REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	Grievant: Manual Diaz
between	Post Office: Sacramento P&DC
UNITED STATES POSTAL SERVICE	USPS Case No: F10C-1F-D 12161337
and	APWU Case No: 304C12TE
AMERICAN POSTAL WORKERS UNION, AFL-CIO	

BEFORE:	Gary L. Connely, Arbitrator
APPEARANCES:	
For the U.S. Postal Service:	Sharon Kelly
For the Union:	Chuck Locke
Place of Hearing;	Sacramento P&DC
Dates of Hearing:	November 16, 2012; May 15, 2013
Date of Award:	July 15, 2013
Relevant Contract Provision(s):	Article 7.1.B; PSE MOU, Sections 2.7.1 and 3.B.3
Contract Year:	2010-2015
Type of Grievance:	Discipline (Rescinded PSE Removal – Remedy)

Award Summary

The grievance is arbitrable. Local Management rescinded the PSE removal and granted the grievant back pay for the remainder of his appointment period, prior to the second hearing day. Under these circumstances, the responsible local official must give due consideration to reappointing the grievant to a second PSE appointment, using the same criteria used to

reappoint PSEs that were below the grievant on the roll. If, after giving reappointment due consideration, the responsible official decides not to reappoint the grievant, that decision is not grievable.

INTRODUCTION AND HEARING OVERVIEW:

I am a member of the regular regional arbitration panel, serving the Sacramento District. By scheduling letter dated November 6, 2012, the parties selected and assigned me to hear case #F10C-1F-D 12161337, a grievance filed by Local 66 on behalf of Manual Diaz. Mr Diaz was a clerk craft postal support employee (PSE) employed at the Sacramento P&DC – the grievance involved his removal, by notice dated March 27, 2012. The hearing was convened on November 16, 2012 at the P&DC. The Service was represented by Sacramento District Labor Relations Specialist Sharon Kelly; the Union was represented by National Business Agent Chuck Locke. Mr Diaz attended.

After the representatives made their opening remarks, the Service declared that it believed the case involved an interpretive issue under the National Agreement or some supplement thereto. Consequently, after following the procedures Article 15.5.B.5, the case was held pending the outcome of national level grievance #Q10C-4Q-C 13016809.

The parties resolved the national level interpretive dispute by a Memorandum of Understanding, dated February 27, 2013, "RE: Postal Support Employee (PSE) Discipline," (the following *italicized* text is the verbatim language of the MOU):

> *This MOU is not intended to alter, amend or change in any way the terms of the 2010-2015 Collective Bargaining Agreement.*
>
> *Per Postal Support Employee (PSE) MOU Item 3.B.3, which states:*
>
> > *"PSEs may be disciplined or removed within the term of their appointment for just cause and any such discipline or removal will be subject to the grievance arbitration procedure, provided that within the immediately preceding six months, the employee has completed ninety (90) work*

days, or has been employed for 120 calendar days, which ever comes first."

- *The parties agree that Postal Support Employees (PSEs) who have successfully completed either a 90 work day or 120 calendar day period within the preceding six months may be disciplined within the term of their appointment for just cause. The parties further agree that such discipline is subject to the grievance-arbitration procedure.*
- *The parties recognize that removal is not the only mechanism available to correct deficient behavior when warranted.*
- *The full range of progressive discipline is not always required for PSEs; however, the parties agree that an appropriate element of just cause is that discipline be corrective in nature, rather than punitive.*
- *The parties agree that PSEs will not be non-scheduled because of misconduct as a substitute for discipline which would be otherwise appropriate.*
- *The parties agree that this MOU fully and completely resolves national dispute Q10C-4Q-C 13016809. All grievances concerning PSE discipline currently filed, and/or held in abeyance pending the national dispute, shall be discussed and resolved in accordance with the language above.*

After resolution of the national dispute, this case was released and returned to regional arbitration, again in accordance with Article 15.5.B.5. By scheduling letter dated April 12, 2013, it was assigned to me a second time for hearing.

The second hearing was convened on May 15, 2013 at the P&DC. The parties were again represented by Ms Kelly and Mr Locke. Mr Diaz was again in attendance.

