

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration § Grievants: Amanda Zuniga
Devontay Brown
§
between § Post Office: Enid, Oklahoma
§
§
UNITED STATES POSTAL SERVICE § USPS Case Nos.: G10C-4G-C 13227391
G10C-4G-C 13257180
§
and § APWU Case Nos.: 13-02
§ 13-14
§
AMERICAN POSTAL WORKERS §
UNION, AFL-CIO §

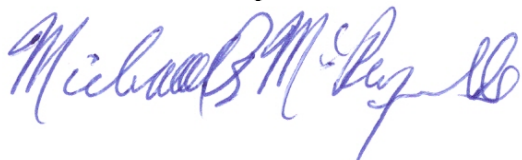
BEFORE: Michael B. McReynolds, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Scott McPherson, Labor Relations Specialist
For the Union: Don Bradshaw, National Arbitration Advocate
Place of Hearing: Enid, Oklahoma
Date of Hearing: May 16, 2014
Date of Award: June 7, 2014
Relevant Contract Provision: Article 7, National Agreement
Contract Year: 2010 -- 2015
Type of Grievance: Discipline – Removal of Postal Support
Employees (PSEs)

Award Summary

Grievances sustained. Service violated National Agreement when it separated PSEs in order to reduce PSE complement to comply with cap established in Article 7.1.B.3, where action violated specific contractual rights of PSEs. Service will take remedial action as provided herein.



Michael B. McReynolds
Arbitrator

Statement of the Case

Amanda Zuniga, the grievant in Case No. G10C-4G-C 13227391, Union No. 13-02, worked as a Postal Support Employee (PSE) at the Fairview, Oklahoma, Post Office from November 17, 2012, until May 13, 2013, when she was separated in the action underlying this grievance. Devontay Brown, the grievant in Case No. G10C-4G-C 13257180, Union No. 13-14, was a PSE at the Enid, Oklahoma, Main Post Office from May 5, 2012, until he was separated on May 29, 2013. The Union filed the grievances protesting these removals on May 13 (Zuniga) and May 22, 2013 (Brown). In both instances the Service stated that the reasons for the separations was to comply with the PSE cap defined in Article 7.1.B.3 of the National Agreement. The Union initially challenged Ms. Zuniga's separation as pretextual, in that it was actually in retaliation for her participation in protected union activity. Later in the processing of that grievance and throughout the processing of the second grievance, however, the Union argued only that the Service could separate PSEs only for lack of work or for just cause. As discussed in greater detail below, the Union challenged the Service's authority to separate PSEs simply because the District had exceeded the 20% cap established for PSEs used in retail/customer services (function four), stated in Article 7.1.B.3 of the National Agreement.

The Service denied both grievances at the initial steps of the grievance procedure, and the Union appealed them to arbitration. The parties were unable to resolve the matters, and these proceedings followed. At the hearing the parties agreed that the two grievances should be consolidated for hearing and award, since both grievances raised similar issues and the disputed actions were based on the same provisions of the National Agreement.

Issue

Although the parties did not specifically agree on a joint statement of the issue, there is no dispute that the question to be resolved here is whether the Service violated the National Agreement when it separated PSEs Amanda Zuniga and Devontay Brown in order to bring the Oklahoma District into compliance with the 20% cap for PSEs established in Article 7.1.B.3 of the National Agreement and, if so, what should be the remedy?

In addition to the underlying issue the Service presented a threshold issue of arbitrability, based on an argument of issue preclusion, asserting that issue presented here has been resolved by the parties in a Step 4 Settlement Agreement reached on August 14, 2013. Because the parties addressed the issue of PSE cap restrictions at the National level, the Service contends that the undersigned is without authority or jurisdiction to rule on the cases presented here.

Relevant Provisions of the National Agreement

The principal issue in this case arises under Article 7, and specifically Article 7.1.B.3, set forth below:

...

B. Postal Support Employees (PSEs)

...

