

ARBITRABILITY - ARTICLE XVI, SECT. 6

AC-N-8662-D

Ganser

4-20-77

ARTICLE XV, SECTION 2, STEP 3 - ARBITRABILITY

ARTICLE XVI - JUST CAUSE

ARTICLE XVI, SECTION 6 Arb. Case No. AC-N-8662-D

In the Matter of the Arbitration between

AMERICAN POSTAL WORKERS UNION, AFL-CIO

-and-

UNITED STATES POSTAL SERVICE

\* Veteran's (Lewis D. Johnson)  
Preference

C# 00021

OPINION AND AWARD

REC'D

APR 23 1977

Arbitration  
Labor Relations Department

BEFORE: Howard G. Ganser, Arbitrator

APPEARANCES:

For the Union - Robert F. Caracciolo, National Representative  
Clerk Craft

For the USPS - Stephen C. Yohay, Esq., Office of Labor Law

BACKGROUND:

Pursuant to the provisions of the National Agreement, bearing an effective date of July 21, 1975, the undersigned was duly designated to act as Arbitrator in a dispute arising under said Agreement.

The hearing was held in Boston, Massachusetts on January 17, 1977. At this hearing, both of the above-captioned Parties was given full opportunity to present testimony and other evidence in support of their respective contentions. The Grievant, Lewis D. Johnson, was present throughout the hearing and he testified in his own behalf.

By agreement at the close of the hearing, the Parties submitted thereafter post-hearing briefs. These were received in timely fashion and duly considered.

STATEMENT OF THE ISSUES:

On behalf of this Grievant, the APWU sought to arbitrate

the issue of whether the Postal Service had just cause, under Article XVI of the National Agreement for the discharge of Lewis D. Johnson as of April 23, 1976.

The USPS, at the outset, contended that the Arbitrator should not decide the merits of the Union's claim because the grievance filed was not arbitrable. The USPS pointed out that, under the provisions of the National Agreement, the Arbitrator is vested with jurisdiction to determine the arbitrability of the claim.<sup>1/</sup>

Thus, it would appear that two possible issues were submitted for final and binding determination. The first is whether the discharge of this Grievant, under the circumstances revealed in this case, presented an arbitrable issue for determination. If that issue were decided in favor of the Grievant, then the issue remaining to be decided is whether the USPS had just cause to terminate him.

STATEMENT OF THE CASE:

On March 20, 1976, Sectional Center Director of Employee Relations sent the Grievant a Memorandum headed, "Subject: Notice of Charges - Proposed Removal." After reciting that a previous removal action had been canceled for procedural reasons sustained by the Chief Appeals Officer, Federal Employee Appeals Authority, U.S. Civil Service Commission, this Memorandum then stated:

"This is notice that I propose to remove you from your position of Full-Time Clerk no earlier than 30 calendar days from the date you receive this notice..."

<sup>1/</sup> Article XV, Section 2, Step 3 of the 1975 National Agreement

The Memorandum then went on to set out in detail the charges lodged against the Grievant. The Memorandum then stated that the Grievant could submit an answer to the charges within 10 calendar days or he could file a grievance under the Grievance-Arbitration Procedures set forth in Article XV, Section 2 of the National Agreement within 14 days after he received the Memorandum.

Four days after he received this notice of the proposed removal, Mr. Johnson filed a grievance in Step 1 of the grievance procedure outlined in the National Agreement. This grievance was denied by Mr. Johnson's immediate supervisor. On March 31, 1976, the APWU appealed on Mr. Johnson's behalf to Step 2A of the grievance procedure. That appeal was denied on April 12, 1976. Then the APWU, on April 15, 1976, filed a Step 2B appeal.