The representatives submitted five Joint Exhibits:

1) The 2010 Collective Bargaining Agreement, (CBA or "the contract);
2) The 2012 edition of the Joint Contract Interpretation Manual, (JCIM);
3) A letter from Ms Kelly to Mr Diaz, dated May 13, 2013; rescinding the removal;
4) A joint national level document, dated June 28, 2011, including 65 contractual questions and answers, (the national Q&As); and,

5) An 87 page grievance file, including:
    - The moving papers, (the Union's appeal forms, Management's decisions and the Union's letters of "additions or corrections" for each Step of the grievance procedure);
    - The removal notice, issued by Supervisor Benjamin Bugarin;
    - Investigative interview notes prepared by Mr Bugarin;
    - The "Supervisor Worksheet for Discipline," prepared by Mr Bugarin;
    - The "Discipline Checklist," prepared by Mr Bugarin;
    - Statements authored by Mr Diaz;
    - Statements authored by Mr Bugarin;
    - Statements authored by other witnesses;
    - Photographs of the worksite;
    - Extracts from the:
    - The CBA
    - The JCIM
    - "The Postal Employee's Guide to Safety," Handbook EL-814, and
    - Mr Diaz's training records.

In addition, the Union submitted six Union Exhibits:

1) PSE hiring lists from October, 2012 though April, 2013;
2) The PSE seniority roster for November, 2012;
3) A new employee orientation report for PSEs, November 14, 2012;
4) A new employee orientation report for PSEs, November 20, 2012;
5) New employee hiring lists, January 31, 2012 and November 7, 2012; and
6) Mr Diaz's hiring test scores.

The Union opened orally. The Service opened orally and in writing.

The Union presented the testimony of Mr Diaz and Local 66 President Ted Edwards. The Service rested on the record.

The representatives elected to submit closing briefs. I received the Union's brief on June 8, 2013. It included a gloss on the US Supreme Court's decision in United Steelworkers v

Enterprise Wheel & Car Corp, (383 US 593, June 20 1960); the subchapter, "Remedy Power and Its Use," from the fifth edition of Frank and Edna Elkouri's book, How Arbitration Works, (pages 390-395)[1]; and four national level arbitration awards and three regional awards:

1) National award #NC-S 5426, (Howard Gamser, April 3, 1979);
2) National award #H4N-NA-C 21 / 27, (3rd Issue), (Richard Mittenthal, September 11, 1987);
3) National award #H1N-4G-C 35899, (Richard Mittenthal, July 11, 1986);
4) National award #H1C-NA-C 97 / 123 / 124, (Richard Mittenthal, February 3, 1989);
5) #W1C-5F-C 4734, (Carlton Snow, August 31, 1987);
6) #W4C-5K-C 12624, et al, (Carlton Snow, January 14, 1988); and,
7) #W7C-5E-C 18702, (William Eaton, August 13, 1990).

I received the Service's brief on June 15, 2013. The brief included six national arbitration awards and two regional awards:

1) National award #B90N-4B-C 94027390, (Carlton Snow, August 20, 1996);
2) National award #NC-E 11359, (Benjamin Aaron, January 25, 1984);
3) National award #H8N-5B-C 17682, (Benjamin Aaron...);
4) National award #H8N-5L-C 10418, (Richard Mittenthal, September 21, 1981);
5) National award #H7C-NA-C 36, et al, (Richard Mittenthal, January 29, 1994);
6) National award #H1N-1J-C 23247, (Neil Bernstein, August 7, 1987);
7) #W1C-5F-C 47343, (Carlton Snow, August 30, 1987); and,
8) #E10C-1E-D 12230417, (Arthur Voss, November 1, 2012).

As agreed by the representatives, I cross-served the briefs by regular mail on June 18, 2013, and, having received no rebuttal from either, I closed the record on June 28, 2013.

[1] Most of the Elkouri's discussion concerning remedies in arbitration, including the information submitted by the Union, is located in Chapter 18, "Remedies in Arbitration," of the sixth edition of How Arbitration Works, (BNA Books, 2003), pages 1187-1250. All references in this award to the Elkouri's seminal book will be to the sixth edition.

ISSUE AND STIPULATIONS:

After the hearing was opened, Ms Kelly presented the May 13, 2013 letter which has been identified as Joint Exhibit #3. The letter, from Ms Kelly to Mr Diaz; is captioned, "Rescission of Removal and Back Pay Award." In relevant part, the letter states:

> "This letter is to advise you that the Notice of Removal dated March 27, 2012 is hereby rescinded.
>
> "You will be paid for the average number of hours you worked 13 weeks prior to the effective date of your removal (April 27, 2013[2]). Your back pay period will be April 28, 2013 through the expiration of your PSE appointment of October 1, 2012."

