

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)	Grievant: Maribel Mota-Flores
Between)	
)	Post Office: San Juan Capistrano, CA
UNITED STATES POSTAL SERVICE,)	
Employer,)	USPS Case No.: F06N-4F-D 09146731
-and-)	F06N-4F-C 09183520
)	
NATIONAL ASSOCIATION OF)	DRT Case No.: 01-128620; 01-132115
LETTER CARRIERS AFL-CIO,)	
Union.)	

BEFORE: Claude Dawson Ames

APPEARANCES:

For the Employer: Carol Cook, Labor Relations Specialist

For the Union: Charlie Miller, President NALC, Br. 1100

Date of Hearing: July 10, 2009

Date of Briefs: August 15, 2009

Date of Award: September 14, 2009

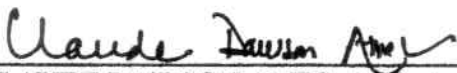
Contract Provisions: Articles 3, 12, 15, 16, 17, 19, 31

Contract Year: 2006-2011

Type of Grievance: Discipline (Discharge); Contractual (Info. Request)

AWARD SUMMARY

1. The Postal Service had just cause to issue the Grievant the Notice of Removal for Failure To Meet The Requirements Of The Position.
2. There was no violation of the National Agreement when Management denied the Union's request for test information. The Union's grievances are denied.



CLAUDE DAWSON AMES, Arbitrator

I.

BACKGROUND

The Grievant, Maribel Mota-Flores, was issued a Notice of Removal for "Failure To Meet The Requirements Of The Position." The Grievant was charged with failing her Postal Driver's Training, which was required to drive a Postal Vehicle. The events leading up to the removal are detailed below:

The Grievant began her career with the Postal Service on February 27, 2006, as a Mail Processing Clerk at the San Juan Capistrano Post Office. On November 7, 2008 the Grievant and several other employees were notified that their positions, as Mail Processing Clerks, Level—6, were no longer needed and they would be excessed on January 17, 2009. The Grievant was given a number of options, including reassigning to the Letter Carrier Craft. The Grievant was also informed that if reassigned to the Carrier Craft, she would have to successfully pass the Postal Services' driving test, or she would be separated from the Postal Service.

On February 20, 2009 the Grievant elected to be reassigned into a vacant Letter Carrier Position, within the installation. By letter, dated February 24, 2009, the Grievant was notified of her reassignment to the Carrier's position and her new reporting time. The letter also informed the Grievant that she must qualify for the requirements of the position.

The Grievant began her training for the Carrier's position on March 2, 2009. The instructor informed the class that the 805 exam was part of the Driver Training Program and was a pass or fail situation. He informed them that they must pass all portions of the Driver Training Program, or they would be separated from the Postal Service. On March 4, 2009 the Grievant was given the 805 computer based exam and failed, receiving an ineligible rating. On March 6,

2009, after an Investigative Interview, the Grievant was issued the Notice of Removal for Failing To Meet The Requirements Of The Position.

The NALC filed a grievance on the removal on March 12, 2009 and requested a copy of the 805 test that the Grievant failed and her specific test scores. The Postal Service denied the Union's request, arguing the test contained proprietary information and to release it would comprise the integrity of the test. The NALC filed a grievance on the denial of information on April 6, 2009 and is the companion grievance in this matter.

The Union now appeals the removal and denial of information grievances to arbitration, after being impassed at Step-B, by the Dispute Resolution Team.

II.

ISSUES PRESENTED

The issues presented for resolution are as follows:

1. Did Management violate Articles 3, 6, 12, 16, 19, 29, and 31 of the National Agreement when they issued the Grievant a Notice of Removal for "Failure to Meet the Requirements of the Position", dated March 6, 2009 without just cause ?

If so, what is the appropriate remedy?

2. Did the Employer violate Articles 17 and 31 of the National Agreement when they failed to provide the Union with information requested in accordance with Article 17 and 31?

If so, what is the appropriate remedy?

III.

STIPULATIONS

The parties agreed to the following stipulations:

1. The matter is properly before the Arbitrator.
2. If Chris Harold was present at the hearing, he would testify to the following: When the Grievant asked a question of him during the taking of Test 805, he did not respond with "I don't know", but "I cannot help you."

IV.

