REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	§	
	§	**Grievant: Daniel Pfalzgraf**
between	§	
	§	**Post Office: Columbus, OH**
UNITED STATES POSTAL SERVICE	§	
	§	**Case No.: C00T1CC06080529--036840SLB**
	§	
AMERICAN POSTAL WORKERS UNION, AFL-CIO	§	
	§	

BEFORE: Irene Donna Thomas, Arbitrator

APPEARANCES:

For the United States Postal Service: Stephen J. Rennick, Labor Relations Specialist, 850 Twin Rivers Drive, Columbus, OH 43216-9401; Technical Advisor: Donald Cox.

Witnesses: John A. Maggioncalda, Manger Field Maintenance Operations
Timothy D. Reed, Manager Maintenance

For the APWU: Vance Zimmerman, National Business Agent, Central Region, 2430 Dayton Xenia Road, Suite B; Dayton, OH 45434

Witnesses: Daniel E. Anowlden, Retired
Shannon Barr, Maintenance Support Clerk, Chief Steward
Daniel Pfalzgraf, BEM

Place of hearing: 2323 Citygate Drive; Columbus, OH

Date of hearing: March 17, 2010

Post-hearing briefs postmarked: May 12, 2010

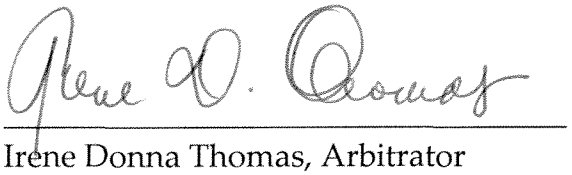
Date of award: June 22, 2010

Relevant Contract Article(s): 38

Contract Year: 2000 - 2006

AWARD SUMMARY

The grievance is sustained and the remedy issued as follows: When the employer failed to schedule the grievant to take required prerequisite courses before scheduling him to take required courses needed for "promotion" to the BEM position, the grievant is entitled to be made whole for all losses, including but not limited to, fringe benefits, higher level wages, night differential and Sunday premium pay that he may have been entitled to due to his schedule as a BEM. If he would not have been entitled to nigh shift differential and Sunday premium pay as a BEM, he, of course, is not entitled to these remedies. The grievant is awarded out of schedule pay where the employer knew or should have known that the grievant had not been scheduled for the prerequisite courses before returning him to his previous occupational group as an unassigned regular. I find that out of schedule pay is also appropriate where the employer did not produce evidence to explain why Mr. Pfalzgraf was not given an opportunity to retake the required training where he had not been scheduled for the prerequisite courses but where a similarly situated employee had been allowed to retake required training where he had not completed a required prerequisite course because it was not "fair." As the union did not provide evidence to show that the grievant would have been scheduled to receive overtime pay, I do not award such a payment. I retain jurisdiction of this matter in the event of issues arising concerning the interpretation or application of this Opinion and Award.



Irene Donna Thomas, Arbitrator

INTRODUCTION

Pursuant to the grievance-arbitration procedures between the United States Postal Service and the American Postal Workers Union, AFL-CIO, the undersigned arbitrator was selected to hear and decide the dispute described herein and to render a final and binding Opinion and Award. The union filed this grievance alleging that the employer violated the national agreement by forcing the grievant into an involuntary downgrade due to an alleged unsatisfactory completion of EC1.

The arbitration hearing opened before this arbitrator on March 17, 2010 at which time both parties were provided with an opportunity to offer the testimony of sworn testimony, to make arguments and to submit documentary evidence in support of their respective positions. The parties requested, and was granted, an opportunity to submit closing briefs and supporting arbitral citations by May 10, 2010. The parties agreed between themselves to extend the date for submission of the briefs and the arbitral submissions to May 12, 2010. However, this arbitrator inadvertently issued an award on May 11, 2010 that was ultimately vacated so that the parties' written arguments could be given full, fair and careful consideration. The documents, submissions and the parties' oral and written arguments were carefully considered in rendering the following Opinion and Award.[1]

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[1]Included with the employer's closing brief were the following arbitral decisions: Matter of the Arbitration of Class Action, H1T5HC11097 (1984)(Arbitrator Bloch); Matter of the

ISSUE

The union stated the issue as "did management violate the national agreement when they demoted the grievant effective March 4, 2006 and was notified on February 24, 2006? If so, what should the remedy be?"

