

C# 14305

IN THE MATTER OF THE ARBITRATION BETWEEN


UNITED STATES POSTAL SERVICE)	GRIEVANT: Ray A. Boykin
)	
AND)	CASE NO.: H90N-4H-D 95000488
)	GTS NO.: 007744
NATIONAL ASSOCIATION OF)	PLACE: Mobile, AL
LETTER CARRIERS)	DATE: February 8, 1995

BEFORE: J. REESE JOHNSTON, JR., ARBITRATOR

APPEARANCES: FOR THE UNITED STATES POSTAL SERVICE:
 Mr. Daniel R. Borth
 Labor Relations Specialist
 U. S. Postal Service
 250 St. Joseph Street
 Mobile, AL 36601-9401

FOR THE NALC:
 Mr. Ray Winters
 Local Business Agent, Memphis Region
 National Association of Letter Carriers
 325 Rural Hill Road, Suite 2
 Nashville, TN 37217

AWARD: The grievance of Ray Boykin is granted, and the United States Postal Service is directed to continue him in his employment as he has been up to the time of this Award under the Modified Article 16 agreement.


 J. Reese Johnston, Jr.
 Arbitrator
 Two Chase Corporate Drive
 Suite 120
 Birmingham, AL 35244-1015

DATE OF AWARD: March 20, 1995

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BACKGROUND

On June 15, 1994 Mr. Boykin, the grievant, received a Notice of Proposed Removal which stated as follows:

This is advance written notice that it is proposed to remove you from the Postal Service no sooner than 30 calendar days from the date of your receipt of this letter. The reason for this action is:

CHARGE : FAILURE TO BE REGULAR IN ATTENDANCE/AWOL

On August 2, 1993, a settlement was signed to reduce your Letter of Proposed Removal to a 7-day Suspension. Since that time your attendance has failed to meet the requirements of your position.

On Saturday, May 14, 1994, you failed to report for work at 0700 AM as scheduled. I called your house at 0715 AM and left a message on your answering machine advising you that you would be charged AWOL. You contacted me at 0855 AM stating you had over slept. You were charged AWOL for the period of 0700 - 0855 AM accordingly.

On May 17 and 18, 1994 you called in sick, when advised this was a serious offense, your response was I am not coming in to work and just do what you have to do.

Additionally, from May 28, 1994 through June 9, 1994, you did not contact the Post Office and you were charged AWOL.

Each of the incidents as cited above are just cause for your removal.

A review of your past disciplinary record reveals the following:

1. 07/31/93 7-Day Suspension - Attendance/AWOL
2. 07/24/92 Notice of Removal - for Failure to be Regular in Attendance. Held in Abeyance due to a last chance agreement.
3. 09/18/91 14-Day Suspension - Attendance/AWOL.
4. 03/27/91 7-Day Suspension - Attendance/AWOL.

You and/or your representative may review the material relied on to support the reasons for this notice at 250

Saint Joseph Street during the hours of 7:00 a.m. to 4:00 p.m. If you do not understand the reasons for this notice, contact Daniel R. Borth, Labor Relations Specialist, for further explanation.

You and/or your representative may answer this proposal within 10 days from your receipt of this letter, either in person or in writing or both, before James F. Salter III, Postmaster, 250 Saint Joseph Street, Mobile, AL between the hours of 8:00 a.m. and 4:00 p.m. you may also furnish affidavits or other written material to James F. Salter III within 10 days from your receipt of this letter. You will be afforded a reasonable amount of official time for the above purpose if you are otherwise in a duty status. After the expiration of the 10 day time limit for reply, all the facts in the case, including any reply you submit, will be given full consideration before a decision from James F. Salter III is rendered.

Since you are being disciplined for attendance, your record during the period between issuance of this discipline and subsequent steps in the grievance/arbitration procedure shall be considered for the purposes of mitigation or aggravation by the parties and, if necessary, by the arbitrator. The arbitrator shall give due consideration based upon the length of time between the issuance of this discipline and the arbitration hearing date.

You have the right to file a Grievance under the Grievance/Arbitration procedure set forth in Article 15, Section 2, of the National Agreement within fourteen (14) days of receipt of this notice.

On June 28, 1994 a Letter of Decision regarding the Notice of Proposed Removal was sent to Mr. Boykin, and that Letter of Decision stated as follows:

On June 15, 1994, you were issued a notice proposing to remove you from the U. S. Postal Service based on charges outlined in the notice.

I have given full consideration to the information in your personal answer and your representative's answer on June 23, 1994.

You contended that the dates in the notice of proposed removal of May 17 and 18, 1994, were cited in error and that you worked those days. The correct dates should

have been May 19 and 20, 1994. This does not change the facts of your poor attendance record nor provide an acceptable explanation for your absence for your AWOL from May 28, 1994, through June 9, 1994.