RELEVANT CONTRACT PROVISIONS

ARTICLE 3—MANAGEMENT RIGHTS

The employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

- 3.1 To direct employees in the performance of official duties;
- 3.2 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;
- 3.3 To maintain the efficiency of the operations entrusted to it
- 3.4 To determine the methods, means and personnel by which such operations are to be conducted

ARTICLE 6—NO LAYOFFS OR REDUCTIONS IN FORCE

6.B.5 No less than 20 days prior to effecting a layoff, the employer will post a list of all vacancies in other seniority units and crafts at the same or lower level which exist within the installation and within the commuting area of the losing installation. Employees in an effected seniority unit may, within 10 days after the posting, request a reassignment under this Article to a posted vacancy. Qualified employees will be assigned to such vacancies on the basis of seniority. If a senior non-preference eligible employee within the seniority unit indicates no interest in available reassignment, then such employee becomes exposed to layoff. A preference eligible employee within the seniority unit shall be required to accept such a reassignment to a vacancy in the same level at the installation, or, if none exists at the installation, to a vacancy in the same level at an installation within the commuting area of the losing installation.

ARTICLE 12—PRINCIPLES OF SENIORITY, POSTINGS AND REASSIGNMENT

12.5.B.9 Whenever in this Agreement provision is made for reassignment, it is understood that any full-time or part-time flexible employee reassigned must meet the qualification requirements of the position to which reassigned.

ARTICLE 16—DISCIPLINARY PROCEDURES

Section 1: Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs and alcohol), incompetence, failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

ARTICLE 17—REPRESENTATION

Section 3. Rights of Stewards

The steward, chief steward or other Union representative properly certified in accordance with Section 2 above may request and shall obtain access through the appropriate supervisor to review the documents, files and other records necessary for processing a grievance or determining if a grievance exists and shall have the right to interview the aggrieved employee(s), supervisors and witnesses during working hours. Such requests shall not be unreasonably denied.

ARTICLE 19—HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21. Timekeepers Instruction.

ARTICLE 29—LIMITATION ON REVOCATION OF DRIVING PRIVILEGES

An employees driving privileges may be revoked or suspended when the on duty record shows that the employee is an unsafe driver. Elements of an employee's on-duty record which may be used to determine whether the employee is an unsafe driver includes but are not limited to; traffic law violations, accidents or failure to meet required physical or operation standards.

The report of the Safe Driver Award Committee cannot be used as a basis for revoking or suspending an employees driving privileges. When a revocation, suspension or reissuance of an employees driving privileges is under consideration, only the on-duty record will be considered in making a final determination. An employee's driving privileges will be automatically revoked or suspended concurrently with any revocation or suspension of State driver's license and restored upon reinstatement. Every reasonable effort will be made to reassign such employee to non-driving duties in the employee's craft or in other crafts. In the event such revocation or suspension of the State driver's license is with the condition that the employee may operate a vehicle for employment purposes, the employee's driving privileges will not automatically be revoked. When revocation or suspension of an employee's driving privileges is under consideration based on the on-duty record, such conditional revocation or suspension of the State driver's license may be considered in making a final determination.

Initial issuance—an employee shall be issued a Certificate of Vehicle Familiarization and safe Operation when such employee has a valid State driver's license, passes the driving test of the U.S. Postal service, and has a satisfactory driving history.

An employee must inform the supervisor immediately of the revocation or suspension of such employee's State driver's license.

ARTICLE 31—UNION MANAGEMENT COOPERATION

31.3 The employer will make available for inspection by the Union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of this Agreement, including information necessary to determine whether to file or to continue the processing of a grievance under this Agreement. Upon the request of the Union, the Employer will furnish such information, provided, however, that the Employer may require the Union to reimburse the USPS for any cost reasonably incurred in obtaining the information.

V.

POSITION OF THE PARTIES

A. Employer's Position

The Service argues there was just cause for the Grievant's removal. The Grievant's position of Mail Processing Clerk—Level 6 was no longer needed at the San Juan Capistrano Post Office. The Grievant, along with several other clerks, were notified that they were to be excessed from the craft. On November 7, 2008 the Grievant was given her notice of involuntary reassignment by the Officer-In-Charge and the District Complement Coordinator, Joe Badalewski. At this meeting, Mr. Badalewski informed and discussed the options with the impacted employees and advised them of the possible positions to which they could be reassigned. One of the options was reassignment into the Carrier Craft, but they were informed they must successfully pass the driver training or they would be separated from the Postal Service.

On February 20, 2009 the Grievant elected to become a full-time letter carrier and signed the Choice Selection Worksheet, selecting one of the withheld carrier routes at the San Juan Capistrano Post Office. On this same day, Supervisor April Averbach, had a discussion with the Grievant concerning the importance of passing the Driver Training and failing to do so, she would be terminated. She was given a Letter of Reassignment Within the Installation into a Different Craft due to Excessing on February 24, 2009. The letter gave the Grievant the specifics of her training, start date, non-scheduled days, reporting time and informed her that she must meet the requirements of the position she was being reassigned to.

