

C-26048

REGULAR ARBITRATION

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

USPS Case #C01N-4C-D05067958

NALC Case #05019

BEFORE: Tobie Braverman ARBITRATOR

APPEARANCES:

For the U.S. Postal Service: Bryan W. Cole

For the Union: Charles Troy Clark

Place of Hearing: Lexington, Kentucky

Date of Hearing: June 2, 2005

AWARD: The Grievance is sustained. The Employer has failed to demonstrate just cause for the Grievant's removal. The Grievant shall be reinstated to employment with full back pay and benefits from November 1, 2004.

Date of Award: July 6, 2005

PANEL: Eastern Area NALC Regions 6, 11 and 13



 Tobie Braverman

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JUL 19 2005

JUL 15 2005

VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

PATRICK C. CARROLL

The instant case is submitted to the Arbitrator pursuant to the terms of the grievance arbitration provisions set forth in the Collective Bargaining Agreement of the parties. Hearing was held at Lexington, Kentucky on June 2, 2005. The issue before the Arbitrator for decision is as follows:

Did the Employer violate Article 16, Section 1, Principles, of the 2001-2006 National Agreement when it issued the Grievant a Notice of Removal dated February 18, 2005 for the reason, "Improper Conduct/ being found guilty in a court of law of Trafficking in a Controlled Substance 1st Degree (cocaine) and Trafficking n Marijuana? If so, what is the appropriate remedy?

FACTS

Joseph Fairbanks (hereinafter referred to as the "Grievant") had been employed by the U.S. Postal Service (hereinafter referred to as "Employer") for approximately eighteen years at the time of his removal effective February 18, 2005. At all times relevant herein, the Grievant was employed by the Employer as a letter carrier at the Lexington, Kentucky Liberty Road Station. The facts leading to the Notice of Removal as established at the June 2, 2005 hearing are as follows.

On October 4, 2003 the Grievant was arrested while at work, and was taken from the Liberty Road Station by the local police. He was incarcerated for two days, and was charged with trafficking in Cocain and Marijuana, both felonies under Kentucky law. Upon his return to

work, the Grievant met with Station Manager, Lewis Fenderson to discuss the incident. According to Fenderson, he was prepared to place the Grievant on Emergency Placement at the time of the meeting, but after hearing the Grievant's account of the events leading to his arrest, he determined to allow the Grievant to continue working. Fenderson testified that the Grievant explained that the drugs belonged to his fiancée, that he had been unaware of the drugs, and that he would be cleared of the charges. Based upon his discussions with the Grievant, Fenderson determined that the Grievant should be permitted to continue working. He further advised the Grievant that he should advise him as to the disposition of the charges once they were resolved. Fenderson did not, however, put this direction to the Grievant in writing, and the Grievant testified that he did not recall the direction.

In the ensuing months, Fenderson questioned the Grievant casually about the status of the charges on several occasions, and the Grievant responded on each occasion that the matter was proceeding and that his lawyer remained confident that the charges would be dismissed. Fenderson further testified that at one point he had a discussion with Delivery Supervisor, Rhonda Markland, who informed him that the Grievant had advised her that the charges had been dismissed. Markland did not testify at hearing, and the Grievant testified that in response to her inquiry as to how things were going with the charges, he advised her that it was finished, and things were great. The Grievant testified that this was an honest statement, since at the time of this conversation he had pled guilty, been sentenced to five years probation, thus avoiding further incarceration, and had been successful in keeping custody of his two daughters. The interpretation that the charges had been dismissed, was Markland's own presumption based upon the Grievant's response that it was "done" and things were going well.

The Grievant continued to work without incident of any kind until late September, 2004 when the Employer received a complaint from an individual named Rita Ellis. Ellis, a former girlfriend of the Grievant, alleged that the Grievant had been harassing her at her place of employment. Jason Morton, Customer Services Supervisor investigated the complaint. During the course of his discussions with Ellis, who alleged that the Grievant had been to her place of work which was not on his route as many as fifteen times in a single day to harass and threaten her, Morton learned that the Grievant was a convicted felon.