In the Service's view, its decision to rescind Mr Diaz's removal and pay him back pay for the remainder of his appointment period, effectively renders the grievance moot. The Union disagrees.

According to the Service, the issue should be stated as:

> "Is this grievance arbitrable? If so, whether Management violated Article 19 of the National Agreement[3] and the PSE Q&As (#20 and #21) when the Grievant was not reappointed as a PSE Clerk in the Sacramento P&DC as part of the Union's make whole remedy?"

The Union sees it differently. According to the Union, the issue is:

> "Did the Postal Service violate the CBA when they rescinded the grievant's Notice of removal without making him whole for all loses? If so, what should the remedy be?"

After an animated debate it was clear that the representatives were not able to reach agreement as to the arbitrability of the grievance nor were they able to reach an agreement as to the issue.

---

[2] There's no dispute that the "April, 2013" citations in the letter actually refer to April, 2012.
[3] The Service's reference to "Article 19 of the National Agreement" is a misstatement. The actual reference is Section 3.B.3 of the national Memorandum of Understanding, Re: "Postal Support Employees," located at Appendix A of the CBA.

Consequently, the representatives authorized me to decide whether the grievance is arbitrable and, if it is, to then frame the issue.

As the Elkouris point out:

> "The grievance statement filed at the initial step of the internal dispute resolution process may define the issue or issues, especially if the statement is carefully worded or if the parties fail to agree on a statement of the issue. The parties sometimes specifically agree to this use of the grievance form. As the grievance is processed through the several steps of the internal procedure, the issue may be more significantly defined.
>
> "Sometimes the parties agree to the statement of the issue during the course of the hearing, when the evidence places the dispute in sharper focus. The arbitrator also may initiate a discussion to clarify the issue and its scope, which could produce a different statement, perhaps worded by the arbitrator and accepted by the parties. In many cases, the arbitrator must clarify the issue. The parties may request it, or the contract may provide that if the parties do not agree on the issue, it will be determined by the arbitrator. The arbitrator may incorporate the parties' separate submissions into one of his or her own wording as an accurate statement of the issue."[4]

In my opinion, the Service's submission is more closely aligned with the parties' actual dispute. In the aftermath of the Service's unilateral decisions to rescind Mr Diaz's removal and to pay him back pay for the remainder of his appointment period, there is only one remaining significant dispute between the parties – should Mr Diaz be reappointed to a clerk craft PSE position? Therefore, I will adopt and decide the questions posed by the Service's issue statement – although I will not restrict my inquiry to Q&As #20 and #21.[5]

Although the representatives were unable to reach agreement as to the issue statement, they were able to make some factual stipulations:

- The grievant was not re-hired after his 360 day term.

[4] Previously cited, pages 296-297.
[5] Joint Exhibit #4, page 4.

- The Postal service hired PSE's junior to the grievant after his 360 day term was over.
- The removal issued to the grievant has been rescinded.

RELEVANT CONTRACT PROVISIONS:

ARTICLE 7 EMPLOYEE CLASSIFICATION

Section 1 Definition and Use

****

Subsection B Postal Support Employees (PSEs)

****

8. PSEs shall be hired from an appropriate register pursuant to such procedures as the Employer may establish. They will be hired for a term not to exceed 360 calendar days per appointment. Such employees have no daily or work hour guarantees, except as provided for in Article 8.8.D PSEs will have a break in service of at least 5 days, if reappointed.

APPENDIX A APWU POSTAL SUPPORT EMPLOYEE MEMORANDA

Re: Postal Support Employees

The parties agree to the following general principles concerning Postal support employees (PSEs):

****

Section 2 Contract Provisions

****

Article 7.1.B.8

PSEs shall be hired from an appropriate register pursuant to such procedures as the Employer may establish. They will be hired for a term not to exceed 360 calendar days per appointment. Such employees have no daily or weekly work hour guarantees, except as provided in Article 8.8.D. PSEs will have a break in service of at least 5 days, if reappointed.

****

Section 3 Other Provisions

****

Subsection B Article 15

****

3. The separation of PSEs upon completion of their 360-day term and the decision to not reappoint PSEs to a new term are not grievable. PSEs may be separated for lack of work at any time. Such separation is not grievable except where it is alleged that the separation is pretextual. PSEs separated for lack of work before the end of their term will be given preference for reappointment ahead of other applicants who have not served as PSEs if the need for hiring arises within one (1) year of their separation.