The Grievant reported to Driver's Training on March 2, 2009 and was again informed by the instructor, Louie Flores, that she must pass all portions of the Driver Training or she would

be separated from the Postal Service. The Grievant received the requisite amount of training for the 805 test, however, on March 4, 2009 the Grievant took the test and was rated ineligible. She could not proceed any further in the training and returned to the San Juan Capistrano office.

The Service argues that since the Grievant was forewarned about her responsibility to pass the Driver Training and the consequences if she failed any portion(s) of that training, the Notice of Removal was issued for just cause.

Regarding the request for information, the Service argues that Management at the local level attempted to comply with this request, but was informed by the District training department they did not have access to the test and only received a printout of the test results. The Service also argues the applicability of the EL-804 Handbook, Safe Driver Program, specifically Section 333.32, Administering and Securing Test Materials. That section states in part that "The test contains information that, if released, would compromise the fairness of the training and testing process." This provision is directly related to the test given during training and is applicable in this case. Also, this was not an unreasonable denial of information, given the sensitive nature of the testing materials.

The Service argues that it has met its burden of proof in this case and asks that this grievance be denied.

B. Union's Position

The Union contends that the discharge was not for just cause and punitive in nature. The Union argues that the Employer never established that the handbooks, manuals or Collective Bargaining Agreement (CBA) called for discharge for test failure. The Notice of Removal contained no reference to any violation of handbooks, manuals or contract provision. The

Employer has failed to reference a specific rule or regulation which allowed for the discharge of the Grievant for allegedly failing a computerized test.

The Grievant did not willfully or intentionally fail the test. The Employer has not presented any evidence or allegation that the Grievant failed the test on purpose, therefore the Grievant must be given full credit for putting forth her best effort. The Employer has failed to establish that the Grievant actually failed this computer based test. The only thing the Employer has presented was a Notice of Results, claiming Ineligible. This report is far from competent evidence, which could be viewed and verified. The report is less than hearsay and should be excluded from consideration, since the Arbitrator has no way to assess the accuracy of the report.

The Union also argues there was a change to the terms and conditions of employment when the EL-804 was implemented. There is no requirement to pass the 805 exam to be a carrier. Testimony of Management witness Flores was that the Grievant was the first full-time, non-probationary, career Letter Carrier to be fired for allegedly failing the 805 test.

Article-19 of the CBA specifically requires the Employer to notify the Unions of any changes to any handbooks that would impact its members. Requiring full-time, non-probationary, career Letter Carrier's to pass the 805 test, or be fired, is a significant impact on the craft. Without any evidence that the NALC was notified that such change was taking place, it must be held that it was never the intent of the driver's training program to require full-time, non-probationary, career Letter Carriers to take and pass the 805 test.

The provisions of the EL-804 was not reasonably, fairly, or equitably applied. The testimony of Mr. Rubio, regarding retesting, was completely unreasonable in that the Grievant only got one shot at passing the test. His testimony conflicts with Section 517.11 of the

EL—804, which provides for opportunities to retake the test. The Grievant's request to retake the test should have been immediately granted.

The Union also argues that the Grievant should have been allowed to remain in the Letter Carrier craft and perform non-driving duties and cites the National Level Award from Arbitrator Snow, Case I94N-4I-D 96027608.

Regarding the information denial, the Union contends they have made persuasive arguments and presented sound reasoning regarding the relevance of the information requested and that withholding of exculpatory evidence significantly impacted the Grievant's defense. Article 17, 31 and the National Labor Relations Act require the Employer to make available for inspection by the Union all relevant information and any failure to accommodate a legitimate request demands a remedy.

The Union requests that the Grievant be returned to her position in the Letter Carrier Craft and to be made whole for all lost wages and fringe benefits.

VI.

DECISION

At issue is whether the Service had just cause to issue the Grievant a removal for Failure To Meet The Requirements Of The Position, when she failed to successfully pass the Postal Driver Training Program. Also, whether Management violated Articles 17 and 31 of the National Agreement when they denied the Union's request for information, specifically the 805 test Grievant failed and her test score.

The Grievant was hired in the San Juan Capistrano Post Office as a clerk in 2006. But in November 2008 that office was overstaffed in the Clerk Craft and began a process to excess the clerks into other positions, where needed. The Grievant elected to be reassigned to the Carrier

Craft, but had to pass the Postal Driver Training Program, or face being separated from the Service. On March 4, 2009, Grievant failed her 805 exam, which was part of the Driver Training Program and was subsequently issued the removal notice.

