

REGULAR ARBITRATION PANEL

In the Matter of Arbitration) Grievant: Mark Wagner
between)
UNITED STATES POSTAL SERVICE) Post Office: Pittsburgh P&DC, PA
and)
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL, CIO) Case No.: USPS C11N-4C-C13171774
)
) Union No.: DRT 12-276756
)
)
)

BEFORE: John M. Hamrick, Arbitrator

APPEARANCES:

For the U. S. Postal Service: Claire M. Mankowski, Labor Relations Specialist

For the Union: Jeff Fultz, NALC Headquarters Advocate

Place of Hearing: Pittsburgh, PA

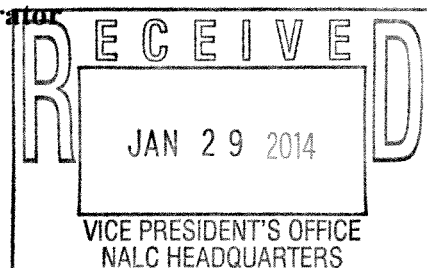
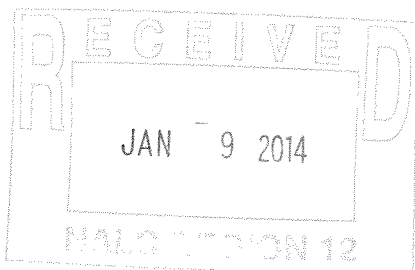
Date of Hearing: November 6, 2013

AWARD: The grievance is sustained for the reasons stated herein. The grievant is entitled to back pay, for all lost workdays due to the emergency placement and removal actions, as outlined herein.

Date of Award: January 7, 2014

PANEL: Eastern

John M. Hamrick, Arbitrator



BACKGROUND:

This case involves the alleged failure of management to comply with a grievance resolution settlement dated October 3, 2012 involving USPS Cases No. C06N-4C-D12154844 and C06N-4C-D12191176. Arbitrator Jane Minnich sustained both the foregoing grievances by an Award dated October 3, 2012. On Page 12 of that Award, Arbitrator Minnich stated, in part, that the grievant shall be reinstated with full back pay and benefits, less any interim income and government benefits received.

The grievant in that case and in the instant case is Letter Carrier Mark A. Wagner. In the first case, the grievant was placed in an emergency status position on March 29, 2012 and was removed from service on May 31, 2012. He was not returned to service until October 9, 2012. After he was returned to service, a number of inquiries were made by the grievant and his union representatives regarding back pay for the time he lost. The Union was unable to get a satisfactory resolution to the back pay issue and, consequently, initiated a complaint at Informal Step A on April 25, 2013. The supervisor and shop steward were unable to resolve the complaint and it was appealed to Formal Step A. The parties met on May 22, 2013 and, again, they could not resolve the issue. The grievance was appealed to Step B on May 24, 2013.

The Step B Team stated that the issue was whether or not management violated the provisions of Article 15.3.A and 4.A.6 and Article 19, specifically M-01517, of the National Agreement by failing to comply with the grievance resolution settlement, of the two aforementioned grievances dated October 3, 2012. The Step B Team, after considering all the evidence and arguments in the case file, declared an impasse. The grievance was appealed to arbitration by the Union by letter dated July 25, 2013.

Letter dated September 24, 2013 informed this arbitrator informed of his appointment to hear this case on November 6, 2013 at a postal facility located in Pittsburgh, PA. The hearing was heard as scheduled. The parties were given the opportunity to present testimony, evidence and argument in support of their respective positions. The parties determined that they needed to file post-hearing briefs. The briefs were received by the arbitrator on December 13, 2013. By letter of even date, this arbitrator exchanged the briefs and declared that the hearing was closed.

ISSUE:

Did management violate the provisions of Article 15, Sections 3.A. and 4.A.6. and Article 19 of the National Agreement when it failed to comply with the grievance resolution settlement dated October 3, 2012 for grievances C06N-4C-D12154844 and C06N-4C-D 12191176? If so, what is the remedy?

CONTRACT PROVISIONS:

ARTICLE 15 - GRIEVANCE - ARBITRATION PROCEDURE

Section 3. Grievance Procedure – General

- A. The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in resolution of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end. At each step of the process the parties are required to jointly review the Joint Contract Administration Manual (JCAM).

Section 4. Arbitration

A. General Provisions

6. All decisions of an arbitrator will be final and binding. All decisions of arbitrators shall be limited to the terms and provisions of this Agreement, and in no event may the terms and provisions of this Agreement be altered, amended, or modified by an arbitrator. Unless otherwise provided in this Article, all costs, fees and expenses charged by an arbitrator will be shared equally by the parties.