   PSEs may be disciplined or removed within the term of their appointment for just cause and any such discipline or removal will be subject to the grievance arbitration procedure, provided that within the

immediate preceding six months, the employee has completed ninety (90) work days, or has been employed for 120 calendar days, whichever comes first.

In the case of removal for cause within the term of an appointment, a PSE shall be entitled to advance written notice of the charges against him/her in accordance with Article 16 of the National agreement.

Additionally, the national parties signed a joint "Questions & Answers" document[6], dated June 28, 2011 clarifying numerous contractual issues. The Q&As are prefaced with the statement, "These questions and answers are not intended to alter, amend, or change in any way the terms of the 2010-2015 agreement..."

20 How does management determine which PSE to terminate during their term, when there is lack of work?

ANSWER: Clerk and Maintenance craft PSEs will be terminated for lack of work based upon the inverse craft standing on the roll in the installation. MVS craft PSEs will be terminated for lack of work based on inverse occupational group standing on the roll in the installation.

21 When needed, how does management determine which PSE to bring back to work?

ANSWER: PSEs will be returned based upon their craft standing on the roll in the installation, or in the in the MVS craft by their occupational group standing on the roll, for up to a one year period from their break in service.

[6] Joint Exhibit #4, the Q&As are included in the JCIM, (Appendix A, pages 1-12).

THE REPRESENTATIVES' RESPECTIVE POSITIONS:

The Service's closing brief summarizes its position this way, (the *italicized* language is quoted verbatim):

> *In a contract case, it is the Union charging Management with a violation. Thu, it is their burden to to prove the violation. In this case, the Union has failed to do so.*
>
> *...Article 3 of the National Agreement, is retained by Management and gives Management the exclusive right to hire, promote, transfer, assign, and retain employees in positions within the Postal service and to suspend, demote, discharge, or take other disciplinary action against such employees. Management exercised this right when it made the determination not to reappoint the grievant to another PSE appointment. The fact management retained and/or hired other PSEs has no bearing on this instant grievance and should not be considered by the arbitrator, especially in light of the clear and unambiguous language in Article 19.3.B.3 which states, "The separation of PSEs upon completion of their 360 day term and the decision not to reappoint PSEs to a new term are not grievable. PSEs may be separated for lack of work at any time. Such separation is not grievable except where it is alleged that the separation is pretextual. PSEs separated for lack of work before the end of their term will be given preference ahead of other applicants who have not served as PSEs if the need for hiring arises within one (1) year of their separation." The grievant was not separated for lack of work and is therefore not entitled to reappointment to a PSE appointment.*
>
> *...Article 15.5.A.6 states in pertinent part, "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. As such...* [the arbitrator must]... *find the grievance is not arbitrable and deny and dismiss the grievance in its entirety.*

Not surprisingly, the Union sees things differently. Here's what the Union's closing brief has to say, (the *italicized* language is quoted verbatim):

It is not the Union's position that the Agency simply did not hire back the grievant after his 360 day term had expired. If that was the only fact in this case, we would not be here. The issue is that while the grievant was improperly terminated, his 360 day term expired. Also during this timeframe, the Agency hired back PSEs junior to the grievant. When they did, they were bound by question #21 of the June 28, 2011 National Q&As to return the grievant back to work because of his higher standing on the PSE rolls.

...Question #20...clearly relates to how PSEs will be terminated for lack of work. Then if you look at the Article 19 MOU... it lays out the process for returning PSEs separated for lack of work when it states, "PSEs separated for lack of work before the end of their term will be given preference for reappointment ahead of other applicants who have not served as PSEs if the need for hiring arises within one year of their separation. This language gives preference to PSEs separated for lack of work in which a junior PSE on the roll could be reappointed ahead of a senior PSE on the roll. Question #20 and this language from the Article 19 MOU go hand in hand on how to terminate and bring back PSEs for lack of work.

Question 20 and this language in the Article 19 MOU which pertains to letting PSEs go for lack of work and later returning them, clearly conflicts with Question #21...which requires PSEs to be returned solely based upon their standing on the rolls of the installation.

While Question #21 clearly pertains to returning PSEs to work after their break in service which occurs only after their 360 day term has expired,

Elkouri and Elkouri, How Arbitration Works, fifth edition, Chapter 9 "Standards for Interpreting Contracts"[7] states:

> *"There is no need for interpretation unless the agreement is ambiguous. If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by arbitrators."*

[7] In the sixth edition, Chapter 9 is titled "Interpreting Contract Language," pages 428-484.