Further, I find the reasons stated in the notice of charges are fully supported by the evidence and warrant your removal to promote the efficiency of the service. I have considered all applicable Douglas factors and all other evidence of record.

This action will be effective July 23, 1994.

As a preference eligible, you have the right to appeal this decision in writing to

Merit Systems Protection Board
Suite 1050
401 W. Peachtree Street N.W.
Atlanta GA 30308-3523

within 20 calendar days from the effective date of this decision.

If you appeal to the MSPB, you should state whether you do or do not wish a hearing and you should furnish me a copy of your appeal. For further information on appeals procedures contact Daniel R. Borth, Labor Relations Specialist. Attached for your reference is a copy of the MSPB regulations and a copy of the appeal form.

If you appeal to the MSPB, you thereby waive access to any procedures under the National Agreement beyond Step 3 of the Grievance/Arbitration procedure. You have a right to file an MSPB appeal and a grievance on the same matter. However, if the MSPB issues a decision on the merits of your appeal, if an MSPB hearing beings (sic), if the MSPB closes the record after you request a decision without a hearing, or if you settle the MSPB appeal, you will be deemed to have waived access to arbitration. Further, if you have an MSPB appeal pending at the time the Union appeals your grievance to arbitration, of (sic) if you appeal to the MSPB after the grievance has been appealed to arbitration, you will be deemed to have waived access to arbitration.

You are entitled to a representative of your own choosing throughout your appeal. You and your representative, if he or she is a U. S. Postal Service employee, shall be afforded a reasonable amount of official time for preparation of your case if you and/or your representative are otherwise in a duty status.

The grievant and his Union filed a grievance in regard to this Letter of Removal. At the Step 2 meeting on this grievance on July 20, 1994 the grievance was settled. The settlement agreement stated as follows:

"This grievance has been: settled, under the following terms and conditions. Pursuant to Article 15 of the National Agreement this settlement/withdrawal shall not be precedent for any purpose, neither shall it be cited in any forum for any purpose.

Due to the typographical errors in Mr. Boykin's Notice of Removal, it will be withdrawn at this time. The removal will be reconsidered and may be issued at a later date."

My tapes and notes also showed that a seven-day suspension was imposed. On July 28, 1994 another Notice of Proposed Removal was sent to Mr. Boykin. This Notice of Proposed Removal read as follows:

This is advance written notice that it is proposed to remove you from the Postal Service no sooner than 30 calendar days from the date of your receipt of this letter. The reason for this action is:

CHARGE : FAILURE TO BE REGULAR IN ATTENDANCE/AWOL.

The Postal Service requires employees to be regular in attendance. You (sic) continued irregular attendance causes an unwarranted disruption to the scheduling, work performance and efficiency of the Postal Service. This type of conduct will not be tolerated. The above is a serious offense and you are charged accordingly.

A review of your past disciplinary record reveals the following:

1. 07/31/93 7-Day Suspension - Attendance/AWOL
2. 07/24/92 Notice of Removal - for Failure to be Regular in Attendance. Held in abeyance due to a last chance agreement.
3. 09/18/91 14-Day Suspension - Attendance/AWOL.

4. 03/27/91 7-Day Suspension - Attendance/AWOL.
5. 04/10/90 Letter of Warning - Attendance/AWOL.

You and/or your representative may review the material relied on to support the reasons for this notice at 250 Saint Joseph Street during the hours of 7:00 a.m. to 4:00 p.m. If you do not understand the reasons for this notice, contact Daniel R. Borth, Labor Relations Specialist, for further explanation.

You and/or your representative may answer this proposal within 10 days from your receipt of this letter, either in person or in writing or both, before James F. Salter III, Postmaster, 250 Saint Joseph Street, Mobile, AL between the hours of 8:00 a.m. and 4:00 p.m. You may also furnish affidavits or other written material to James F. Salter III within 10 days from your receipt of this letter. You will be afforded a reasonable amount of official time for the above purpose if you are otherwise in a duty status. After the expiration of the 10 day time limit for reply, all the facts in the case, including any reply you submit, will be given full consideration before a decision from James F. Salter III is rendered.

Since you are being disciplined for attendance, your record during the period between issuance of this discipline and subsequent steps in the grievance/arbitration procedure shall be considered for the purposes of mitigation or aggravation by the parties and, if necessary, by the arbitrator. The arbitrator shall give due consideration based upon the length of time between the issuance of this discipline and the arbitration hearing date.

You have the right to file a Grievance under the Grievance/Arbitration procedure set forth in Article 15, Section 2, of the National Agreement within fourteen (14) days of receipt of this notice.