ARTICLE 19 - HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this

Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

EMPLOYEE AND LABOR RELATIONS MANUAL

436.1 Corrective Entitlement

An employee or former employee is entitled to receive back pay for the period during which an unjustified or unwarranted personnel action was in effect that terminated or reduced the basic compensation, allowances, differentials, and employment benefits that the employee normally would have earned during that period.

For purposes of entitlement to employment benefits, the employee is considered as having rendered service for the period during which the unjustified or unwarranted personnel action was in effect.

436.2 Limitations

- a. Any amount that the employee earned in a new employment or in an enlarged part-time employment to replace Postal Service employment must be determined and offset against the amount of the reimbursement to which he or she would be entitled.
- b. Back pay is allowed, unless otherwise specified in the appropriate award or decision, provided the employee has made reasonable efforts to obtain other employment, as follows (see also 436.42f).

1. Job applicants not hired by the Postal Service must immediately make reasonable efforts to obtain other employment.
2. Separated employees, or employees on indefinite suspension, are allowed 45 days before they must make reasonable efforts to obtain other employment.

436.3 Corrective Action

The installation head or other appropriate authority determining

that a previous decision was unjustified or unwarranted initiates and directs the corrective action to be taken to ensure appropriate earnings to the employee for the period affected.

436.4 Documents in Support of Claim

436.42 Statements by Employee

The following must be provided by the employee on PS Form 8038, *Employee Statement to Recover Back Pay*:

- a. Where the original action resulted in separation or suspension, the employee must furnish the following:
 1. The employee must provide a statement as to whether he/she earned any income during the back pay period. If the employee received any outside earnings, the employee must provide information on whether the earnings were from any of the following: (a) a part-time job held at the time of removal; (b) in a new job; or (c) in an enlarged part-time job obtained to replace Postal Service employment. In any of those cases, the employee must provide a statement from the employer showing the record of hours worked and gross earnings during the back pay period.
 2. If the employee was already working in a part-time job at the time of removal or suspension, the employer should include the employee's record of employment for the 6-month period prior to the removal or suspension.
 3. If outside earnings were from self-employment, the employee must provide an affidavit stating the amount earned during the back pay period. If such employment existed before the back pay period, the earnings must also be stated for 13 pay periods prior to the back pay period.
- b. The employee must provide a statement as to whether he/she received any unemployment compensation, and if so, state the amount received and the state that made the payments.
- c. The employee must provide a statement that he/she was ready and able to perform his/her job during the back pay period. If not, the employee must state inclusive dates not ready and able, and the cause of the incapacity or unavailability. The employee may

request payment of sick or annual leave, as appropriate, to his or her credit.

- d. The employee must provide a statement that the employee was ready and able to perform his/her job during the back pay period. If not, state inclusive dates not ready and able, and the cause by which incapacitated or unavailable. The employee may request payment of sick or annual leave as appropriate and to his/her credit, for the period of incapacity or unavailability during the back pay period.
- e. Where the original action resulted in separation or indefinite suspension and the employee obtained no outside employment for all or any part of the back pay period, the employee must furnish the following:
 1. If the back pay period is 45 days or less, the employee is not required to certify or to provide documentation in support of efforts to secure other employment during this period.
 2. If the back pay period is more than 45 days and does not exceed 6 months, the employee must provide a statement certifying the reasons why he/she did not obtain outside employment for all parts of the back pay period that exceeded the first 45 days.
 3. If the back pay period is more than 6 months, the employee must provide documentation in support of efforts to secure other employment for all parts of the back pay period that exceed the first 45 days.
- f. On health benefit coverage, the employee should state whether he or she desires to: (1) enroll in any plan, the same as a new employee; or (2) have the prior enrollment reinstated retroactive to the date it was terminated.
- g. Where the original action resulted in denial of employment with the Postal Service, the individual must provide documentation in support of his or her efforts to secure other employment for all parts of the back pay period. The individual must also provide a statement of earnings during the back pay period as required by 436.42a.
- h. The employee must complete in full and sign both PS Form 8038 and PS Form 8039 indicating his/her agreement or disagreement with the local official's completion of the form. If the employee

does not agree, the basis for the disagreement should be explained.

UNION POSITION:

The Union contended that the grievant never received the back pay award issued by Arbitrator Minnich on October 3, 2012 for either the emergency suspension action (Case No, C06N-4C-D12154844) or the removal action (Case No. C06N-4C-D12191176) issued to the grievant.