After continued investigation of the complaint, it was determined that there was insufficient evidence to charge the Grievant with any offense based upon the harassment allegations. Upon receiving confirmation from Postal Inspections as well as the Grievant that he had in fact pled guilty to charges of trafficking cocaine and marijuana, the Grievant was placed on emergency placement on October 16, 2004. Thereafter, on February 18, 2005 the Grievant was issued a Notice of Removal. The instant grievance then ensued.

RELEVANT CONTRACTUAL PROVISIONS

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.

ELM 661.53 UNACCEPTABLE CONDUCT

No employee will engage in criminal, dishonest, notoriously disgraceful or immoral conduct, or other conduct prejudicial to the Postal Service. Conviction of a violation of any criminal statute may be grounds for disciplinary action by the Postal Service, in addition to any other penalty pursuant to statute.

ELM 661.55

Illegal use of drugs may be grounds for removal from the Postal Service.

ELM 666.2 BEHAVIOR AND PERSONAL HABITS

Employees are expected to conduct themselves during and outside of working hours in a manner which 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 personnel be honest, reliable, trustworthy, courteous and of good character and reputation. ...

POSITIONS OF THE PARTIES

Employer Position: The Employer contends that the evidence demonstrated that the Grievant's supervisor made it clear to the Grievant after his arrest that the Grievant was to advise him of the result of the charges once they were adjudicated. The Grievant did not follow these instructions. Instead he chose to keep his conviction secret until the Employer became aware due to a harassment allegation made by a former girlfriend. He is untrustworthy and should not be employed in a position of trust. The Employer further argues that while the Grievant has stated that he takes responsibility for his illegal conduct, in his testimony he blamed others, including his fiancée who he said was taking drugs and arranged the drug deal, his attorney who advised him to plead guilty, the Kentucky Attorney General and others. He is not credible and has not taken responsibility for his drug trafficking activities.

The Grievant being a convicted felon, he should not be permitted to occupy a position of

public trust with the Employer. Letter carriers are the face of the Postal Service. The public must be able to trust them. It brings discredit to the Employer if the public has knowledge that letter carriers are convicted felons. It also brings discredit upon other employees, and other employees of the Employer should not be required to work with a convicted drug dealer. The grievance should be denied.

Union Position: The Union contends that the Employer has failed to meet its burden of proof to demonstrate by clear and convincing evidence that there is any nexus between the Grievant's guilty plea for trafficking drugs which occurred off duty and damage to the Employer's reputation. There was no evidence that there was any publicity surrounding the Grievant's arrest and guilty plea, and there was no evidence to demonstrate either damage to public confidence or any problem with the Grievant's coworkers continuing to work with him.

The Grievant is clearly remorseful for his conduct. It also clear that the Grievant was not involved with drugs. The incident was a single indiscretion involving an unfortunate relationship with his then fiancée. Further, he remains on probation for the next four years. The Grievant knows that he must maintain good conduct or face potential incarceration. The Grievant did not recall being told to advise the Employer of the disposition of the charges. He was not dishonest. He believed that if he were not incarcerated he would keep his job. Further, the Grievant worked for eleven months delivering mail after his arrest without any incident involving dishonesty.

The Union finally argues that the discipline here was untimely and a denial of due process. The Employer became aware of the Grievant's guilty plea in October, 2004 The removal did not occur, however until February, 2005, allegedly because the Ellis charges were under continued investigation. Those charges, however were never pursued as grounds for

removal. The Employer had all the information it needed for removal in October, 2004 and the four month delay amounted to a denial of due process. The Grievance should be sustained.

DISCUSSION AND ANALYSIS

This being a case of removal from employment, it is clear that the burden of proof to demonstrate just cause for removal rests with the Employer. In meeting its burden of proof, the Employer must demonstrate by clear and convincing evidence both that the Grievant is guilty of the conduct with which he is charged and that the commission of that conduct warranted the penalty of removal from employment. In this case the Notice of Removal makes in essence two charges as the basis for the Grievant's removal. The Grievant is charged initially with dishonesty in his failing to inform the Employer as to the status of his criminal charges and allegedly lying about their final disposition. He is further charged with the illegal use of drugs by virtue of his guilty plea and conviction for trafficking in cocaine and marijuana.

