinafter referred to as the Union), a hearing was held before the undersigned arbitrator on June 4, 1975 at the United States Postal Office in Washington, D. C. At the hearing the parties appeared, gave testimony, presented evidence, and were represented by Mr. Joseph H. Johnson, Jr. for the Union and Mr. Robert G. Krause for the Service. A stenographic transcript was made of the proceedings and both parties submitted post-hearing briefs.

BACKGROUND OF THE CASE

On April 23, 1974, Mr. Bruce Szmajda completed an Application for Employment (Form 2591) in which he responded "no" to Question 20 which queries, in relevant part:

> 20. Have you ever been convicted of an offense against the law or forfeited collateral, or are you now under charges for any offense against the law? (Include charges to which a guilty or nolo contendere plea was entered or, if convicted, a sentence of probation was imposed. You may omit: (1) traffic violations for which you paid a fine of $30.00 or less; and (2) any offense committed before your 21st birthday which was finally adjudicated in a juvenile court or under a Youth Offender law.) (Joint Exhibit 3)

Mr. Szmajda on May 28, 1974 was hired as a City Letter Carrier assigned to the Berwyn Station of the College Park, Maryland Post Office.

A routine background investigation by the Civil Service Commission revealed that the grievant was arrested in December 1969 for possession of marijuana and LSD. He was charged with violation of the State Narcotics Law and violation of the Dangerous Drug Act, and these charges were adjudicated on April 23, 1970 and April 24, 1970. (Service Exhibit 1) Following verification of the accuracy of the report as well as a clarification of various

abbreviations in the report, employment personnel at the Prince Georges Sectional Center reviewed the grievant's employment records to determine if the information in question had been revealed. Upon discovery of the "no" answer to Question 20, the matter was reviewed by management, and Mr. Sumajda received an Advance Notice of Discharge on October 3, 1974 for falsification of his Application for Employment (Form 2591). He was separated effective November 3, 1974. (Joint Exhibit 5a and 5b)

Mr. Sumajda grieved the discharge action, and unable to adjust the grievance to its satisfaction, the Union requested arbitration of the issue.

POSITIONS OF THE PARTIES

The Service's Position

The parties agree that the penalty of discharge is appropriate where there has been a material falsification of an employment application. The disposition of the charges against the grievant lead to the inescapable conclusion that the grievant was guilty of falsification. With respect to the charge of possession of LSD, the grievant pled guilty, was adjudged guilty, received a sentence of one year (probated for two years), a fine of $1000.00, and court costs of $45.00. (Service Exhibit 7a) The finding of guilt in this case was not considered by the court to be final, pending satisfactory completion of probation. Upon successful completion of his probation, the court on April 23, 1972 set aside the finding of guilt previously entered. (Service Exhibit 7b) With respect to the felony charge of possession of marijuana, this case also resulted in a conviction with a probated confinement sentence, but one not conditionally imposed. (Service Exhibit 8a) Rather two years later, after satisfactorily completing that part of his five year probationary sentence, the grievant was discharged from his probation and his 1970 conviction was set aside. (Service Exhibit 8b) Notwithstanding the action of the Court as it applies to the public record, it is clear that there was a criminal conviction in both cases. Therefore, the grievant's response to Question 20 was not accurate. The guilty pleas and convictions persisted despite any later action that might have affected the public record.[1] (Service Brief, pp. 3-5)

[1] The Service cites Douglas Aircraft Co., 19 LA 854, in support of this position.

