THE ISSUE PSE DISCIPLINE CARRIED FORWARD TO CAREER CONVERSION

THE DEFINITION

A PSE employee is disciplined after they have become a career employee. The U.S. Postal Service relies upon discipline they received as a PSE to build progression as a career employee.

THE ARGUMENT

Most Arbitrators support the position that once a PSE (non-career employee) is converted to a career employee that the discipline issued to them as a PSE (non-career employee) does not carry forward as a newly hired career employee. In a National Level decision by Arbitrator DAS in case # Q11N4QC14239951, the U.S. Postal Service argued that non-career (temporary) employees could not carry forward into career status leave from the non-career status as ELM 510 does not pertain to non-career employees. The U.S. Postal Service can't have it both ways. An argument of this Due Process violation must be raised no later than Step 2 of the grievance process.

Examples of this might include:

A PSE received a Letter of Warning for Attendance and a 7 Day Suspension. After being converted to a career employee, the U.S. Postal Service issued a 14 Day Suspension to the newly converted employee for absences that occurred as a career employee. The U.S. Postal Service cites the Letter of Warning and Seven Day Suspension in the Notice of 14 Day Suspension as relied upon for progression of past elements.

THE COLLECTIVE BARGAINING AGREEMENT

Article 16.1 of the Collective Bargaining Agreement:

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 or alcohol),

incompetence, failure to perform work as requested, violation of the terms of this Agreement, or 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.

JOINT CONTRACT INTERPRETATION MANUAL- ARTICLE 16.1

CORRECTIVE RATHER THAN PUNITIVE

The requirement that discipline be corrective rather than punitive is an essential element of the "just cause" principle. In essence, this means that for most offenses management must issue discipline in a progressive fashion.

This includes issuing lesser discipline (e.g., a letter of warning) for a first offense and increasingly severe discipline for succeeding offenses (e.g., short suspension, long suspension, discharge).

The basis of this principle of corrective or progressive discipline is that it is issued for the purpose of correcting or improving employee behavior and not as punishment or retribution. However, in certain instances removal may be the proper corrective action on the first offense, for example, theft, threats, etc.

"The Postal Service argues that CCAs who convert to career status are new career employees who are subject to the requirements in ELM 510 for purposes of annual leave usage. The NALC is conflating the distinct set of annual leave provisions that apply separately to noncareer CCAs and those that apply to career city carriers. The annual leave rules for career city letter carriers are found under Article 10 of the National Agreement, which incorporates ELM 510 into the National Agreement, while the annual leave rules for CCAs are found in the NALC National Agreement at Appendix B.3 and make no reference to ELM 510. It is only after a CCA is converted to a career city carrier that the annual leave rules in Article 10 and ELM 510 apply to these employees, making the former CCA a new employee, who is, for the first time, subject to ELM 510."

Arbitrator Irene Donna Thomas **Case No. B11M1BD15279427**
Kearny, NJ **July 20, 2016** **Pages 6-15**

"The union vigorously argued that upon the grievant's conversion to a full-time employee from her employment as a Mail Handler Assistant (MHA), she is a new career Postal employee. As such, the union argued, discipline issued to her during her stint as a MHA may not be held against her to support just cause for discipline issued to her as a career employee. The union cited this arbitrator's award in *Matter of the Arbitration between USPS and APWU (Hankerson)*, B10C1BD15063172 – NY 14200 (2016) in support of its position. In *Hankerson*, I found that the employer did not meet its Article 16 obligation to impose corrective or progressive disciplinary action when it utilized discipline imposed upon a non-career employee to support disciplinary action imposed upon that employee after her conversion to a new career employee. Therefore, I found that the employer did not have just cause to remove the grievant. I reached that determination by reviewing and applying the parties' collective bargaining agreement, the JCIM and the adopted handbooks and manuals, *see* Article 19. The union here argued that because the circumstances for MHAs and the non-career personnel in the APWU bargaining unit are identical, the rationale I applied in that case should be applied in this case. The union submitted a national arbitration award, *Matter of Arbitration between USPS and NALC,* Q11N4QC14239951 (2015) issued by Arbitrator Shyam Das in further support of its position. Specifically, the union argued that in *NALC*, the *unions* took the position that the non-career employees are not "new employees and that they have all been continuously employed by the Postal Service at the time of their conversion." The union noted that in NALC, the employer argued the exact opposite (and inconsistent with their current position) – that non-career employees "who convert to career status are new career employees." The union argued that Arbitrator Das rejected the union's position, adopted the employer's position and held that non-career employees who are converted to career employees are new employees and, thus, they were subject to the requirements in ELM 510 for purposes of annual leave usage. As a new employee, the union argued, disciplinary action issued to an employee while in their temporary status cannot be used to support a more stringent disciplinary penalty.