3. In the Clerk Craft, the total number of PSEs used in mail processing (function one) within a District, will not exceed 20% of the total number of career mail processing (function one) clerk craft employees within that District, except in accounting periods 3 and 4, beginning two (2) years from the effective date of the contract. The total number of PSEs used in retail/customer services (function four) within a District will not exceed 20% of the total number of career retail/customer services (function four) clerk craft employees within that District. The number of PSEs derived from the retail/customer services (function four) percentage may be used in function one and when doing so will not count against the 20% mail processing (function one) District cap.

....

(Bold in original.)

Joint Contract Interpretation Manual

July 2012

On July 13, 2012, the parties issued the 2012 APWU/USPS Joint Contract Interpretation Manual (JCIM) update. This manual "...provides a mutually agreed upon explanation on how to apply the contract to the issues addressed." The 2012 JCIM contains an extensive list of questions and answers relating to various provisions of the

National Agreement, including 24 questions and answers pertaining specifically to PSEs. Question 24 is relevant to the issue disputed here¹:

24. May PSEs be removed for reasons other than lack of work?

ANSWER: PSE's [sic] 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 PSE had completed ninety (90) work days, or has been employed for 120 calendar days, whichever comes first.

Other Relevant Documents

In support of its argument that these grievances are not arbitrable because the underlying issue was subsequently resolved at the National level, the Service relied on a Settlement Agreement dated August 14, 2013, and signed by the Service's Vice-President, Labor Relations, Doug A. Tulino, and Union President Cliff Guffey. The relevant portions of this agreement are as follows:

...

Re: Postal Support Employee (PSE) District / ISC Cap Violations Q10C-4Q-C 13126898 / HQTG20130201

The parties agree that the following represents resolution of National Dispute Q10C-4Q-C 13126898 / HQTG20130201, regarding the PSE cap restrictions enumerated in Article 7 of the National Agreement as it relates to remedying the current dispute for Functions 1 and 4 (Clerk Craft). Accordingly, any District or ISC Clerk Craft grievance held in abeyance pending this national dispute will be withdrawn at the step where it is being held. The remaining issues in National Dispute Q10C-4Q-C 13126898 / HQTG20130201 will be addressed in Items 2 and 4 below.

...

1. The Postal Service will convert 399 Clerk Craft PSEs to career status. The Postal Service will have sixty (60) days from the date of this agreement to implement and complete conversions resulting from this settlement. This process will be administered by the parties at the national level.

¹ These questions and answers, including Question 24, were initially agreed to by the parties at the National Level on or about May 25, 2011, and were included in the record here as Joint Exhibit 3. The parties incorporated them into the 2012 edition of the JCIM.

2. The parties agree to continue their discussions and meetings for the purpose of implementing a process that will prevent the issue of hiring PSEs in excess of the contractual caps.
- ...
4. Future disputes concerning the District and/or ISE PSE caps will be addressed by the parties at the national level. If the parties are unsuccessful in addressing future issues that arise concerning PSE cap restrictions, the APWU may advance the scheduling of a hearing date for remaining issues in accordance with Article 15.5.D.
5. The parties agree that the issues in National Disputes Q10C-4Q-C 13126898 / HQTG20130201 are excluded from this settlement agreement.
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(Management Exhibit 1.)

The Arbitrability Issue

When a party raises a question of arbitrability it is necessary to address that issue first. No determination may be made on the merits of a grievance if it is not arbitrable. In this case, Management contends that these grievances are not arbitrable because the underlying issue has since been resolved by the parties as part of another dispute. The Service argues that if the Union believes these grievances are about handling PSE cap violations, they were specifically remedied in the August 14, 2013, settlement agreement quoted above.

The Union contends that the National settlement agreement has nothing to do with the issue presented here. In particular, the Union notes that the remedy reached in the Step 4 settlement provided for converting 399 PSEs to career positions, a remedy the Union is not seeking in these cases. Rather, in the instant grievances the Union argued that Article 7.1.B.3 does not create any authority for the Service to separate PSEs for any reason other than those stated by the parties in the guidelines established by the parties and included in Joint Exhibit 3.

Analysis and Conclusions – Arbitrability Issue

A party challenging arbitrability of a grievance bears the burden of establishing the merits of its claim. In this situation the Service contends that the issue presented

here was addressed and resolved by the Step 4 settlement of August 14, 2013. If that were the case, of course, that settlement would preclude the parties from proceeding to arbitration on these disputes. Having carefully reviewed and considered the settlement agreement and the arguments of the parties, however, I am not persuaded that the Service has met its burden of showing that the settlement actually resolved the question in issue here.