Completion of the Service 805 test was a condition precedent for continued employment when the Grievant elected to be reassigned to the Letter Carrier Craft; namely successfully passing the required Driver Training Program. From the evidence and testimony presented, the Grievant was aware that her failure to pass this training exam would result in removal.

There were too many clerks in the San Juan Capistrano Post Office and Management chose to move these individuals to other crafts where there was a need. The Grievant was presented with several options, including reassigning to the Carrier Craft.

Joe Badalewski, the Complement Control Coordinator for the Santa Ana District, testified that he went to the San Juan Capistrano Office and conducted a stand up with those impacted clerks. During this stand up, Badalewski passed out the sixty (60) day notification letters of excessing and explained their options. He testified that he was clear in explaining to the impacted clerks, including the Grievant, that they must meet the requirements of their new position they choose and pass the necessary exam; or they would be separated from the Postal Service. Based on the record before the Arbitrator, the Grievant was informed of this job requirement and the consequences if she failed to pass the Driver Training Program, on at least two other occasions.

Supervisor April Averbach testified that when the Grievant made her selection to be reassigned to the Carrier Craft, she reminded the Grievant of the position requirement to pass the Driver Training or she would be terminated.

Louie Flores, Human Resources Associate, who supervises the Driver Instructors and facilitates the Driver Training Program, also testified that instructions given to the class at the beginning of the training program was that they were required to pass each phase of the Driver Training Program or they would be separated from the Postal Service. Flores also, testified that in preparation for the 805 exam the students were given eight (8) hours of classroom training and one (1) hour study time before administering the test. Grievant successfully passed the road but not the computerized test. Flores stated that the only proof of failure was a computerized slip indicating that Grievant was ineligible and Human Resources did not have access to the 805 test.

Prior to reassigning to the Letter Carrier Craft, Grievant was a Mail Processing Clerk and had been in this position for a period of approximately two (2) plus years. This position did not require the Grievant to pre-qualify to drive a Postal Vehicle in the delivery of the mail. But her new position as a Letter Carrier, did require that she do so in order to drive all types Postal Vehicles in the performance of her new carrier duties.

Once the Grievant elected to be reassigned to the Letter Carrier Craft she was informed on at least three occasions that she was required to successfully pass the Driver Training Program, since driving a Postal Vehicle is a precondition for the position, or she would be separated from the Postal Service. Passing the driver training was a condition for continued employment for the Grievant.

The EL—804, Section 333.2 (Drivers Required to Take Classroom Driver Training), is clear that the Grievant was required to take the training as she was new driver. The Agreement at Article 12.5.B.9 is also clear that any full-time or part-time flexible reassigned under those provisions, must meet the requirements of the position to which reassigned. Driving a Postal Vehicle was a requirement for the Letter Carrier position the Grievant was reassigned to, and

since she was unable to pass the Driver's Training test, she was not qualified for the position of a Letter Carrier and removed.

The Union raised a number of arguments in defense of the Grievant, which will be addressed in turn. First, that Management did not cite a violation of any handbook, manual, or contractual provision that the Grievant violated when she failed the 805 exam. While this is true, the Grievant was put on notice, on three different occasions, when she reassigned to the Letter Carrier Craft, that her continued employment was contingent upon her successfully passing the Driver Training Program. The Grievant was aware of her responsibility and obligation to successfully pass the Driver's Training Program as a requirement for the position and failing to do so, would lead to her removal.

The Union claims that the terms and conditions of employment were changed when the EL—804 was implemented. Article 19 of the CBA requires Management to notify the Union of any changes to handbooks that would impact its members. Requiring full-time, non-probationary career Letter Carriers to pass the 805 test or be fired, is a significant impact. However, this is an issue, which should have been discussed between the parties at the National Level, prior to the EL—804 being implemented. Further, the Union's argument misstates the issue, since the Grievant is opting into the Carrier Craft as a letter carrier, and is required to meet all conditions of the position. Letter Carriers are required to pass their Driver Training Program as a condition precedent to operating postal vehicles. Moreover, the Union's broader issue is not a matter for local determination or one which the Arbitrator chooses to opine upon.

The Union also argues that the Grievant should have been allowed to remain in the Letter Carrier Craft and perform non-driving duties. In support of this position the Union submitted a National Decision from Arbitrator Snow, case I94N-4I-D 96027608. However, in examining the

Snow award, the Arbitrator found the opinion distinguishable from the instant case and not relevant. In Snow's case a long tenured Letter Carrier was discharged when his State license was suspended for three (3) years. The Union in that case argued that under Article 29, Grievant should have been given non-driving duties until such time as his State license was restored. Arbitrator Snow agreed with the Union and put that Grievant back to work.