...there is no ambiguity in the language found in the Questions & Answers in Questions #20 and #21.... The language is clear and unequivocal when read. Therefore...based upon the standard stated above, there is no need for an interpretation as the language of the Q&As is clear on the procedure to bring back PSEs to work after their break in service and how Management terminates PSEs during their term for lack of work.

President Ted Edwards testified...to Union Exhibits 1-6. Mr Edwards testified that Union Exhibit #1 demonstrated the PSE hiring list for November 7, 2012 and April 12, 2013 both showing PSEs junior to the grievant were on the hiring list to be hired. Union Exhibit #2 is the Sacramento P&DC PSE seniority roster for November 2012 showing Management hired numerous PSEs with a lower standing on the rolls than the grievant. Union Exhibit #3 and #4 are both new hire notification forms sent to the Union showing new hire PSEs that were hired with a lower standing on the rolls than the grievant. Union Exhibit #5 shows the January 31, 2012 hiring list showing the PSEs junior to the grievant were on the hiring list to be hired. Union Exhibit #6 shows the grievant had a rating of 81.5 on the hiring rolls.

The Agency conceded the removal action was inappropriate and unilaterally rescinded it but they don't want to be held entirely accountable for their actions. The Union is not requesting a remedy that is excessive or outside of the make whole remedy that we requested right from the start when we filed the Step 1 grievance. There is no new argument in this case. There is no dispute between the parties as to what the issue was in this case. In fact, we had three stipulations at the arbitration hearing and the Agency unilaterally withdrew the removal action in its entirety one day prior to the arbitration hearing. The Union is and has always only requested a make whole remedy which would now include back pay and reinstatement to the Postal service as a PSE because the Agency hired new PSEs that were junior to the grievant. The remedy requested by the Union will only put the grievant back to where he would have been had the Postal Service honored the grievant's just cause rights and issued him progressive discipline in the first place. The only reason the grievant is entitled to another appointment as a PSE at this time as part of the remedy is because the Agency wrongfully terminated the grievant and then sent the issue to Headquarters for review. The lengthy process created by the Agency should not be held against the grievant now in the remedy portion of the grievance. The Agency cited numerous national arbitrations pertaining to

remedies. Most of them stated that the employee is only entitled to be made whole for what was lost and the Union agrees. The Union is not requesting anything above a make whole remedy for what was lost in this case by the grievant.

FINDINGS AND CONCLUSIONS:

Arbitrability:

In their opening comments on arbitrability, the Elkouris say:

> "When an existing dispute is taken to arbitration by a joint submission of the parties, there ordinarily is no problem of arbitrability because by the submission the parties identify the dispute and agree to the arbitration. A different situation may be presented, however, when one party invokes the arbitration clause of a collective bargaining agreement by a demand or notice of intent to arbitrate a dispute that has arisen during the term of the agreement. Here arbitration may be resisted by the other party on the ground that the dispute is not arbitrable. It may be asserted for instance, that the case does not involve any of the types of disputes that are covered by the arbitration clause, or that while covered by the arbitration clause the dispute is not arbitrable because some condition precedent to arbitration, such as exhaustion of the grievance procedure or timely notice of intent to arbitrate, has not been met."[8]

In the first instance, arbitrability disputes involving issues which the resisting party claims are not covered by the arbitration clause are commonly referred to as "substantive arbitrability" questions; disputes involving allegations that some procedural requirement for arbitration has not been complied with are usually called "procedural arbitrability" questions. In this case, the Service has raised a substantive objection to arbitration.

According to the Service, this case was arbitrable when the issue was, or would have been, a question of whether Mr Diaz had been removed for just cause. But in the Service's view, it took that issue off the table when it rescinded the removal and granted Mr Diaz back pay for the remainder of his appointment period. As the Service sees it, the issue now – whether Mr Diaz

[8] Previously cited, pages 277-278.

has a contractual entitlement to reappointment – is barred from arbitration by the language of Section 3.B.3 of the PSE MOU, "The separation of PSEs upon completion of their 360-day term and the decision to not reappoint PSEs to a new term are not grievable." The Service points to this language and asserts that the Union's demand for a "make whole" remedy that includes Mr Diaz's reappointed was clearly not grievable and hence, is not arbitrable. I disagree.