The employer argued that the *Hankerson* decision does not control the outcome of this grievance. The employer argued, essentially, that I "went beyond the scope of the jointly stipulated issue and the contractual limitations of {my} authority and issued the ... award sustaining the grievance. The employer also argued that I exceeded my jurisdiction because I extended to PSE employees a right not bargained for by the parties. Moreover, the employer argued, the national agreement prohibits an arbitrator from altering, amending or modifying the terms of the collective bargaining agreement. Yet, I did so because my "award alters the language of the national agreement and give rights to the employees that were not bargained for." Finally, the employer argued, there is no explicit language in the collective bargaining agreement supporting my position. Therefore, it is illegitimate and should not be viewed as controlling in this case. After very careful consideration of the employer's written argument, the national agreement, and the Contract Interpretation Manual, I affirm the *Hankerson* decision as it applies to MHAs.

Because this arbitrator was charged with determining whether the employer had "just cause" to issue the Notice of Removal, I was also authorized to determine whether the employer utilized the contractually required "corrective" or "progressive" discipline standard, *that the parties negotiated into the concept of just cause*, to determine if just cause had been met in that case. Notably, the employer does not assert that this arbitrator lacked jurisdiction to hear the Article 16 discipline grievance. The employer does not assert that this arbitrator lacked jurisdiction to determine if it had properly utilized "progressive discipline" in issuing the NOR. Indeed, it could not. The employer implicitly asserted that it utilized progressive discipline by reciting the grievant's non-career employee disciplinary action to support the NOR. Also, the employer does not allege here that the express language of the submission precluded this arbitrator from considering whether the corrective/progressive discipline requirement could be met through the use of discipline issued to a non-career employee.

However passionate the employer's position that I improperly modified or altered the terms of the collective bargaining agreement, its position is based upon a simple, but erroneous belief – that there must be explicit contract language to prohibit the employer from using disciplinary action issued to a non-career employee to support discipline against that employee after her conversion to a new employee. I disagree with this position because it is not supported the collective bargaining agreement as determined by basic principles of contract interpretation.

Collective bargaining agreements are interpreted according to ordinary principles of contract law – at least when not inconsistent with federal labor policy. *M & G Polymers USA, LLC v. Tackett,* 135 S. Ct. 926, 933 (2015). "In this endeavor, as with any other contract, the parties' intentions control." *Id.* Under general principles of contract law, the absence of explicit language in an agreement is not the end of interpretation and construction analysis. *Id.* At 938 (observing that no rule requires 'clear and express' language in order to show what the parties intended); *see also, Dobson v. Hartford Fin. Serv. Grp., Inc.*, 389 F.3d 386, 399 (2d Cir. 2004) (holding that "{I}f the interpreting {arbitrator} can discern from the contract as a whole what the parties 'must have intended,' it should enforce that intention despite a lack of express terminology.")(citation omitted). A contract includes, not only the promises set forth in express

words, but, in addition, *all such implied provisions as are indispensable to effectuate the intention of the parties and as arise from the language of the contract and the circumstances under which it was made. See., Sacramento Navigation Co. v. Salz*, 273 U.S. 326, 329 (1927). In *Hankerson*, this arbitrator, too, observed that arbitrators are authorized to enforce "contract provisions" inferred from the written contract, *citing Ethyl Corp. v. United Steelworkers of American, AFL-CIO*, 768 F.2d 180, 186 (7th Cir. 1985).

Constraints upon the employer's Article 3 right to discipline an employee may be limited by both the express and implied terms of the national agreement. The employer does not cite a single authority to support the proposition that this arbitrator, or any arbitration for that matter, is confined solely to the explicit terms of the national agreement when determining whether it followed the just cause requirement of "corrective" or "progressive" discipline. The employer has not submitted one iota of support for the contract interpretation principle that an arbitrator must ignore an argument raised by the opposing party based upon implied provisions of the national agreement. Thus, for the reasons stated in *Hankerson* and the reasons stated below (see discussion re NPMHU), I find that the parties' intent was to treat converted non-career employees as "new" employees, unencumbered by prior disciplinary action. This is true particularly where the *employer* vigorously asserted before a national arbitrator that converted non-career employees are "new" employees (see below).