On April 21, 1976, before the Step 2B decision was rendered, Boston Postmaster Phillip Sullivan sent Mr. Johnson a letter sustaining the charges against him as set forth in the Memorandum dated March 20, 1976. In that letter, the Postmaster indicated that Mr. Johnson would be removed effective April 23, 1976. Because Mr. Johnson was a preference eligible employee, the letter from the Postmaster also included the following:

You have the right to appeal to the Civil Service Commission immediately, but no later than fifteen (15) calendar days after the effective date of your removal.

An appeal to the Commission should be sent to the Chief Appeals Officer, Federal Employee Appeals Authority, Boston Field Office, John W. McCormack Post Office and Courthouse, Boston, MA 02109. Your appeal to the Commission must be in writing and must give reasons for contesting the action, with any offer of proof and pertinent documents you are able to submit.

If you appeal to the Civil Service Commission you thereby waive access to any procedure under the National Agreement beyond Step 2B of the grievance-arbitration procedures. If you appeal to the Civil Service Commission, please provide me with a copy of your appeal.

On April 22, 1976, Mr. Johnson did exercise his right as a preference eligible employee and appealed to the Commission. Acting upon receipt of such an appeal, the Commission stated in the report rendered as to the action which it took on said appeal:

After receipt of the letter of appeal, we secured from the Post Office copies of pertinent records and documents and the evidence relied on to support the action. We provided the appellant with a duplicate set of these materials and gave him an opportunity to comment in writing within ten days and to request a hearing. He responded in a letter of June 7, 1976, but he did not ask for a hearing. We therefore closed the record and proceeded to adjudication.

The Decision of the Commission as set forth in Part VI of its report reads as follows:

It is our decision, based on a thorough review of the record, that the action of the Postal Service in removing Mr. Johnson from the position of Full Time Clerk, PS-5, was effected in accordance with the procedural requirements of the Civil Service Regulations and is supported by a preponderance of evidence, and it is hereby sustained.

Section 772.309 of the Regulations provides that this decision is a final decision of the Commission and the appellant has no further administrative appeal rights.

This decision of the Commission establishes that Mr. Johnson took advantage of his right as a preference eligible to have the Commission review the procedures employed to effect his removal as well as the merits of his case. Based upon the record documented from the files of the Post Office, the Commission con-

cluded that the Postal Service did not commit any procedural irregularities in processing Mr. Johnson's proposed removal. Those were the grounds on which Mr. Johnson had previously lodged a successful appeal to the Commission. The Commission also determined on this occasion that applying a preponderance of evidence standard that the Grievant was guilty of the misconduct with which he had been charged and that discharge was an appropriate disciplinary action.

Thereafter, on June 24, 1976, representatives of the Postal Service and the APWU met for the purpose of reviewing Mr. Johnson's grievance at Step 2B of the grievance procedure. On July 2, 1976, the District Director, Employee and Labor Relations, wrote to the National Representative of the APWU and denied the grievance at that Step.

The letter of decision from the USPS also contained the following note at the bottom:

Note: We were notified by the Boston Post Office that Mr. Johnson had exercised his appeal rights to the Civil Service Commission. We (sic) relate this information to the Union during our Step 2B meeting. Consequently, this case is not appealable (sic) by the Union's arbitration.

On July 15, 1976, the formal decision of the Civil Service Commission, referred to and quoted above was sent to the Postmaster in Boston from the Chief Appeals Officer of the Federal Employee Appeals Authority of the Commission.

On July 26th, the APWU requested arbitration, and on August 2, 1976, APWU General President Filbey certified the case for arbitration. To that request, the following reply was received from the Postal Service by letter dated September 10, 1976:

It has come to our attention that the grievant in the above-captioned case appealed his discharge to the Civil Service Commission. A copy of the Civil Service Commission Decision is enclosed.

Such action constituted a waiver of access to the arbitration procedure under Article XVI, Section 6, of the Agreement.

Despite the Postal Service's contention that there had been a waiver of the right to arbitrate this grievance when the disciplinary action was appealed by this preference eligible employee to the Civil Service Commission, the APWU pressed its claim and the case was jointly submitted to the undersigned by letter dated November 24, 1976.