This grievance was not "born" as a dispute over Mr Diaz's separation upon completion of his 360-day term and a subsequent Management decision not to reappoint him. The facts are that he had not completed his term and that no decision had been made to not reappoint him at the time the grievance was filed – simply because he had been fired. He was removed for cause during the term of his appointment and the grievance began its life as a just cause dispute over his removal. That's what this grievance was about, through the first day of hearing, through the referral to Step 4, right up to two days before the second day of hearing – when the Service unilaterally rescinded the removal and awarded Mr Diaz back pay for the remainder of his appointment. And right from the start, the Union has requested that the removal notice be rescinded and that Mr Diaz be "made whole."

At bottom, this is now a grievance about remedy. The language of the MOU may or may not estopp me from directing the Service to reappoint Mr Diaz as part of the remedy, but it does not preclude the Union from making such a request and that request does not make the grievance inarbitrable. The Service is certainly free to argue that its unilateral decision to rescind the removal and grant Mr Diaz back pay for the remainder of the term of his appointment satisfies any contractual obligations it may have to make Mr Diaz whole, but the Union's insistence that the facts in this case warrant Mr Diaz's remedial reappointment does not make an otherwise arbitrable grievance inarbitrable.

The grievance is arbitrable.

"Make whole" remedies:

The Union has asked that Mr Diaz be "made whole." What does that mean? Typically, make whole awards pertain to compensatory damages. As the Elkouris point out:

> "Monetary damages in arbitration should normally correspond to specific monetary loses suffered.... In accord with this view, arbitrators adhere to the principle that on finding a contract violation, arbitrators have inherent power under a contract to award monetary damages to place the parties in the position they would have been in had there been no violation. "[9]

But make whole remedies may go beyond monetary damages. Again, the Elkouri's:

> "Make-whole recovery may extend beyond proven out-of-pocket costs and money losses, often relying on an assumption that an employee would have done something or reached some status if the opportunity had been available."[10]

Although Arbitrator Mittenthal is specifically addressing compensatory monetary damages in national award #H7C-NA-C 36, it is clear that his comments are applicable to non-monetary contractual benefits as well:

> "...a damage award, arising from a violation of the collective bargaining agreement, should be limited to the amount necessary to make the injured employees whole. Those deprived of a contractual benefit are made whole for their loss. They receive compensatory damages to the extent required, no more and no less."[11]

As for me, my views are consistent with the Elkouris' and Arbitrator Mittenthal's – depending on the specific circumstances in a particular case an injured employee may be entitled to both monetary and non-monetary compensatory damages as part of a make whole remedy. Typically, an employee has been made whole when they have been placed in the status or situation they would have otherwise been in, had the injury not occurred.

The contractual limits on a make whole remedy:

As an arbitrator I have "inherent remedial power" under the contract, but my power is not unlimited. Article 15.5.A.5 expressly states, "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

[9] Previously cited, pages 1201-1202.
[10] Previously cited, page 1206.
[11] Page 15 of the award.

Agreement be altered, amended, or modified by an arbitrator." I have an absolute obligation to adhere to the contract and any make whole remedy that I, or any other arbitrator may impose, must be consistent with the controlling provisions of the contract. Or to put it another way, I cannot grant Mr Diaz a remedial benefit to which he is not otherwise contractually entitled.

Mr Diaz's compensatory damage award and his right to be made whole:

First of all, just to be clear about this, there is no dispute that Mr Diaz is entitled to some sort of compensatory damage award in this case. The Service conceded as much when it rescinded his removal and granted him back pay for the remainder of his appointment period. The disagreement between the parties is simply whether, as the Service contends, back pay is all he is entitled to, or, as the Union asserts, he is entitled to something more?

To begin, let's take a look at what "rescission" actually means. In my opinion, when the Service rescinds a disciplinary action, the action has the same standing, or lack of standing, as a "totally overturned disciplinary action." It is a nullity and in accordance with the JCIM, it must be "...removed from the employee's Official Personnel Folder."[12] As a consequence of the Service's decision to rescind the removal notice, the notice must be expunged and Mr Diaz's disciplinary record is unblemished. A second consequence of the rescission is that Mr Diaz, who would have worked but for the removal, is – in the absence of the removal – presumed to have been working during the remainder of his term.[13] This presumption seems to me to be particularly important. If Mr Diaz had been working, instead of fired, at the end of his term, would he have been reappointed? The Service points at Section 3.B.3 of the PSE MOU and says, "No way!" Is that really so?