The Union contention that the grievant did not falsify his application because there had never been a finding of guilt or conviction in the criminal charges is not supported by the evidence. Union witness Rosenbloom, the grievant's former probation officer, admittedly has no direct knowledge or expertise concerning Texas law or the adjudication of the criminal charges in the grievant's case. In short, the testimony of the witness boils down to his claim that he finds the situation confusing. The grievant claims that there had been no final finding of guilt or conviction by the Texas court, and therefore his failure to disclose his past was not improper. This contention does not stand up in the light of court records in evidence. Moreover, the grievant's actions following receipt of the discharge notice cast doubt on his credibility. His letter to Judge Ellis on November 4, 1974 can scarcely be viewed as a candid forthright effort towards meaningful clarification, since it concerns only one charge, the possession of LSD, omitting the second charge which was clearly adjudicated with a final conviction. In addition, the grievant failed to put forward accurately the question posed in Question 20. (Service Exhibit 5a) The same self-serving style is reflected in the letter from Probation Officer Richard Beach. (Union Exhibit 1) (Service Brief, pp. 5-7)

The Union's second argument to the effect that the grievant answered Question 20 to the best of his knowledge and therefore met his obligation in the employment process cannot withstand scrutiny. The grievant was not confused, but a well-educated college graduate who admittedly read the question very carefully before answering. His explanation at the hearing displays a highly technical and self-serving approach to a situation requiring an accurate answer. Even assuming the grievant felt that his answer was proper, the information withheld is clearly material to the employment process, and in light of the highly sensitive nature of the grievant's position, the Service had a right to accurate disclosure of the information. (Service Brief, pp. 7-8)

The satisfactory completion of a probation sentence and the subsequent judicial action in this case do not relieve the grievant of the obligation to disclose his past. The Service's consistent concern for appropriate and

full disclosure of information of this nature is evidenced by a comparison of Question 20 to the question formerly asked before the Application for Employment utilized by the Service was revised. (Service Exhibit 9) The addition of parenthetical instruction to include "charges to which a guilty or nole contendere plea was entered or, if convicted, a sentence of probation was imposed" came on the heels of expanded reliance on such pleas in many criminal courts across the country, and properly reflects the type of disclosure properly expected by the Service. If the grievant's attempt to avoid a proper response by hiding behind a technical defense is allowed to prevail, it would seriously complicate and impair a practical application of the normal employment process. (Service Brief, pp. 8-9)

For the above reasons, the grievance should be dismissed.

The Union's Position

The grievant's answer to Question 20 must be viewed as true, complete, and correct to the best of his knowledge. Further the grammatical composition of the question amended with the parenthetical phrase tends to be ambiguous and confusing. Such confusion was revealed in the testimony of Union witness Rosenbloom, a probation officer currently employed by the U.S. District Court (Transcript, pp. 41-44, 49), and was shared by Arbitrator Peter Seitz in a decision involving different facts, but the same question.[2] Notwithstanding this confusion, the testimony of Union witness Rosenbloom supports the position that the grievant responded to the question truthfully and correctly to the best of his knowledge. (Union Brief, pp. 1-3)

The word "falsify" indicates knowledge on the part of the employee to whom a statement is attributed that such statement is, in fact, false. If the employee making the statement is unaware that the statement is incorrect, the better word would obviously be "mistake." The grievant was at all times under the impression, and correctly so, that he had no record of conviction or forfeiture of collateral concerning charges which had been placed against him some

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[2] Grievance AB-N-3062 (Ronald Botwin), U.S. Postal Service and American Postal Workers Union, Feb. 21, 1975.

time before in the state of Texas. In a letter dated October 21, 1974, Richard J. Beach, an officer in the Division of Parole and Probation for the 7th Judicial Court for Maryland, stated:

> In reviewing the probation orders and discharge from probation, it could be viewed as a release from any criminal conviction and responsibility. (Union Exhibit 1)

Judge Ben Ellis, while differing with the grievant's response to Question 20, nevertheless stated, "Mr. Szmajda was not convicted of either of these charges but a sentence of probation was imposed in each case." (Service Exhibit 6b) While the Judge stated that the grievant did not properly state the question asked of him, alluding to the parenthetical phrase amended to the question, the grievant sought counsel and advice from his probation officer before writing his letter to the Judge, and stated the question to the Judge in the form advised by his probation officer. Whereas the Judge states that the grievant's answer was "incorrect," the probation officer differs from the conclusion as stated by the Judge. (Union Brief, pp. 3-4)