As noted above, the Grievant is initially charged with lying concerning the status of the criminal charges against him. According to the testimony of Station Manager Fenderson, upon the Grievant's return to work after his arrest, Fenderson agreed to permit him to continue working based upon the Grievant's assurances that the drugs involved were his fiancée's and the charges against him would be dismissed. Fenderson testified that he told the Grievant at that time that he was to keep him apprized of the status of the charges. In several casual conversations, the Grievant advised Fenderson that the matters were proceeding favorably but were not yet resolved. The alleged lying occurred when the Grievant purportedly advised

Supervisor Markham that the charges had been dismissed and she reported the same to Fenderson. In fact, however, the Grievant testified that he told Markham that the matter was over and things were going well. It was her interpretation of his remarks which resulted in her erroneous reporting to Fenderson that the charges had been dismissed. Markham was not present at hearing and did not testify. Under these circumstances, the Arbitrator must accept the Grievant's account of the conversation in question. The Employer has failed to demonstrate that the Grievant lied about the status of his criminal charges.

The Employer further contends that the Grievant demonstrated dishonesty when rather than coming forward to advise Fenderson of the status of the criminal charges, he was repeatedly evasive. In fact, it is clear that the Grievant never advised the Employer of his guilty plea. Rather, the Employer found out about the plea after being advised that the Grievant was a "convicted felon" by an angry ex-girlfriend. As previously noted, Fenderson testified that he advised the Grievant in a meeting upon the Grievant's return to work after his arrest, that the Grievant should advise him when the criminal matter was concluded. The Grievant testified that he did not remember this part of the conversation.

While Fenderson likely so advised the Grievant, he never put this instruction in writing. Further, he never clearly advised the Grievant, either verbally or in writing that if the Grievant were convicted of the charges, he would be terminated from employment. Since the Grievant was returning to work after an arrest and two day incarceration, it is entirely likely that the Grievant was, as he testified, "in a state of shock". Under the circumstances, he could not be expected to remember the details of his conversation with Fenderson. Fenderson, as the Employer, was under an obligation to put his instructions to the Grievant in clear written form.

This is particularly true if Fenderson intended to terminate the Grievant in the event of a conviction, either after trial or guilty plea. Had the Grievant been so informed clearly and in writing, his obligation to advise the Employer of the outcome of the charges would have been clear. As it was, it was not. The obligation was based upon a verbal conference at a time when the Grievant's life was in a state of crisis and which occurred seven months prior to the actual disposition of the charges. The onus was on Station Manager Fenderson to make both his instructions and the consequences for failure to follow them clear and unequivocal.¹ Under the circumstances, the Employer has failed to demonstrate either that the Grievant lied or was dishonest by clear and convincing evidence.

The other basis for the Grievant's discharge as set forth in the Notice of Removal is that the Grievant is a convicted felon having pled guilty to and been convicted of trafficking in cocaine and marijuana. It is beyond dispute that the Grievant in fact committed this offense. By the Grievant's own testimony, upon his former fiancée's request, he passed cocaine and marijuana to two individuals who came to his fiancée's residence for the purpose of purchasing cocaine. He was arrested some time thereafter, and ultimately pled guilty to drug trafficking charges upon the advice of his attorney. The plea was made in order to insure that he could avoid incarceration, retain custody of his young daughters and keep his job. There is no question but that the Grievant has committed this offense.

The question of whether the Employer has met its burden of proof, however does not end here. The Employer is further obligated to demonstrate that the penalty of removal is warranted

¹Had the Grievant clearly known that Fenderson would remove him from employment in the event of a conviction, he surely would have taken this information into consideration at the time he agreed to plead guilty rather than face the rigors and expense of a trial.

for the offense committed by the Grievant. In this case, it is clear that all of the Grievant's conduct, other than his arrest, was committed while the Grievant was off duty. That being the case, the Employer is obligated to demonstrate that there is a sufficient nexus between the Grievant's off duty conduct and his continued employment so as to warrant removal from employment. The Employer argues here that letter carriers are the public face of the Postal Service. They are charged with not only delivering important and valuable mail, but also with protecting its integrity. The public trust in the Postal Service will be undermined if the public becomes aware that convicted felons are entrusted with this work. The Employer further argues that it has an obligation to protect the Grievant's co-workers from being forced to work with a convicted felon.