In relevant part, Section 3.B.3 says, "The separation of PSEs upon completion of their 360-day term and the decision not to reappoint PSEs to a new term are not grievable." According to the Service, its only obligation to Mr Diaz after rescinding his removal was to pay him for the remainder of his term – he had no entitlement to a reappointment and, when Management decided not to reappoint him, that decision is not subject to arbitral review because it is not

[12] Joint Exhibit #2, page 154, (Article 16, page 7).
[13] This presumption is buttressed by the clear language of Section 436.1 of the Employee and Labor Relations Manual, pertaining to eligibility for benefits during back pay periods, "For purposes of entitlement to employment benefits, the employee is considered as having rendered service for the period...," Joint Exhibit #3, page 67.

grievable. But as I've already said, this argument is inconsistent with what actually happened in this case. In actuality, except for the rescission letter issued two days before the second hearing day, there was never a decision "not to reappoint" Mr Diaz – because he was fired prior to and at the time his term ended – and that's not the same thing at all. Nobody in Management ever decided not to reappoint Mr Diaz because at the time he would have been eligible for reappointment he had been removed.

This is not just a semantic quibble. Had Mr Diaz not been fired at the time his term expired, he would have been at least considered for reappointment.[14] And that leads us to Questions #20 and #21 of the national joint Q&As.

Questions #20 and #21:

Question #20 clearly pertains to those situations in which a PSE is terminated for "lack of work." That's not why Mr Diaz was removed and the Service has never suggested that lack of work played any part in its decisions relating to his removal or its rescission. Question #20 is not applicable in this case. Question #21 is a different matter.

Question #21 addresses how Management is to determine which PSEs are to be brought back to work. The answer is, "PSEs will be returned based upon their craft standing on the roll in the installation...for up to a one year period from their break in service." According to the Union, if Mr Diaz is made whole by retuning him to the situation he would have been in had he not been removed, it follows that he should be reappointed to another term since that's what happened to PSEs who were below him on the roll.[15] That makes perfectly good sense, within the context of Question 21, but it also flies in the face of Section 3.B.3 of the PSE MOU.

In relevant part, Section 3.B.3 of the PSE MOU states:

---

[14] This is the reason that I find the Service's suggestion that the Union's request that Mr Diaz be reappointed should be dismissed as "new argument" to be unpersuasive. Mr Diaz was removed, and the grievance was filed, almost six months before the end of his appointment – had the Service rescinded the removal at the early Steps of the grievance procedure, Mr Diaz would have been eligible and considered for reappointment at the end of his term – as were the other PSEs. The fact that the Service didn't make the decision to rescind the removal until after the expiration of his term does not then preclude the Union for asking that be reappointed, since, at least in the Union's view, reappointment would have been a "given" had Mr Diaz not been removed.

[15] The representatives have stipulated that PSEs below Mr Diaz on the roll were reappointed.

> "The separation of PSEs upon completion of their 360-day term and the decision to not reappoint PSEs to a new term are not grievable. PSEs may be separated for lack of work at any time. Such separation is not grievable except where it is alleged that the separation is pretextual...."

The language of the MOU is clear and unambiguous. Management's decision to separate a PSE at the end of his or her appointment term is not grievable under any circumstances. Management's decision to terminate a PSE before the end of his or her appointment because of lack of work is grievable only if it is alleged that the determination that there is a lack of work is pretextual. Question #21 notwithstanding, had Mr Diaz not been removed and had he been working at the end of his appointment, if Management had then decided not to reappoint him for any reason whatsoever – that decision would not have been grievable. That is clearly the meaning and intent of Section 3.B.3.

To the extent that Section 3.B.3 of the PSE MOU and Question #21 are in conflict, that tension must be resolved in favor of the MOU. The preface to the Q&As states, "These questions and the responses thereto are not intended to alter, amend, or change in any way the terms of the 2010-2015 agreement...." The MOU is specifically referenced by[16] and included in[17] the "2010-2015 agreement" – and it constitutes the specific terms and conditions for PSE employment. Whatever was intended by the signers of the Q&As, that intent was not to alter, amend or change the terms for PSE employment, and those terms include Section 3.B.3. The Section clearly bars a PSE from obtaining reappointment after the expiration of their term though the grievance procedure, and the grievance procedure includes arbitration.