On August 15, 1994 a Letter of Decision regarding the Notice of Proposed Removal was sent to Mr. Boykin, which Letter of Decision stated as follows:

On July 28, 1994, you were issued a notice proposing to remove you from the U. S. Postal Service based on charges outlined in the notice.

I must note that you did not reply to the Notice of Proposed Removal in person nor did you provide a written response. Therefore, I find the reasons stated in the notice of charges are fully supported by the evidence and warrants your removal to promote the efficiency of the service. I have considered all applicable Douglas factors and all other evidence of record.

This action will be effective September 3, 1994.

As a preference eligible, you have the right to appeal this decision in writing to

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within 30 calendar days from the effective date of this decision.

If you appeal to the MSPB, you should state whether you do or do not wish a hearing and you should furnish me a copy of your appeal. For further information on appeals procedures contact Daniel R. Borth, Labor Relations Specialist. Attached for your reference is a copy of the MSPB regulations and a copy of the appeal form.

If you appeal to the MSPB, you thereby waive access to any procedures under the National Agreement beyond Step 3 of the Grievance/Arbitration procedure. You have a right to file an MSPB appeal and a grievance on the same matter. However, if the MSPB issues a decision on the merits of your appeal, if an MSPB hearing beings (sic), if the MSPB closes the record after you request a decision without a hearing, or if you settle the MSPB appeal, you will be deemed to have waived access to arbitration. Further, if you have an MSPB appeal pending at the time the Union appeals your grievance to arbitration, of (sic) if you appeal to the MSPB after the grievance has been appealed to arbitration, you will be deemed to have waived access to arbitration.

You are entitled to a representative of your own choosing throughout your appeal. You and your representative, if he or she is a U. S. Postal Service employee, shall be afforded a reasonable amount of official time for preparation of your case if you and/or your representative are otherwise in a duty status.

The Step 2 decision letter read as follows:

This is to confirm the disposition of the subject grievance which was discussed at Step 2 of the grievance procedure. Based on the information presently contained in the grievance file, the grievance is denied.

RELEVANT FACTS:

ON 4/10/90 MR BOYKIN WAS ISSUED A LETTER OF WARNING ON ATTENDANCE/AWOL. ON 3/27/91 A 7 DAY SUSPENSION ON ATTENDANCE/AWOL. ON 9/18/91 A 14 DAY SUSPENSION ON ATTENDANCE/AWOL. ON 7/24/92 A NOTICE OF REMOVAL ON ATTENDANCE/AWOL, HELD IN ABEYANCE DUE TO LAST CHANCE AGREEMENT. ON 7/31/93 A 7 DAY SUSPENSION INSTEAD OF A REMOVAL BY INVOKING LAST CHANCE AGREEMENT. ON JULY 28, 1994 MR BOYKIN RECEIVED A NOTICE OF PROPOSED REMOVAL. AGAIN THE CHARGE WAS FAILURE TO BE REGULAR IN ATTENDANCE/AWOL. ON AUGUST 14, 1994 A LETTER OF DECISION WAS ISSUED STATING THE ACTION WILL BE EFFECTIVE SEPT 3, 1994.

UNION'S POSITION:

A SEVEN DAY SUSPENSION DOES NOT WARRANT A REMOVAL. THE LETTER OF CHARGE IS VAGUE ONLY CITE SEVEN DAY SUSPENSION AND NOTICE OF REMOVAL. DOES NOT CITE ANY IRREGULAR ATTENDANCE TIME OR DAYS, ITEM 3, 4, AND 5 SHOULD NOT BE CITED SINCE THEY ARE OVER 2 YEARS OLD. ALSO THIS IS PUNITIVE ACTION SINCE HE RECEIVED A NOTICE OF REMOVAL JUNE 28, 1994 AND THE GRIEVANCE WAS WITHDRAWN 7/22/94.

THE LETTER OF CHARGES SHOULD BE WITHDRAWN

DETAILED REASONS FOR DENIAL:

MANAGEMENT AGREES THAT A SEVEN DAY SUSPENSION IN ITSELF WOULD NOT JUSTIFY A REMOVAL HOWEVER THIS SEVEN DAY SUSPENSION WAS IN LIEU OF A REMOVAL. THE UNION CONTENTS THAT WE SHOULD NOT CITE ITEM #3, 4, AND 5 HOWEVER THESE ITEMS LEAD UP TO AND ARE DIRECTLY RELATED TO MR BOYKINS 7 DAY SUSPENSION, WHICH AS PART OF THE AGREEMENT CAN BE CITED IN FUTURE DISCIPLINARY ACTIONS. THE UNION FEELS THIS IS A PUNITIVE ACTION SINCE HE RECEIVED A NOTICE OF REMOVAL JUNE 28, 1994 WHICH WAS WITHDRAWN. THIS IS NOT A PUNITIVE ACTION MR BOYKIN HAS BEEN GIVEN MANY CHANCES TO IMPROVE HIS ATTENDANCE. MANAGEMENT HAS GIVEN HIM LAST CHANCE AGREEMENTS AND HAVE CHANGED PRIOR REMOVALS TO SUSPENSIONS. THE JUNE 28 NOTICE OF REMOVAL WAS WITHDRAWN DUE TO TYPOGRAPHICAL ERRORS WITH THE UNDERSTANDING THAT IT WOULD BE REVIEWED AND POSSIBLY REISSUED. THE UNION SIGNED OFF ON THIS AT STEP 2 SO MANAGEMENT HARDLY SEES HOW THIS COULD BE PUNITIVE.