The employer's written argument reciting decisions such as Arbitrator Brandschain (1947), Arbitrator Goodstein (1980) and a claimed agreement by the parties at the national level concerning "the carry forward of work hours used to calculate eligibility for protection under the Family Medical Leave Act" were not considered in *Hankerson* because, despite the employer's knowledge that the union intended to make an implied contract analysis, it did not provide this information to the arbitrator for consideration. Instead, the employer stuck by its guns contending that because there was no *express* contract language stating that it was precluded from utilizing discipline imposed upon a non-career employee to support just cause for a removal issued to a converted career employee, the argument was frivolous. But, even if this information had been provided to this arbitrator, it is unpersuasive. This arbitrator did not "change the contract" ("Arbitrator Thomas in making her decision to unilaterally change the National Agreement ..."), but, only applied its terms, and the terms of the JCIM and the Employee and Labor Relations Manual (see Article 19), incorporated into the national agreement to the extent that its provisions are not inconsistent with the national agreement, and considered the employer's alleged past practice to determine the question of whether the disciplinary action issued to the grievant was progressive and; therefore, for just cause.

In its written argument, the employer stated that the APWU's statement that the parties are "currently in discussions about {the issue of use of non-career employee disciplinary action} at the national level, "should have" been a clear indicator to Arbitrator Thomas that a resolution of the issue by her would alter the terms of the contract and therefore it was beyond the scope of her authority." But, until the parties at the national level decided the question, the contract before this arbitrator was ambiguous. Thus, this arbitrator was required to conduct an analysis of the parties' intent. I considered the intent of the parties by applying the contract and basic, elementary principles of contract interpretation. Moreover, perhaps the employer missed the main point to that discussion in the *Hankerson* award: the employer's claimed past practice

argument was untenable because there was no evidence to support the employer's "bald" claim that the APWU acquiesced in the employer's known practice of "carrying over" unscheduled leave usage and prior disciplinary action. In this case, neither in the employer's argument nor at the arbitration hearing did the employer submit evidence to show that this arbitrator's analysis did not apply to the National Postal Mail Handlers Union or that the NPMHU, *did, in fact*, acquiesce in this alleged prior practice.

In this case, the NPMHU national agreement also requires that issued disciplinary action be "corrective rather than punitive." Article 16.1. Indeed, the Contract Interpretation Manual further explains this concept:

> The requirement that discipline be 'corrective' rather than 'punitive' is an essential element of the 'just cause' principle. In short, it means that for most offenses management must issue discipline in a 'progressive' fashion, issuing lesser discipline (e.g., a letter of warning) for the first offense – remember that discussions are appropriate for first offenses of a minor nature – and a pattern of increasing severe discipline for succeeding offenses (e.g., short suspension, long suspension, discharge). The basis of this principle of 'corrective' or 'progressive' discipline is that discipline issued for the purpose of correcting or improving employee behavior and not as punishment or retribution.

This language is identical to the APWU JCIM language. I find, therefore, that the parties' understanding of this language is the same under the APWU JCIM and the NPMHU's CIM. Indeed, for a long time, the parties to the national agreement, particularly when the parties adopted the language of Article 16.1, engaged in combined bargaining. During that period, the APWU and NPMHU bargained together. Therefore, in the absence of evidence to the contrary, it is perfectly legitmate to conclude that this language in both contracts have the same understanding.

As noted above, in this case, the NPMHU provided additional support for its position: a 2015 arbitration award issued by Arbitrator Das. Indeed, as the NPMHU argued here, in that case, the employer took a position that is diametrically opposed to the position it is taking in this case. There, the employer argued that converted non-career employees are "new" employees and, therefore, must complete a 90 day probationary period after their conversion before they may be credited with or take annual leave. Arbitrator Das adopted the employer's interpretation. Now, however, the employer essentially wants the contract to read that a converted non-career employee is a "new" employee for annual leave purposes but is not a "new" employee for disciplinary purposes. The employer argued that the Das Award "shouldn't be looked at as relevant in this case because it doesn't say anything about throwing away a previous disciplinary record." But, there is another cardinal principle of contract interpretation that must be applied: a contract should be read to give effect to all its provisions and to render them consistent with each other. *See, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 63 (1995). Adopting a position that a converted employee is "new" for purposes of his annual leave usage but is not a "new" employee, entitled to full employee benefits and privileges for disciplinary

purpose, cannot be reconciled in this arbitrator's view. Thus, based upon the above rationale, this arbitrator's contract based rationale in *Hankerson* as it applies to MHAs and of course, the NPMHU national agreement and CIM, I find that the prior discipline issued to the grievant cannot be used to support corrective or progressive discipline in the present case. Therefore, the employer did not have just cause to issue a fourteen (14) day suspension.

