

REGULAR ARBITRATION PANEL

 In the Matter of the Arbitration *
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 between: *
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 United States Postal Service *
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 and *
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 National Association of *
 Letter Carriers, AFL, CIO *

Grievant: J. Lyons
 Post Office: Islandia, NY
 USPS Case No: B06N-4B-D 13043659
 NALC Case No: 412-282

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

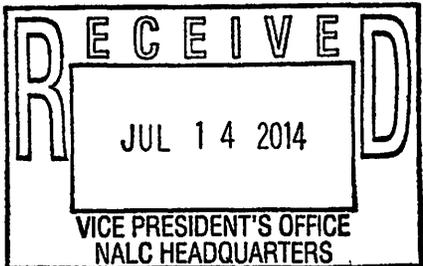
For the U.S. Postal Service: Robert A. Cossaro
 For the Union: Dan Szucs

Place of Hearing: Postal Facility, Islandia, NY
 Date of Hearing: April 16 - April 30, 2013
 Date of Award: May 26, 2013
 Relevant Contract Provision: Article 16.6
 Contract Year: 2006
 Type of Grievance: Discipline
 Award Summary:

The Grievant was placed on an indefinite suspension when Management learned he had been arrested. The evidence in this case failed to establish reasonable cause, per Article 16.6. The instant grievance is sustained and the Grievant shall be made whole.

Lawrence Roberts

 Lawrence Roberts, Panel Arbitrator



SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 16 April 2013 and 30 April 2013 at the postal facility located in Islandia, NY, both dates beginning at 10 AM. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a digital recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

The Grievant in this case is employed as a Letter Carrier, at an Islandia, NY Postal facility, the Rockville Centre. The Grievant has been employed by the Postal Service for some fourteen years.

On or about 7 November 2012, the Grievant received the following "Notice of Indefinite Suspension-Crime Situation" Letter from a Supervisor, which reads as follows:

"You are hereby notified that you will be indefinitely suspended from the Postal Service effective Monday, November 5, 2012. While in this status you are not authorized to enter the premises of the Oceanside Post Office without prior approval.

The reason for this action is that on Sunday, November 04, 2012, you were arrested for violation of New York State PL Sections(s)§145.00 01 Criminal Mischief in the Fourth Degree and New York State PL Sections(s)§240.26 03 Harassment in the Second

Degree. You surrendered yourself to the Law Enforcement and were arrested for a crime for which a sentence of imprisonment could be imposed.

ELM Section 665.16 Behavior and Personal Habits
Employees are expected to conduct themselves during and outside of working hours in a manner that 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 employees be honest, reliable, trustworthy, courteous, and of good character and reputation. The Federal Standards of Ethical Conduct referenced in §662.1 also contains regulations governing the off-duty behavior of Postal employees. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or conduct prejudicial to the Postal Service. Conviction for a violation of any criminal statute may be grounds for disciplinary action against an employee, including removal of the employee, in addition to any other penalty imposed pursuant to statute. Employees are expected to maintain harmonious working relationships and not do anything that would contribute to an unpleasant working environment.

You have the right to file a grievance under the grievance/arbitration procedure set forth in Article 15 of the National Agreement within fourteen (14) calendar days of your receipt of this notice.

If this action is reversed or modified on appeal, back pay may be allowed unless the award or decision specifies otherwise, and only if you made reasonable efforts to obtain alternate employment during the potential back pay period. The documentation which you must maintain and present to support a back pay claim is described in Subchapter 436 (attached) of the Employee and Labor Relations Manual."

A timely grievance was filed protesting the Indefinite Suspension of the Grievant.

The grievance was properly processed through the Parties Grievance-Arbitration Procedure of Article 15. The Step B Team declared an impasse on 27 December 2012. Therefore, the matter is now before the undersigned for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. The record was closed following the presentation of oral closing arguments by the respective Advocates.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.
2. Grievance Package

COMPANY'S POSITION:

It is the contention of the Employer that reasonable cause exists in the instant case to place the Grievant on an indefinite suspension.

According to the Service, as of the close of business on 15 April 2013, the day prior to this hearing, the Employer still has not received any determination on the court's sentencing of the Grievant for his actions leading to his arrest on 4 November 2012.

It is pointed out by the Employer that the collective bargaining agreement, 16.6(A) state the Employer "may" indefinitely suspend an Employee in those cases where the Employer "has reasonable cause to believe an Employee is guilty of a crime" for which a sentence of imprisonment can be imposed.

Management contends the Grievant has admitted to his actions for which the charges are still pending. The Employer believes this admission sets a foundation for them to believe the Grievant is guilty.

The Service insists that it is undisputed that the Grievant did in fact have a verbal argument with his sister on 4 November 2012 at their home and the Grievant did intentionally cause \$200.00 of damage to a door at the house he shares with his sister as reflected on Page 17 of the Joint Exhibit 2.

The Agency claims it is uncontested that as a result of this verbal altercation and physical act by the Grievant, his own sister had called police and pressed charges as a result of his actions.