The employer stated the issue as "did management violate the agreement when after the grievant failed a requisite training course, was returned to his current occupational group and level (it was not a demotion)?"

After careful consideration of the documentary evidence, the sworn testimony and the parties' arguments, I conclude that the appropriate issue for resolution is "did management violate the national agreement when they returned the grievant to his previous occupational group and level after he failed the EC I requisite training course where the employer did not schedule him to take both prerequisite courses for the EC I training? If so, what should the remedy be?"

Arbitration of Bradley Swanson, F94T1FC97104597–97MT62 (2005)(Arbitrator Gentile); Matter of the Arbitration between the USPS and the NALC, H1N1JC23247 (1987)(Arbitrator Bernstein); Matter of the Arbitration of John Ritchey, E1T2FC1524 (1983)(Arbitrator Zumas). The union submitted the following arbitration decisions for consideration: Matter of the Arbitration of Class Action, A98C4AC00164718 (2003)(Arbitrator Thomas); Matter of the Arbitration of Daniel R. Brott, G98T1GC01041035–25600 (2002)(Arbitrator Armendariz); Matter of the Arbitration of Class Action, B00C4BC04210536–CFS2604 (2006)(Arbitrator Pecklers); Matter of the Arbitration between USPS and NALC, S1T3QD18859 (1984)(Arbitrator Hardin); Matter of the Arbitration of Seltz, H90T1HC95021765–94968 (1998)(Arbitrator Baldovin); Matter of the Arbitration of Class Action, C06C4CC08259796–58040804 (2009)(Arbitrator Miles); Matter of the Arbitration of Class Action, C94T1CC98102168–98460 (2003)(Arbitrator Zobrak); Matter of the Arbitration of Class Action, C94C1CC9201655–ACL698 (2007)(Arbitrator Fullmer).

THE MATERIAL FACTS

On or about January 18, 2005, the employer posted a Notice of Inent for the position of BEM, PS-08. The posting closed on January 26, 2005. On or about January 30, 2005, Maintenance Manager Tim Reed posted a list of Successful Bid and/or Promotion Candidates. Among others, the list noted that Dan L. Pfalzgraf, with a service date of September 25, 1994, had been promoted from Laborer Custodial to Building Equipment Mechanic effective February 5, 2005 under Notice of Intent Number 01-05.

The Notice of Intent to Fill Vacancy stated that applicants were required to successfully complete five prescribed training courses: IES, EC I, EC III, EC IV and EC VI. Successful completion of the EC I course required the grievant to take two prerequisites courses, Intro to Refrigeration and IES. Mr. Pfalzgrad did not take the Intro to Refrigeration course before being scheduled to take the EC I course. The EC I course began on January 23, 2006 and ended on February 2, 2006. On February 3, 2006, the Instructor, Tom Wright, notified the Maintenance Manager, Timothy Reed, that the grievant failed the EC I course. By memorandum dated February 21, 2006, Mr. John A. Maggioncalda, Manager Field Maintenance Operations, notified the grievant that effective Saturday, March 4, 2006, his duty assignment will be restored to Laborer-Custodian as an unassigned regular employee pursuant to Articles 38.5.C.3 and 38.5.C.4

of the national agreement. Mr. Maggioncalda cited Mr. Pfalzgraf's failure to satisfactorily complete the EC I course as the reason for this action.

Beginning February 24, 2006, the union began requesting information to investigate the possibility of a grievance.[2] On or about March 6, 2006, the union filed a grievance protesting the forced, involuntary downgrade. The union argued, among other things, that it had "investigated and found other maintenance employees that have failed required training in the first year [but who were] not downgraded." The union further asserted that management "is not being consistent and [is] making an example out of Dan." The employer denied the grievance at Step 1 contending that maintenance employees are required to demonstrate by passing required training in the first year of promotion [that] they are competent in their craft.