"Arbitrator Thomas's decision that PSEs converted to career status are entitled to begin their career employment with a clean record was based on her analysis of a number of contractual provisions. She noted that PSEs are non-career employees hired for a limited term. They are not guaranteed appointment for another term or conversion to career status, and have limited rights under the National Agreement. PSEs are not entitled to sick leave. Once converted to career status, such employees are considered new employees under the contract, and are appointed to terms with no time limit. Under ELM 421.41 career status confers full employee benefits and privileges. Arbitrator Thomas considered a clean disciplinary record one such benefit conferred by appointment to career status.

I find Arbitrator Thomas decision well-reasoned and persuasive. The grievant was employed as a PSE beginning in 2012 and could have been removed for just cause at any time prior to his conversion. Alternatively, had he not been reappointed at the end of any term, he would have had no recourse. Once converted to career status the grievant served as a probationary employee for three months during which he accumulated almost all the absences cited in the NOR. Management was aware of the grievants disciplinary record as a PSE when it reappointed and subsequently converted him to career status. Once he became a career employee, however, the grievant had different employment benefits and privileges than applied to him as a PSE. I agree with Arbitrator Thomas that under the contract, employees begin their career employment without a prior disciplinary record carried over from their PSE employment.

There is another concern that would arise if discipline imposed on PSEs could be considered prior elements of discipline that may be cited against career employees. Many arbitrators, including this one, have concluded that PSEs are not entitled to the full range of progressive discipline afforded career employees under Article 16. The discipline in a PSEs record may, therefore, be at a higher level than would have met the just cause standard had it been imposed on a career employee. The grievant, for example, had a 14-day suspension as a PSE for Failure to be Regular in Attendance. It is unclear from the record, however, whether the grievant had been afforded the full range of corrective discipline as a PSE prior to the imposition of the 14-day suspension. The carry over of PSE discipline imposed under a more restrictive just cause standard to the records of career employees would seem inconsistent with the principle that career employees begin as new hires with full employee benefits and privileges and are entitled to full just cause protection."

DISCUSSION AND ANALYSIS

Article 15.5.A.6 of the national agreement provides, in relevant 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.

Article 37.2.0.1 of the national agreement provides:

D. Application of Seniority

1. Seniority for full-time employees ... begins on the date of entry into the Clerk Craft in an installation and continues to accrue as long as service is uninterrupted in the Clerk Craft and in the same installation, except as otherwise specifically provided for.

The parties MOU re Postal Support Employees 1.a., at 279 of the collective bargaining agreement provides:

1. General Principles:

a. The PSE work force will be comprised of non-career, bargaining unit employees, which is the only category of non-career employees established to work within APWU bargaining units.

b. PSEs will be hired for a term not to exceed 360 calendar days and will have a break in service of at least 5 days, if reappointed.

3. Other provisions

B. Article 15

3. The separation of PSEs upon completion of their 360-day term and the decision to not reappoint 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 immediately 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 the provisions of Article 16 of the National Agreement.

JCIM Article 10

Under Article 10, PSEs do not earn sick leave. JCIM at 76. They do, however, "receive annual leave to be used for rest, recreation, emergency purposes, as well as, illness or injury."

Employee and Labor Relations. Manual

The Employee and Labor Relations Manual (ELM), 421.4l.a, provides that a career appointment is

> a new hire for an appointment without time limit requiring the completion of probationary period that confers full employee benefits and privileges. The term applies to (a) new employees, (b) former employees who are being reinstated, (c) employees transferring from federal agencies, and (d) current Postal Service employees who choose to transfer to or from the rural carrier craft.