The Employer goes on to cite the various charges filed against the Grievant.

Management also mentions the arresting officers beliefs that on the investigation and information he received from the victim, the Grievant did intentionally cause damage to the victim's door by punching it numerous times during a verbal argument with the victim.

The Employer also insists that a Letter from the Grievant's attorney reaffirms the facts that it is still possible a sentence of imprisonment could be imposed.

The Service mentions that Article 16.6 requires only a reasonable cause for its belief to suspect a crime has been committed which is tied to the Grievant. And this piece of evidence, according to the Employer can be found on Pages 14-18 of Joint Exhibit 2. The Employer also claims that the JCAM 16.6 clearly shows there is no requirement for Management to conduct an investigation as required for lessor offenses.

The Service believes the indefinite suspension was in accord with the provisions of Article 16.6 of the Parties Agreement.

Based on all the above reasoning, the Employer asks the instant grievance be denied in its entirety.

UNION'S POSITION:

It is the contention of the Union that the indefinite suspension of the Grievant was lacking of either reasonable or just cause. The Union argues the action is punitive in nature and in violation of Article 16.

According to the Union, it is the burden of Management to prove there was reasonable cause to believe that the Employee is

guilty of a crime for which a sentence of imprisonment can be imposed.

The Union argues that Management must conduct an adequate investigation and must establish just cause to suspend, Management must establish a nexus between the alleged misconduct and the workplace.

The Union insists that the Employer has an obligation to confront the Grievant with the information it has received and provide the Grievant an opportunity to present his version of events.

And at a bare minimum, the Union believes that Management should interview the Employee or at least invite him to submit a written explanation of the circumstances surrounding the arrest. The Union is of the opinion this did not happen in the instant case.

The Union requests that Management cease and desist from any further violations of the Parties Agreement, make the Grievant whole in every way including but not limited to all back pay and benefits.

THE ISSUE:

Did Management violate the National Agreement, Article 16.6 when they issued the Grievant an "Indefinite Suspension - Crime Situation"? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 16.6
Indefinite Suspension - Crime Situation

DISCUSSION AND FINDINGS:

The Grievant in this matter was placed on an "Indefinite Suspension" as per Article 16.6. While the foundation of Article 16 is based on "just cause," Article 16.6 lessens that

standard by a degree to only require "reasonable cause" when deploying Section 6.

The foundation of just cause is oftentimes satisfied by the clear and convincing evidence standard. And certainly each case of discipline rests on its own merits. There is not a steadfast definition of just cause, as it becomes somewhat subjective based on the objectivity of the specific evidence in any particular case.

And in my considered opinion, that was certainly the intent of the framers, in that, each matter of discipline rests on its own set of facts and circumstances. And to that end, the just cause standard sets the guideline of that negotiated intent.

That same "foundation" was altered somewhat in Section 6. The negotiators lessened the standard of cause from that of "just" to "reasonable." And that change, was only under a very specific instance, that of a "Crime Situation." Section 7 was specifically added to address other situations where an "Emergency Procedure" may be necessary.

Section 6 allows the Employer to make a "reasonable" decision, based on that very specific "snapshot" in time. The Employer must show there to be reasonable cause to believe an

Employee is guilty of a crime. Management must be able to show some form of fact(s) or circumstance(s) that would have led them to such a conclusion of Employee guilt. In that regard, the negotiators were clear, the language is unambiguous.

Management must show that some form of investigation was conducted by them, and, that internal investigation produced a reasonable cause indicating the bargaining unit Employee may be "guilty of a crime for which a sentence of imprisonment can be imposed." In my considered opinion, Management must be able to show some form of evidence that an Employee may be guilty. An arrest, in and of itself, fails to make the required "reasonable cause" requirement of Section 6.

My view is in sync with Arbitrator Sherrie Rose Talmadge, wherein 2002, (A94N-4A-D 01256837) she wrote that:

"Many arbitrators have held that Management cannot determine whether there was "reasonable cause to believe that the employee is guilty" based upon an arrest alone or based upon a newspaper account of the incident. Rather, Management has an obligation to confront the Grievant with the information it has received and provide the Grievant an opportunity to present his or her version of events. At a minimum, the Employer should interview the employee or at least invite him to submit a written explanation of the circumstances surrounding the arrest."

In that decision, Arbitrator Talmadge referenced a 1981 Decision by Arbitrator Carlton Snow, which was of the same

opinion regarding the above cited language of Article 16.6.

Thirty two years does not change the reasoning set forth by Arbitrator Snow. The language of the Agreement did not change and Professor Snow's reasoning is as grounded today as it was in 1981.

The depiction of that particular matter mentioned above seems akin to the circumstances surrounding the instant case. Management, in this case, based their entire reasoning of the indefinite suspension on a "bald record of arrest." And, in my considered opinion, this does not satisfy the reasonable cause standard set forth in Section 6.