While some arbitrators have reached the conclusion that in cases wherein any type of drug related conviction is involved, there is sufficient nexus between the criminal conduct and employment to warrant removal, this Arbitrator believes that each case must be examined on its own facts to determine whether such a relationship exists. Several factors unique to the circumstances of this case convince the Arbitrator here that there is an insufficient nexus between the Grievant's conduct and his employment to warrant removal.

Initially, it must be noted that the Grievant credibly testified without contradiction that the incident leading to his arrest and guilty plea was a single isolated incident precipitated by his poor judgment in becoming involved with a woman who was using drugs. He is no longer seeing the woman. He testified that he has never been involved with drugs before or since and has never used drugs. The Employer presented no evidence which would cast doubt on the Grievant's testimony in this regard. The incident is thus not part of a pattern of illegal conduct,

and is unlikely to recur.

Further, there was no evidence presented to demonstrate that the Grievant's arrest and guilty plea brought any notoriety upon the Employer. There was no evidence of any press coverage, and further no evidence that the Employer had received any information in the form of customer complaints or otherwise to indicate that the general public was aware of the incident or concerned by the Grievant's continued delivery of their mail. In fact, the Grievant worked for eleven months after his arrest, and for four months after his guilty plea without incident. There was no evidence presented at hearing which would demonstrate that the Employer's speculation of public distrust or harm is other than simply that; speculation.

It is further clear that the Employer has failed to present evidence which would demonstrate that the Grievant's co-workers find working with him objectionable. The only testimony presented on this point was presented by the Union which presented the testimony of a co-worker, Jennie Walker, who testified that the Grievant's conviction did not bother her. She further testified she had worked for several years with an individual by the name of Dan Henderson who had a well publicized felony record. According to both Walker and the Grievant, Henderson's former life as a heroine addict and convict, which included convictions for armed robbery and escape, was common knowledge at the Liberty Road Station. Henderson worked as a clerk, and due to his local public service on behalf of addicts, his employment with the Postal Service was apparently publicly known. Surely if the employment of this individual, who had led a criminal life which he turned around was not a problem for his co-workers, the Grievant's single mistake was no more so. The Employer has simply failed to demonstrate by clear and convincing evidence that the Grievant's conviction will have a detrimental effect on the work

place in the circumstances of this case.

The final issue which must be decided in this case is the due process issue raised by the Union. The Union argues that although the Grievant was placed in non pay status by an Emergency Placement effective October 16, 2004, the Employer waited until February 18, 2005, four months later, to initiate his removal. Employer witnesses testified that the reason for this delay was continued investigation of the Ellis harassment charges. It is clear however, that the last bit of evidence on those charges was received by the Employer in late October, 2004. Although the Employer wanted to continue to give Ellis, the woman allegedly harassed, more time to gather witness statements, to wait until February was simply unreasonable. The complaint was made in late September, 2004. By the end of October, Ellis had not produced sufficient corroborative information to back up her charges despite the Employer's repeated efforts to contact her for information. After that, having already wreaked havoc on the Grievant's work situation, she apparently lost interest. Since the Employer proceeded with the removal without the harassment charges, there is little demonstrated basis for the extended delay. The Employer was aware of all information on which the removal was based in October, 2004. The extended delay while the Grievant remained in non-pay status was simply not reasonable. That being the case, the Grievant's make whole remedy should extend to November 1, 2004, one week after the last date on which the Employer garnered any evidence relating to the Grievant's case. The Grievant spent far more time than was reasonable in non-pay Emergency Placement status by virtue of the Employer's undue delay in issuing the Notice of Removal.

AWARD

The Grievance is sustained. The Employer has failed to demonstrate just cause for the Grievant's removal. The Grievant shall be reinstated to employment with full back pay and benefits from November 1, 2004.

Dated: July 6, 2005



Tobie Braverman