To begin with, the settlement, by its own terms, resolves a National Dispute regarding “the PSE cap restrictions enumerated in Article 7 of the National Agreement.” The grievances here do not challenge any aspect of the PSE cap established by Article 7. The Union acknowledges and accepts the existence and the extent of the PSE cap in the Oklahoma District. The Union does not take issue with the restrictions themselves. Rather, the Union challenges the Service’s action in separating the grievants in order to bring the PSE complement in the Oklahoma District down to the 20% figure specified in Article 7. Moreover, and this is critical in assessing the impact of the Step 4 settlement, if the Service actually believed the issues in these grievances were addressed by the agreement it would necessarily have sought to have the Union comply with the terms of the settlement. For example, the settlement refers to cases being held in abeyance pending resolution of the National dispute. These grievances were not held in abeyance, however, nor was there any action by the Service to compel the Union to withdraw them in order to comply with the terms of the settlement. Finally, Item 4 of the Step 4 settlement provides that “future disputes concerning the District and/or ISE PSE caps will be addressed by the parties at the national level.” The Service did not refer these grievances to Step 4 or otherwise elevate them to the national level at any point of the grievance procedure, including at arbitration. In these circumstances, it must be concluded that the Step 4 settlement does not preclude the parties from presenting these grievances for decision by a regional arbitrator. It is further concluded that the grievances are properly before me and they are arbitrable. Accordingly, this Opinion and Award will proceed to a consideration of the underlying issue.

Positions of the Parties

The Union

It is the Union's position that the Service did not have any valid authority to separate the grievants. The Union does not dispute the Service's contention that the Oklahoma District had exceeded the 20% cap when the grievants were separated. The problem, according to the Union, is that Article 7 does not give the Service any authority to separate PSEs simply because the cap had been exceeded. The Union notes that under the National Agreement, including the JCIM, there are only three reasons the Service may use to separate a PSE: first, at the expiration of the PSE's appointment; second, for lack of work during the term of the PSE's appointment; and, third, for just cause during the term of the PSE's appointment. The Union argues that none of the conditions permitting the Service to separate the grievants existed here. As a result, the Union contends that the Service violated the contract when it separated the grievants. The Union seeks to have the grievants reinstated without loss of any wages or benefits to which they may have been entitled. The Union specifically denied that it was seeking to have either of the grievants converted to a career position as part of the requested remedy.

The Service

The Service takes the position that the grievants were separated because the District PSE cap had been exceeded in the Oklahoma District. In order to meet the PSE cap restrictions in the District, the Service argues it was necessary to separate about 20 PSEs in order to comply with the specific terms of Article 7.1.B.3 of the National Agreement. The Service notes that early in 2013 a large number of vacancies occurred when thousands of career employees took advantage of an employee incentive or buyout package. This led to the need to hire considerably more PSEs than anticipated. On that occasion the Union agreed to a 90-day grace period in which there was no PSE cap. Because the number of PSEs in a district is a percentage of the career employee complement, the Oklahoma District was left with too many PSEs still on the rolls.

As to the requested remedy, the Service asserts that if the grievants were returned to work this would "...cause the arbitrator to violate the PSE cap agreement and put the

District back over the cap,” thereby causing an additional violation of the National Agreement.

Discussion

There is no material dispute between the parties over the facts of this case. The circumstances leading to the separation of the grievants developed over a period of time when the parties were still adjusting to some of the significant changes brought about when the terms of the new National Agreement were implemented. The creation of the PSE position solved a great many staffing problems the Service had faced for several years, but it also generated a separate set of questions for the parties to address. The parties anticipated these new questions, and provided answers to them in the revised JCIM issued in July 2012. The parties have specifically agreed that the JCIM “...provides a mutually agreed upon explanation on how to apply the contract to the issues addressed.”

In these cases it is not disputed that the grievants were appointed for terms “not to exceed 360 days.” Grievant Zuniga was separated during her first term of service, while Grievant Brown had completed one 360-day term and was on his second appointment when he was separated. Both grievants had completed 90 workdays within the six months immediately preceding their separations.