The author of the 7 November 2012 Indefinite Suspension Letter to the Grievant, a Supervisor, testified at the hearing, on more than one occasion, that his decision to place the Grievant on an Article 16.6 suspension was based solely on the information found in the arrest record. Notably, that arrest record was presented to the supervisor by the Grievant.

And the controlling language found in that arrest record reads as follows: "The basis for this information and belief is the supporting deposition of (victim), which is attached hereto and made part hereof. That deposition was not a part of Joint Exhibit 2.

Supporting the Manager's testimony is the fact the Grievance Package itself is devoid of any additional information concerning the Grievant's arrest. It was quite obvious to me that, Management based their entire "Indefinite Suspension" on the fact the Grievant was arrested. The entire record is devoid of any further details, other than the charge.

The decision to suspend was made on or about 7 November 2012. And the record in this case clearly established that the only information obtained by the Employer at that time was the arrest record. And the indefinite suspension was based on that single piece of evidence, which, clearly was insufficient in meeting the requisite requirement of Article 16.6. And it's based on the evidence at that particular snapshot in time.

There was other evidence introduced in this matter, however, it was irrelevant. Anything following the date of the suspension becomes immaterial.

The evidence that was available to the Employer at the time of the suspension was the fact the Grievant was arrested, spent the night in jail, however, was then released the next morning by a judge, on his own recognizance, without bail. And at best,

the reading of the arrest record seems more akin to a "he said, she said" dispute.

The altercation for which the Grievant was arrested pertained to an argument he had with his sister who lived in the same building as he. His sister had a live in boy friend and when a former boyfriend showed up at their residence his sister invited him in and according to the Grievant's testimony he felt there was going to be trouble. The Grievant further testified that it was that situation that initiated the argument with his sister. The Grievant's sister told the police the Grievant kicked her door in which makes no sense because it does not seem plausible that the Grievant would become violent if he really wanted to avoid the possibility of violence in the first place. Most significantly, the Grievant testified he was not guilty of the charges and went on to say the damage to his sister's door was done previously by his niece.

My decision is based on the knowledge utilized by the Employer to make their decision to suspend at the time of their action. However, prior to the Employer issuing an indefinite suspension, I would expect, at a bare minimum, to be provided some form of controlling evidence indicating the Employer made a reasonable decision. And that evidence is clearly lacking in this matter.

And it's all about that particular snapshot in time; the knowledge available to the Employer at a given time. In this matter, it was clear the Employer had absolutely no reason to believe the Grievant may be "guilty of a crime for which a sentence of imprisonment can be imposed."

The arrest in this matter happened on a Sunday. The Grievant was released and reported for work on Monday. Even though the Grievant was incarcerated overnight, he was released without bail.

The undersigned is not an attorney nor do I claim to be an expert in legal opinion. However, the undersigned is of the ability to recognize the obvious in such cases.

The Grievant was released from overnight incarceration without bail. And in my considered opinion, it was obvious that such an action was done so by the judge on the premise the Grievant was not guilty of a crime for which a sentence of imprisonment can be imposed. Had the judge believed something to the contrary, there is no doubt bail would have certainly become a condition of release.

The grievant and his sister both live in a house owned by their mother. The grievant lives upstairs and his sister lives downstairs. The grievant was charged with a domestic dispute and if the judge felt the grievant was a threat she would also have ordered the grievant to stay away from his sister but the record is devoid of any information of the sort.

The fact remains the Grievant was released, on his own recognizance, without bail, allowed to return to his home in the same house where his sister lives and he reported to work the following day. The Grievant also testified that the reason he was incarcerated overnight is because he had to go before a judge to be released and being late on a Sunday there was no judge available at that time.

Most significant is the fact the Grievant reported his situation to a supervisor. There was no apparent attempt that the Grievant attempted to hide any information from the Postal Service. In fact, the supervisor testified he believed the Grievant was telling the truth. Yet, the sole basis of suspension, at that time was based only on the arrest documentation.

There was no investigation by the Employer. And in many cases, the lack of any investigation may suffice. However,

based on the Parties Agreement to Article 16.6, there must be a presence of reasonable cause. Had the Employer conducted an investigation and allowed the Grievant to tell his side of the story perhaps this matter would have been resolved earlier on.

And as previously discussed, it was quite clear by the evidence presented in this case that reasonable cause did not exist in this case. Therefore, the indefinite suspension should not have been issued.

As the Union correctly pointed out, everyone is innocent until proven guilty. An arrest, in and of itself, fails to provide sufficient evidence in this case. As previously discussed, the "bare bones" fact the Grievant was arrested does not satisfy the reasonable cause criteria of Article 16.6.

Without any further information, the Union insisted they were unable to properly defend the Grievant. To that end, I agree. For it was not up to the Union to investigate the facts and circumstances of the arrest.

The Employer clearly failed in meeting their obligations of Article 16.6. Their required burden of proof in this case was clearly not satisfied. And for that reason, the instant grievance is sustained and the Grievant shall be made whole.

AWARD

The instant grievance is sustained.

**Dated: May 26, 2013
Fayette County PA**