There has been no evidence submitted that the grievant's response was a deliberate act with intent to defraud. Based on the available source of knowledge which the grievant possessed, he was led to a reasonable conclusion that no conviction or forfeiture existed, and that the answer to Question 20 should be "no." The material within the parentheses refers to "charges," and the grievant was under no charges. (Union Brief, pp. 4-5)

The assumption is that the grievant's answer was false and the decision to discharge him was made without any discussion with the employee. The Service has failed to meet the court test of what is needed to constitute a falsification.[3] The burden of proof is on the Service to show that the grievant could not possibly have construed the facts concerning the charges against him as he did, and show that he willfully and with intent to defraud the Service answered the question at issue in the negative. The Service has failed to meet this burden of proof, and therefore the grievant's discharge lacked just cause. (Union Brief, pp. 5-6)

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[3] The Union cites in re Bermfel, 247 F. Supp. 89 (1965) in support of this position.

For the above reasons, the grievant should be reinstated to his position in the Service and made whole for all lost earnings with interest at the current prime rate. Moreover, all records pertaining to his discharge should be expunged from his record. (Union Brief, pp. 6-7)

OPINION

The issue in the instant case is whether the discharge of the grievant, Mr. Bruce Szmajda, was for just cause. The Service essentially contends that the grievant falsified his Application for Employment (Form 2591). The Union basically argues that the grievant answered the question properly based on the information he possessed concerning the past charges placed against him in the state of Texas.

The facts of the case are not in dispute. The grievant was arrested in December 1969 for the possession of LSD and marijuana, and two separate charges were placed against him, charges which were adjudicated in April 1970. In the first charge, that of possession of LSD, the grievant pled guilty, though such plea was conditional, paid a substantial fine and court costs, and was placed on probation for two years at the satisfactory completion of which the "finding of guilty" was "set aside," the "complaint in each of said causes . . . dismissed," the causes "stricken from the docket of the court," and the grievant "discharged from probation." (Service Exhibit 7a and 7b) In the second charge, that of possession of marijuana, the grievant pled guilty and was placed on probation for five years, at the satisfactory completion of two years of which, the "conviction" was "set aside," the "indictment dismissed," and the grievant was "discharged from said probation" and "released from all penalties and disabilities resulting from the Judgment of Conviction." (Service Exhibit 8a and 8b) The grievant admits he did not report these incidents on his Application for Employment (Form 2591).

While it may be arguable as to whether the grievant should have correctly listed the above incidents on his Application for Employment, there is absolutely no evidence to support the fact that the grievant willfully and deliberately concealed such information in an attempt to mislead the Service.

In a recent decision involving the same issue, and indeed the same question as the one at issue, the undersigned arbitrator stated:

> Where, as here, the Service permits a job applicant to omit the reporting of certain . . . offenses under relatively complex language as viewed by the average layman, it must take the risk that an omission of s(a) . . . offense by a job applicant may be the result of confusion rather than a deliberate attempt at concealment. It is widely recognized that job applicants attempt to put their "best foot forward" in their statements on their applications. Where the Service has, for whatever reasons, reduced the applicant's need for revealing past offenses with the law, it would be highly inequitable to treat such reduction as a device for entrapping applicants who may construe such language in the most favorable light to the particular circumstances of their own individual situation.[4]

This principle is equally applicable to the facts of the instant situation.