Analysis and Conclusions

It is clear that the 2010 – 2015 National Agreement provides PSEs with certain limited but clearly defined rights. Their access to the grievance-arbitration procedure, for example, is significantly restricted when compared to that of career employees. At the same time, however, the contract gives PSEs several specific assurances about their employment status. These assurances include the expectation that, upon completing 90 work days or 120 calendar days of employment, they may be disciplined or removed during the term of their appointment *only for lack of work or for just cause*. In the cases presented here the grievants were not separated for lack of work or for just cause. Rather, as discussed above, they were separated solely because the Oklahoma District had exceeded the number of PSEs it could employ as a percentage of the career employee complement.

As the Union points out, there is no provision in Article 7 that specifically addresses the situation presented here. In particular, there is nothing in Article 7 that actually explains what steps the Service must take when, as happened in this case, it exceeds the PSE cap in a particular district or other covered entity. Equally important, there is no provision in Article 7 that creates a penalty to be applied if a district exceeds its established PSE cap. The contract allows for the Service to exceed the cap at certain times, but even that provision does not identify the steps Management should take if, or when it exceeds the cap. Finally, and perhaps most important, there is nothing in the National Agreement, including the JCIM, that requires the Service to separate PSEs in order to reduce the PSE complement to the level that would meet the cap restrictions.

Because the National Agreement does not specifically establish procedures for Management to follow in instances where, as here, a district or other covered unit exceeds the PSE cap, in order to determine the merits of these grievances it is necessary to look to those provisions of the contract that directly address the issues. Those provisions, as discussed above, are contained in the JCIM, particularly in the Questions and Answers relating to PSEs, Joint Exhibit 3. As discussed above, these provisions create certain enforceable contract rights for PSEs, including the reasonable expectation that they will be employed for up to 360 days unless they are removed for lack of work or for just cause. This affirmative expression of these rights necessarily outweighs the absence of any authority for the Service to separate PSEs during their terms of appointment except for lack of work or just cause. It must be concluded, therefore, that the separations of Grievants Brown and Zuniga violated the National Agreement, specifically the provisions of the Memorandum of Understanding at Appendix A of the National Agreement. As a result, the grievances must be sustained.

There remains the question of the remedy. The Union has requested that the grievants be reinstated and made whole for any lost wages and benefits. The Service contends that such a remedy would result in a further violation of Article 7, in that it would cause the Oklahoma District to exceed the PSE cap. Although there is some merit to both of these arguments, the Service's position is significantly weaker because, as the Service itself stated, the PSE complement is subject to constant fluctuation as both PSEs and career employees enter and leave the workforce. It is noted that Grievant Zuniga worked at the Fairview, Oklahoma, Post Office. There may or may not be sufficient work

at that location to justify returning her to that facility. As of the date of the hearing Grievant Brown had been offered and had accepted a PSE position in another location. In order to remedy the contract violations, therefore, and in order to avoid the possibility that a general award to reinstate the grievants might create a situation where the Service would exceed the PSE cap, the Service will take the following actions:

Remedy

First, if the positions previously held by grievants are vacant, and if they may be filled without violating the Oklahoma District PSE cap, the Service will offer grievants reinstatement to their former positions or to other PSE positions, if they exist, within a 50-mile radius of the facilities where the grievants were previously employed. Second, the Service will make the grievants whole for any wages and benefits to which they were entitled, including back pay as set forth herein, or to which they would have become entitled during the back-pay period as defined below. The back-pay period will extend from the effective date of each separation until the date each grievant accepts appointment to an equivalent position and begins working in that position, or until the date the appointments under which they were working at the time of their separations would have expired, that is, 360 days from the date they began working under those appointments, whichever is sooner. The back pay awarded here will be calculated based on the average number of hours the grievants worked each week during the four pay periods immediately preceding the dates they were separated in the actions disputed here. Accordingly, the undersigned issues the following:

Award

The grievances are sustained. The Service will take the remedial actions as set forth above.

Issued at Fort Worth, Texas, June 7, 2014.



Michael B. McReynolds, Arbitrator