ELM 521.2.g, eligibility for the Federal Employees Health Benefits (FEHB) Program, provides that PSEs are entitled to participate in this program if they meet certain criteria:

(1) Have completed 1 year of continuous service disregarding breaks in service of 5 days or less.

2) Have a predetermined tour of duty.

(3) Have sufficient earnings to cover mandatory withholdings and premium deductions.

Section 512.221 of the ELM provides:

Determining Annual Leave. The following prior service in the Postal Service is used in computing the years of service that determine the annual leave category;

a. Service performed while a career employee of the Postal Service or Post Office Department

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c. If performed before January 1, 1977, time on the rolls as a casual or temporary employee .....

After careful consideration of the national agreement, including the Employee and Labor Relations Manual, the JCIM, the the sworn testimony, the documentary evidence and the parties' arguments, I conclude that this grievance should be sustained.

Throughout the grievance procedure, starting with Shop Steward Kelly Wilder, the union asserted a contract-based claim that disciplinary action for PSEs cannot follow them into their career employment. To support their argument, the union relied upon various provisions of the collective bargaining agreement, the JCIM and the ELM. The employer countered the unions contract-based argument with a general claim that the union "did not submit any supportive documentation to support (the) allegation" that the Service cannot cite PSE disciplinary actions. The employer argued, "past elements are past elements and the union can make that argument but cannot and have not supported it." Generously construing the employer to argue that "the contract does not say that PSE discipline does not follow an individual into a career appointment; therefore, it does," I find this argument unpersuasive.

In this case, I find that under the terms of the national agreement, the employer may not carry over to a career appointment unscheduled leave usage and prior disciplinary actions. PSEs converted to a career appointment are entitled to a clean disciplinary record, indeed a clean record- regardless of whether they had accrued unscheduled leave usage and regardless of whether disciplinary action had been imposed during a non-career, limited appointment.

PSE employees are non-career postal employees hired for a limited term. PSEs are not guaranteed appointment for a new term and they have limited rights under the national agreement. They are not entitled to sick leave. They cannot accrue annual leave.

The parties do not dispute that a career is a "new" employee. A career employee is a new hire for an appointment without time limit and ... conferring *full employee benefits and privileges.* One benefit of a career appointment is a clean disciplinary record and, thus, a presumption that the employee will "well and faithfully discharge the duties of the office on which s/he is about to enter" as sworn to, under oath, on the day of their appointment. By maintaining prior discipline as part of a converted PSEs employment record, the employer implicitly suggests that the employee lied when taking their oath of office and therefore, it should be on the ready to remove the employee based upon antique disciplinary charges and unscheduled leave usage. The word "new" means "not existing before." *See* Oxford University Press. It is incongruous to suggest on the one hand that career employees are "new" employees, but they come to the "new" job burdened by previously existing disciplinary issues. Significantly, under the parties' agreement, a PSE cannot carry over unused leave from one temporary PSE term to another PSE term. It defies logic to conclude that unscheduled leave usage and disciplinary action can carry over from a temporary employment term to a permanent employment term.

It may be that an employee who took a sworn oath to "well and faithfully discharge the duties of the office" will fall short of this goal. In those cases, the collective bargaining agreement authorizes the employer to take corrective, progressive action to correct the wayward behavior. But, in this case, the employer never gave Ms. Hankerson, as a career

employee, a chance to correct her alleged attendance-related infractions as required by Article 16. The employer reached back to Ms. Hankerson's temporary employment status to support imposing discipline in permanent employment status. Thus, the employer fired the grievant within two months of her career appointment. An argument cannot be sustained under any theory that Ms. Hankerson received corrective, rather than punitive disciplinary action as she is entitled to as a newly hired career employee. In short, Article 16 also supports a finding that the employer may not resurrect dead unscheduled leave usage and disciplinary action left behind due to a career appointment.

Mr. laquinta was converted to a career employee subsequent to the LCA and according to the Union, the Postal Service cannot carry over the prior disciplinary record of the PSE. The Union relies upon an Award by Arbitrator Irene Donna Thomas in which the Arbitrator found that "the employer may not carry over unscheduled leave usage and prior disciplinary actions against converted PSEs" and that the Postal Service violated the Agreement and "its due process principles" when the supervisor violated the mandate of Article 16, Section 8 by issuing the Notice of Removal which was not first reviewed and concurred in by the installation head or designee. The same violations occurred in the instant case and based upon the due process violations committed by the Postal Service in this case, the grievance is sustained.