The question of whether preference eligible employees waive their rights to arbitration under the National Agreement when they appeal disciplinary action to the Civil Service Commission was treated by the undersigned in an Opinion and Award issued on August 25, 1976.<sup>2/</sup>

In that Award the undersigned sustained the right of two preference eligible employees to arbitrate their discharge under the provisions of Section 3 of Article XV of the National Agreement despite the fact that they had filed to initiate a review afforded them before the Civil Service Commission. However, those cases can be clearly distinguished from the one under consideration herein. Whereas those two preference eligibles withdrew their request for review of their cases from the Civil Service Commission before any action had been taken on such requests. They did not have any hearing. They did not have any review of the documentary record compiled by the Postal Service made by the Commission since no request for a

hearing was made before the Commission. Finally, in their cases they did not have a decision rendered by the Federal Employee Appeals Authority of the Civil Service Commission as did the grievant in the case here under review.

As was pointed out in that Award, the Civil Service Commission regarded the requests for review filed by Grievants White and McDonald as "cancelled and no further action taken with respect to it." Those grievants, as was pointed out in that Award, made an election to have their cases adjudicated under the provisions of the National Agreement and waived their right to the Civil Service Appeal procedure. That clearly is not the case of what happened with Mr. Johnson.

(THE GRIEVANT)

Mr. Johnson elected to take full advantage of his right as a preference eligible to have his case adjudicated under the Veterans' Preference Act. There is nothing in this record to indicate that Mr. Johnson was not afforded full protection of his rights under the process which he elected. Given the opportunity to have a hearing or a review based upon due consideration of the record in the files of the Postal Service, Mr. Johnson chose the latter type of review and consideration. After a full review of his case on the merits, the Chief Appeals Officer of the Commission concluded that on the "preponderance of the evidence" the action taken against the Grievant by the Service was to be sustained.

Section 6 of Article XVI of the National Agreement provides as follows:

A preference eligible is not hereunder deprived of whatever rights of appeal he may have under the Veterans' Preference Act; however, if he ap-

HEADING: INTERPRETATION N/A ARTICLE XVI, SECTION 6  
VETERANS' PREFERENCE

peals under the Veterans' Preference Act, he thereby waives access to any procedure under this Agreement beyond Step 2B of the grievance-arbitration procedure.

From the facts set forth above regarding the treatment of  
(THE GRIEVANT'S)  
Mr. Johnson's rights under the provisions of the Veterans' Preference Act, there is no question that he did exercise his right to appeal under the terms of that Act and that he did have a full consideration of his case on the merits under the procedures outlined for such appeals. (THE GRIEVANT)  
(THE GRIEVANT)  
Mr. Johnson did not waive his right to appeal under the statute. Mr. Johnson did not withdraw his pending appeal from before the Commission. (THE GRIEVANT)  
Mr. Johnson elected the forum in which his case was to be tried, and after he had full knowledge of the decision he did seek separate consideration of his case on the merits under the grievance-arbitration provisions of the National Agreement.

Section 6 of Article XVI clearly establishes and provides  
(THE GRIEVANT)  
that Mr. Johnson, by securing an adjudication from the Commission, had perfected his appeal to the Commission and waived access to any procedure beyond Step 2B of the National Agreement.

For the reasons stated above, the issue of arbitrability raised by the Service must be decided in its favor and the grievance  
(THE GRIEVANT)  
filed on behalf of Mr. Johnson by the APWU cannot be considered by any arbitrator under the provisions of the National Agreement.

A W A R D

Grievance AC-N-8662-D filed on behalf of (THE GRIEVANT)  
Lewis Johnson is hereby denied.

  
HOWARD G. GAMSER, ARBITRATOR

Washington, DC  
April 20, 1977

RECEIVED  
APR 21 1977  
Arbitration Division  
Labor Relations Department