As I have previously discussed, the purpose of a make whole remedy is to put an injured employee back in the situation or status they would have been in, had the injury not occurred – but as Arbitrator Mittenthal emphatically states, this remedial action should be limited to "no more, no less." In my opinion, a benefit that is not guaranteed by the contract, which the national parties have expressly agreed is not grievable, is "more" than the contract allows. Such a benefit cannot be obtained through arbitration as part of a make whole remedy. The fact that that the parties have agreed on an order of return for PSEs when they are reappointed to a second or succeeding term, via Question #21, is, in the face of Section 3.B.3, not enforceable

[16] At Article 7.1.B.8.
[17] At pages 279-293

through the grievance procedure and, (except in those situations involving early separations for lack of work where that declaration is found to be pretextual), a PSE cannot obtain a second term in arbitration.

OTHER ARBITRAL OPINIONS:

When it comes to the opinions of other arbitrators, I have frequently observed that I adhere to the principle that national level awards "interpret" contract language and those interpretations are binding precedent for regional arbitrators such as me. On the other hand, regional arbitration awards "apply" contract language. Regional awards are applicable in other regional level cases only to the extent that the other arbitrator finds them to be persuasive.[18]

In this case, I have read the national level awards submitted by the representatives with interest. None of these awards address the particular contractual provisions involved in this case – rather they address various questions concerning an arbitrator's remedial authority, within the context of Article 15. Without going into detail, I'll simply say that my findings and conclusions in this case have been guided by their "teachings," (as Arbitrator Snow often called national level arbitral dicta), particularly Arbitrator Mittenthal's.[19]

As for the regional opinions, except for Arbitrator Voss' case, none of these awards involved PSEs and I didn't find them to be particularly helpful. As for the Voss decision, the facts in his case were significantly different from those in this case – at least by the time the Service was done rescinding Mr Diaz's removal and granting him back pay – but I think that my reasoning is similar to his.

---

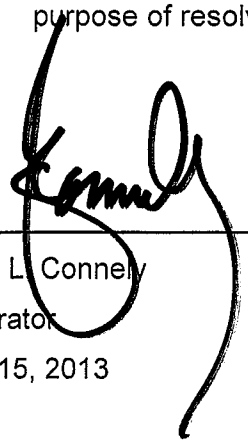
[18] However, I also endorse the views expressed by Arbitrator Dana Eischen, in national level award #E95R-4E-D 01027978, concerning the interpretive weight to be given majority "main stream" regional awards, in the absence of a final national award deciding a particular issue.

[19] As for the US Supreme Court's decision in Enterprise Wheel, I am in full agreement with the Court's holding that arbitrators have broad remedial authority, as long as their awards "draw their essence' from the collective bargaining agreement. In my opinion, an award in this case that would effectively allow Mr Diaz to gain a second appointment through the grievance procedure would be inconsistent with the contract and would not be based on its "essence."

AWARD:

As requested by the Union, Mr Diaz is entitled to a "make whole" remedy. Such a remedy should return him to the situation or status he would have been in, had the injury not occurred. On May 13, 2013, the Service unilaterally rescinded the removal and granted him back pay for the remainder of the term for his PSE appointment. This action effectively returned Mr Diaz to the situation and status he would have been in, had he not been removed – it means that Mr Diaz's disciplinary record was unblemished and that he was working at the time his appointment expired. It also means that he was eligible for reappointment under the same terms and conditions as were other similarly situated PSEs. There is no dispute that local Management did not consider Mr Diaz to be eligible for reappointment because, at the time that decision was made, he had been removed for cause. Mr Diaz cannot be deemed to have been made whole until such time as his local Management has considered reappointing him, using the same criteria that was used to reappoint those "junior" PSEs who were on the roll at the time his appointment expired. Therefore I will enter the following award:

1) Within 30 calendar days from the date of this award, the responsible local Management official will give good faith due consideration to reappointing Mr Diaz to a PSE position, using the same criteria that was used to reappoint those "junior" PSEs who were on the roll at the time his original appointment expired;
2) If the official decides to reappoint Mr Diaz, the action will be taken in accordance with the usual procedures;
3) If the official decides not to reappoint Mr Diaz, he will be given a written notice advising him of local Managements final decision;
4) A decision not reappoint Mr Diaz is not grievable; and,
5) I will retain limited jurisdiction over this award for 45 calendar days for the exclusive purpose of resolving any disputes between the parties over its implementation.



Gary L. Connery
Arbitrator
July 15, 2013