The grievant was placed on emergency placement on March 29, 2012 and remained in that status until May 30, 2012. On May 31, 2012, the Notice of Removal dated April 26, 2012 became effective. The emergency placement lasted 63 days. Section 436.42.e.1 of the ELM states if the back pay period is 45 days or less, the employee is not required to certify or to provide documentation in support of efforts to secure other employment during this period. The remaining 18 days of the emergency placement action falls under the provision of Section 436.42.e.2. of the ELM, which states, if the back pay period is more than 45 days and does not exceed 6 months, the employee must provide a statement that work was sought but not obtained. This is accomplished by completing a PS Form 8038 which asks if outside employment was sought by the employee. That form was sent to management by certified mail on January 15, 2013. As noted above, Section 436.42.e.2. of the ELM requires an employee to offer a statement as to outside employment not being obtained during the period of being off-duty. In Joint Exhibit 2, on page 15, the grievant provided a reasonable explanation why

he did not obtain employment.

The grievant's removal lasted 132 days and the first 45 days of the removal action were from May 31 through July 4, 2012 which, again, required no certification or documents in support of efforts to secure employment during that period. The remaining 87 days, from July 15 through October 9, 2012 were covered by the provisions of Section 436.42.e.2. and, as in the case of the emergency placement, the grievant supplied a reasonable explanation why he did not obtain employment.

The main fallacy of the Postal Service's argument that the back pay period exceeds 6 months is that it combined two separate actions into one action for a back pay period of 195 days. The emergency placement and removal actions were grieved separately by the Union and each action was given an independent decision by Arbitrator Minnich. The language relied upon by the Postal Service, ELM 436 does not allow aggregate determination and specifically defines "original action" and further segregates actions of separation and suspension. The testimony and documentation leaves little doubt that the grievant did follow the steps of the provisions of ELM 346 to the letter without any guidance from the Postal Service.

Section 436.2.b. of the ELM provides that back pay is allowed provided the employee has made reasonable efforts to obtain other employment. A reasonable effort of a work search is now determined by the amount of time the employee was placed in a non-pay status. ELM 436.42.e. is divided into three separate sections which determine

the higher levels of proof as time off the clock increases on a disciplinary action by the employer. A reasonable effort of a work search is now determined by the amount of time the employee was placed in a non-pay status. Section 1 requires no certification is needed to qualify as a reasonable effort of search. Section 2 requires certification in a statement that outside employment was sought as a reasonable effort of search. Section (3) requires certification in the form of a statement showing when and where employment was sought as a reasonable effort of search. The Union argued that the grievant had no obligation beyond saying that he had searched for employment. The ambiguity of the definition "reasonable" comes into play when the Postal Service fails to advise employees of the standards that are to be met in their efforts to seek outside employment.

Management failed to produce any contentions at either Informal or Formal A of the grievance procedure as evidenced by the file. That fact points to the contention that the grievant was never put on notice, either in the emergency placement or removal actions, of what was required of him regarding a job search. Was he ever advised as to the definition of a "reasonable effort" to search for employment? The Union answered these and other questions in their contentions which were never refuted beyond Step A. By its failure to address the Union's contentions, the Postal Service, in effect, agrees to the contentions of the Union.

The Union asked that the grievant be paid immediately for all the lost wages which the Postal Service failed to pay in compliance with Arbitrator Minnich's award and, in addition, award the grievant \$10.00 per day with the final back pay settlement has

been made.

POSTAL SERVICE POSITION

On October 3, 2012, Arbitrator Jane Minnich rendered a decision regarding the grievant's appeal of his emergency placement and subsequent notice of removal. He was awarded reinstatement with full back pay and benefits less any interim and government benefits received.

Under the provisions of Section 436 of the ELM, two forms must be completed in order for an employee to receive back pay. Form 8038 is the Employees Statement to Recover Back Pay and Form 8039 is the Back Pay Decision/Settlement Worksheet. The grievant was sent Form 8039 to complete. He was obligated to provide management with proof of any unemployment benefits and any wages he received. All the grievant provided was unemployment compensation receipts he received and a brief statement that he sought employment during the time he was off from June 11, 2012 through October 9, 2012. If the back pay period exceeds six months, which it did in this case, the grievant must provide dates, names, addresses and telephone numbers of persons contacted; whether an application form was filed, and the reason, if known, why employment was not offered.