Indeed, when applying the facts of the grievant's situation to the specific question which the grievant is accused of falsifying, there is considerable room for argument as to whether the omission of the incidents, cited supra, was incorrect, or improper, let alone a deliberate and willful attempt to conceal such information. Union witness Rosenbloom, a parole officer and presumably knowledgeable about such matters, testified that the question was confusing when applied to the grievant's past history, and could be construed as being satisfied by a negative answer. (Tr., pp. 41-44, 49) Although Service counsel ably tried to discount the value of such testimony on cross-examination by asking witness Rosenbloom whether he was an attorney familiar with Texas laws, the question reveals the weakness of the Service argument. It is patently absurd to suggest that job applicants, save those with spotless records, seek legal counsel, and parochial legal counsel at that, in order to complete a job application with the Service. Moreover, if the courts in a laudable effort to rehabilitate those who have broken the law create confusion as to the legal status of their past offenses, it is highly inequitable for the Service to demand an accounting of such offenses, on pain of extreme disciplinary action, when it is not clear that they remain accountable in a legal sense. If the Service feels it requires such information, it must develop a question which unequivocally cuts through any confusing legalism.

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[4] Case AB-W-5516 (Micheal Harmon) dated August 12, 1975 (APWU).

The record reveals that the Service acted hastily solely on the basis of the FBI report and a clarification of initials on such report plus a confirmation that the offenses were adjudicated in an adult court. (Service Exhibits 1, 2, and 3) The Service never discussed the matter with the grievant to learn his explanation, and did not know until after the discharge action was complete that his convictions were set aside. On November 6, 1974, over one month after the grievant received his Advance Notice of Discharge, and three days after the discharge became effective, the Service sought disposition of the cases listed on the FBI report from the Texas Department of Public Safety. (Service Exhibit 4) On November 15, 1974, some six weeks after the grievant received his Advance Notice of Discharge, and almost two weeks after the discharge became effective, the Service sought further information about the FBI report from Judge Ben Ellis, and asked two critical questions from the standpoint of its disciplinary action, to wit:

> Are the three items listed in the FBI report related to the same arrest? Was Mr. Szmajda convicted of any of these charges?

Obviously, at the time the Service took disciplinary action, it was not in possession of the critical facts necessary for a well-reasoned decision.

In this sense, the due process rights of the grievant were violated. It is widely recognized that management does not give the same open-minded consideration to information in the grievant's favor once a decision has been reached as it does prior to the reaching of a decision. A decision reached must be defended, and the defense of that decision precludes open-minded consideration of factors militating against that decision. The grievant's central defense in the instant case was not known to management and thus not considered in the decision to discharge him. It is highly unlikely it received the proper consideration once the decision to discharge him was reached.

Given these considerations, the Service is in a poor position to attack the grievant's actions after his discharge. The grievant was given no chance to be heard in the decision process and his candor and forthrightness cannot be assessed in terms of the decision made by the Service. Neither his letter to Judge Ellis nor the letter to the Service from Probation Officer Beach reflects any misrepresentations by the grievant. At most, they can be said to

represent a partisan position on the part of the grievant. This partisan position, however, was forced on the grievant by the hasty action of the Service in making the decision to discharge him for falsification, a charge of grave moral character, without being in possession of all the critical facts necessary to reach such a determination. The actions of the grievant in defending himself against such a decision must be viewed in that light.

Finally, the inference by the Service that its action must be upheld because of the materiality of the information, irrespective of a finding of falsification or a bona fide mistake on the part of the grievant, must be rejected. While there is some question as to the materiality of a single "drug bust" in terms of the sensitivity of the grievant's position, it is unnecessary to resolve that issue. The Service discharged the grievant on the basis of falsification, and its action must be assessed in terms of that charge. The Service was unable to prove falsification, nor was it able to demonstrate substantial proof that the answer given by the grievant was necessarily incorrect or improper.

For all of the above reasons the discharge of the grievant was not for just cause. The Service is directed to reinstate the grievant to his job with full seniority rights and reimburse him for all lost earnings. The Service is entitled to deduct from this amount his earnings from other employment during the period in question. The Service is further directed to expunge this disciplinary action from the grievant's record.

AWARD

The discharge of the grievant, Mr. Bruce Szmajda, was not for just cause. The Service is directed to reinstate the grievant to his job with full seniority rights and to reimburse him for all lost earnings. The Service is further directed to expunge this disciplinary action from the grievant's record.

Wayne E. Howard
Arbitrator

Dated: August 14, 1975