DOCUMENTS EXCHANGED AT STEP 2:

Pursuant to Article 15 of the Collective Bargaining Agreement, any appeal to Step 3 of the Grievance/Arbitration Procedure must be made within 15 days of receipt of this decision letter. Your Step 3 appeal should be sent to the Manager, Human Resources, Attention: Labor Relations, Southeast Area Office, Postal Service, 1407 Union Avenue, Memphis Tn 38166-0979. Any appeal to Step 3 must include copies of the following: the Standard Grievance Form, a copy of this Step 2 decision letter, and, if filed, corrections or additions to the Step 2 decision. A copy of the appeal to Step 3 should also be sent to the undersigned USPS Step 2 designee.

The grievant, Ray Boykin, admits that he now realizes that he is an alcoholic. That he has made several attempts to medically resist his alcoholic tendencies. The Mobile Post Office and the Union have adopted a Modified Article 16 program wherein an employee such as Mr. Boykin who has been discharged will continue to work as a postal employee until his grievance has been finally decided at arbitration. Since the time of his discharge, which was to become effective based on the Letter of Decision on September 3, 1994, it appears that his record has been good. It also appears that from the date of the Step 2 settlement, to wit: July 20, 1994, the grievant's attendance record has been satisfactory. The Notice of Removal first hereinabove stated was settled by the Union and the Postal Service, the settlement being a seven-day suspension. It appears to this Arbitrator that rather than settling the Notice of Proposed Removal and Letter of Decision due to an error in two of the dates alleging violations in the original letters, it would have been more appropriate to have amended that Notice of Proposed Removal and the Letter of Decision rather than settling that grievance. By settling that grievance for a seven-day suspension,

the Service then needed additional violations occurring after the date of the first letter of Notice of Proposed Removal. There was no testimony before me of any attendance violations on the part of the grievant after the date of the first letter of Notice of Proposed Removal. Therefore, there was no basis for the issuance of the second letter of Notice of Proposed Removal, and the issuance of that letter with no new failures of attendance would not be proper.

ISSUE

Did the Postal Service have just cause for the removal of the grievant, Ray Boykin, by the issuance of a letter stating Notice of Proposed Removal on July 28, 1994 and the Letter of Decision dated August 15, 1994?

DISCUSSION

I have reviewed my tapes of the testimony of the witnesses and examined the exhibits introduced by the representatives of the parties, and I have read and studied the excellent post-hearing briefs filed by the representatives of the parties.

This is a unique case from a factual situation. The Union raised the issue of double jeopardy. Double jeopardy normally applies in criminal cases and is not normally applicable in civil cases. In arbitration cases, although the discharge penalty has been alluded to as a capital offense, it is still not in the category of a criminal action. Although double jeopardy as such would not be applicable in this case, the principles of fairness and fair play require in my opinion that the grievant, having been

charged once with a Notice of Proposed Removal and the affirmation of that by a Letter of Decision which two letters due to a typographical problem were settled by reducing the Notice of Removal to a seven-day suspension; this coupled with the fact that there was no new allegation that the grievant had failed in his required attendance subsequent to the date of settlement of these referred to first letters; it would not be proper or appropriate to permit the Postal Service to reinstate in effect the earlier Notice of Removal, particularly after it had settled that case with a seven-day suspension. Therefore it is my finding that under the peculiar and particular facts before me that the Notice of Proposed Removal which is the subject of the grievance before me did not show just cause for the bringing of that action.

It should be noted, however, that Mr. Boykin has a deplorable attendance record. That such a record is not one that can be put up with by his employer, the Postal Service. Mr. Boykin has now admitted that he is an alcoholic and must subject himself to appropriate treatment for that disease. Mr. Boykin should realize that a continuation of his poor attendance record will ultimately lead to his removal from employment with the Postal Service. It is in his best interest to seek help from the EAP program and any other available program such as Alcoholics Anonymous so that his disease can be, if not cured, at least treated in such a way that his attendance record no longer is in the deplorable condition that it has been in the past.

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