The grievant provided only unemployment compensation received and simply stated that he sought employment to no avail. The issue is whether the grievant met his obligation to prove he, in fact, sought employment and provided the appropriate documentation. Management only needs to show that the grievant failed to provide any

paperwork or proof that he sought employment. The onus is on the grievant to complete the appropriate paperwork pursuant to Section 436 of the ELM. The evidence that such paperwork was sent to the grievant was acknowledged by Business Agent Napadano on page 7 of the Step B decision where he states “Wagner –Attached is the paperwork that he should have supplied when he returned the 8038 and 8039. This was sent you via Certified Mail on 1/15/2013. Obviously, this is why this has not been paid. My question – is this information sufficient? If not please let me know as soon as possible so that I can instruct him on what he must provide to complete the processing of this claim”.

On April 11, 2013, Mr. Napadano wrote that the denial of back pay because of failure to seek outside employment was not proper because the grievant did in fact, seek employment and that information was sent to management in January 2013. Although the Union claimed a “Search for Work” statement proved that the grievant sought work with all the appropriate information, all that management had was a letter that he sought employment to no avail.

The Union has failed to meet its burden of proof beyond a preponderance of the evidence. The grievant failed to seek employment as is required by ELM 436 and the onus was on him to provide such evidence. The Union was aware that the grievant was to provide proof and failed to do so. There was no testimony to prove that the grievant did provide the information to management so that the back pay could be processed. Management’s witness testimony was unrefuted and, therefore, the Union failed to meet its burden. Accordingly, the Postal Service asked that the grievance be denied in its

entirety and that no remedy be awarded.

OPINION:

This grievance stems from the Postal Service's denial of back pay resulting from a decision rendered by Arbitrator Jane Minnich, dated October 13, 2012, in which she ruled that the actions of placing the grievant on emergency suspension and subsequently removing him from service were done without just cause. The emergency placement action was initiated on March 29, 2012 and ended on May 30, 2012. The notice of removal action became effective on May 31, 2012 and ended on October 9, 2012.

The denial of back pay was based upon the Postal Service's interpretation of the provisions of Section 436.42.e. of the ELM. It took the position that the emergency placement and discharge actions were to be combined into one action to decide how long the back pay period extended. Accordingly, it calculated the back pay period to extend from March 29 through October 9, 2012 or a period of 195 days. The Postal Service then looked at the provision Section 436.42.e.3. of the ELM to determine the grievant's back pay. That provision states that if the back pay period is more than six months, the employee must provide documentation in support of efforts to secure other employment for all parts of the back pay period that exceed the first 45 days. The Postal Service denied back pay beyond the first 45 days on the basis that the grievant failed to provide the necessary documentation to support his effort to secure other employment, although Jt. Ex. 2, p.13 contains a list of employers which the grievant claimed he contacted.

However, such documentation might not have been necessary if the Postal Service had looked upon the emergency suspension and removal as two separate sections. As the opening sentence of Section 436.42.e. indicates “where the original action resulted in separation or indefinite suspension...”

Following the dictates of that language the action resulting in an indefinite suspension, the emergency placement, spanned a period of days from March 29 through May 30, 2012 or a total of 63 days. The back pay period for the action was far short of six months but more than 45 days. In such event, the provision of Section 436.42.e.2. of the ELM applies to this case and states that the employee must provide a statement certifying the reasons why he/she did not obtain outside employment for all parts of the back pay period that exceeded 45 days. The grievant’s statement in Jt. Ex. 2, p.15 notes that he signed up for unemployment compensation benefits and sought work through various businesses to no avail. There is no further documentation required according to the aforecited provision. Therefore, the grievant is entitled to back pay for all lost workdays exceeding the first 45 days of the emergency placement action which ended on May 30, 2012.

With regard to the removal action, which was effective on May 31, 2012 and extended through October 9, 2012, the back pay period for this action was 132 days, again, as in the emergency placement action, far short of six months but more than 45 days. The applicable provision to this action is Section 436.42.e.2 of the ELM. The grievant not only provided his statement contained in Jt. Ex. 2, p. 15 but also a list of

businesses he stated he contacted which appear in Jt. Ex. 2, at p. 13. Accordingly, the grievant has fulfilled the requirements of the cited provision and is entitled to back pay for all lost workdays exceeding the first 45 days of the removal action which ended on October 9, 2012.

There is no award of punitive damages because of the Postal Service's different interpretation of how the back pay provisions apply.

AWARD:

The grievance is sustained for the reasons stated herein. The grievant is entitled to back pay, for all lost workdays due to the emergency placement and removal actions, as outlined herein.

A handwritten signature in black ink, appearing to read "John M. Hamrick". The signature is written in a cursive, flowing style.

John M. Hamrick, Arbitrator, January 7, 2014