In the instant grievance, Grievant is not a tenured Letter Carrier and is opting into the Craft after her Clerk position was excessed. As such, Grievant was never pre-authorized to drive a Postal Vehicle after having passed the Driver Training Program. The language of Article 29 is clear and unambiguous, that for "initial issuance" of the Certificate authorizing an employee to drive a Postal Vehicle, employees must pass the driving test of the U.S. Postal Service. The Grievant failed to pass her 805 test and driver training program. Unlike the Snow case, where grievant was a tenured carrier and not opting into the Carrier Craft after being excessed from his Clerk position as Ms. Mota -Flores, there was no job or position to go back to. The Clerk position has already been excessed and no longer exist. Ms. Mota-Flores failure to pass the 805 driving exam does not grant or provide her with other available job options.

The Union also argues that the Grievant's discharge violated Article-16 and submitted a Regional Award by Arbitrator Levak, Case E94C-4E-D 97030355. In that case, the grievant was discharged when he failed to pass his city scheme. Arbitrator Levak returned the grievant to work after finding that he was inadequately trained. Levak found that there were numerous problems with the instructions and materials, including inadequate facilities provided by the Service. However, none of those training inadequacies were present in this instant grievance or argued by the Union.

The Grievant received eight (8) hours of classroom training, away from her normal workplace, from certified instructors. There was also a one (1) hour study period immediately prior to taking the actual 805 exam.

The Union also filed a companion grievance to the Grievant's removal when they requested a copy of the 805 test and the Grievant's test score. Management denied the request.

It appears Management made a good faith effort to provide this information to the Union. Louis Rubio, Manager of Training for the Santa Ana District, testified that when he received the request for the information, contact was made with Postal Headquarters to see if they could comply with the request. However, he was informed that he could not do so because it would compromise the test and process. Management's position is supported by the EL-804, Section 333.32 (Administering and Securing Test Materials), which states that the test contains information that, if released, would compromise the fairness of the training and testing process.

The Union further argued that without the test, no evidence was presented showing that the Grievant actually failed to pass the 805 exam. Flores testified that the Grievant was rated ineligible by the Service, which was her failure to pass the test. His testimony was supported by the Notice of Results, which shows that the Grievant was rated ineligible on the 805 exam.

In support of its position, the Union directs the Arbitrators' attention to a National Level award from Arbitrator Snow, case H7N-5C-C 12397. In that case, the Union requested all information relating to the attendance and discipline records of two Postal Supervisors. The Union argued the information was necessary for comparison purposes to their Grievant, alleging that the Supervisors had engaged in the same activity as their Grievant. Arbitrator Snow agreed with the Union's position in that case and required the Service to divulge the information to the Union.

However, in this instant grievance, the Union's request is for sensitive and privileged information regarding current testing materials utilized throughout Postal Service examination. This information is of a proprietary nature and to release it would compromise the integrity of the test. Under Article 3, Management has the right to determine the means, methods, standards and procedures for administering Postal examinations and to protect the confidentiality of those testing materials.

After a careful review and weighing of the record, the Arbitrator finds that there was just cause to remove the Grievant for failure to pass the Driver training Program. Evidence of record shows that the Grievant was put on notice on at least three (3) separate occasions of her responsibility and obligation to successfully pass the Driver Training Program and that failing to do so would result in her removal from the Service. This was a legitimate requirement for the Letter Carrier position. Grievant received all the requisite number of training hours, but still failed the exam. The Service was under no obligation to keep the Grievant on the rolls in the Carrier Craft in a non-driving capacity, since the main duty of a Carrier is the delivery of the mails utilizing Postal vehicles.

The Service did not violate the Agreement when the requested information was not released to the Union. The Arbitrator has determined that the 805 exam was of such a sensitive nature that to release it would have unnecessarily comprised the integrity of the Postal Service Driver Training Program examination.

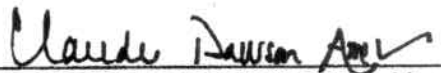
Accordingly, for the reasons stated above, the Union's grievances are denied.

AWARD

1. The Postal Service had just cause to issue the Grievant the Notice of Removal for Failure To Meet The Requirements Of The Position.
2. There was no violation of the National Agreement when Management denied the Union's request for information.

The Union's grievances are denied.

September 15, 2009



CLAUDE DAWSON AMES, Arbitrator

Courtesy of www.PostalEmployeeNetwork.com