The union appealed to Step 2. The employer did not hold a Step 2 hearing. The union appealed to Step 3. The employer denied the grievance at that level asserting that

> It is the union's responsibility to establish that a contractual violation exists. The union has not met its burden of proof. The union has made allegations regarding management's improperly downgrading the grievant. Allegations or assertions are not proof. Upon review of the information provided in the file the record reflects that the grievant was not involuntarily downgraded; however, he was the successful applicant for a promotion contingent upon satisfactory completion of training. The grievant was placed in a detail assignment in the occupational group and

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[2]The union submitted various information requests on February 24, 2006, February 28, 2006 (2), March 5, 2006, March 12, 2006 and March 13, 2006 (Interview with Tim Reed before Step 2 hearing).

level of the duty assignment for which the training was intended. The grievant failed to complete satisfactorily the required training and based on this failure he shall remain as an unassigned regular in his current occupational group and level. There is nothing in the record to show that management's actions are in violation of the National Agreement. The union's arguments are not supported by any substantive evidence contractually or otherwise and lack any merit. The remedy requested by the union is inappropriate. Accordingly this grievance is hereby denied.

By letter dated May 3, 2007, the union demanded arbitration.

POSITION OF THE PARTIES

Union:

The union's position can best be summarized from its oral opening statement and its written closing statement. The record shows beyond dispute that the grievant was promoted to a BEM on February 5, 2005. Once promoted, he was sent to Oklahoma for completion of a course – a course which has two prerequisites that he was not scheduled to take beforehand.

Mr. Pfalzgraf is not the first individual in Columbus who was unsuccessful at passing a class. At least 50 employees failed a class before the grievant, yet, management did not demote a single one of these employees. Management either let it go and did nothing or allowed the employee to retake the class. For instance:

- Ora Ault failed three courses during the five year period and management took no actions against him.
- Ronald Armentrout failed Course 5568704 (IES prerequisite) (the same course) three times and management took no actions against him.
- Darrell Lowery failed two courses and was not demoted, nor was his

pending qualification detail ended.

- Kenneth Logal failed two courses, was not demoted, and nor was his pending qualification detail ended.
- James Koenig was promoted into a BEM position on August 11, 2001. He was sent to training on April 15, 2002 and failed course 5568704. Management sent him back to training and did not demote him or send him back to his previous occupational group.
- Employee Clarence Hatzer was sent to training on August 30, 2004, he failed the course and management sent him to the same training again on November 1, 2004.

In any event, under the clear and unambiguous terms of the national agreement, the employer was required to promote Mr. Pfalzgraf. Article 38.5.c.3 states, in pertinent part, that "Upon satisfactory completion of the required training or one year from the date detailed, whichever occurs first, the employee shall be declared the successful applicant [and promoted]." In this case, the grievant entered the position of BEM on February 5, 2005. Presuming that the grievant was just detailed, the employer had until February 4, 2006 to end the detail. But, it was not until February 24, 2006 that the employer gave the grievant a letter dated February 21, 2006 indicating that he had been demoted. Therefore, the grievant should not have been demoted.

Turning to the remedy, Mr. Pfalzgraf lost out on higher level pay, Sunday premium pay, night shift differential and overtime. He was also forced to work a different schedule than he would have worked if management had not demoted him. Therefore, out of schedule pay is appropriate. Moreover, the grievant also lost out on opportunities to bid on other BEM positions due to his demotion. The union requests

that this grievance be granted in its entirety, the grievant made whole for all losses and award him the correct bid job according to his corrected seniority and be made whole in all ways. For these reasons, among others, this grievance should be sustained.

Employer:

The employer's position can best be summarized by its oral opening and its written closing remarks. The grievant, Daniel Pfalzgraf, a Laborer/Custodial PS-3, received a promotion effective February 5, 2005 from PS-3 to PS-8 contingent upon successful completion of required training, in accordance with Article 38.5.C.3 of the National Agreement. The grievant, upon failing training course EC-1 effective February 3, 2006, was restored to his original occupational group and level, having not satisfied the requirement to keep his promotion. The grievant was fully aware that his promotion to PS-8 was contingent on the successful completion of training course EC-1. This requirement was explained to the grievant in the Notice of Intent which stated **"To become permanent in this position employee must successfully pass the following prescribed training courses: IES, EC1, ECIII, EC IV, and EC VI." (bold in original).** This requirement was also reinforced in the Remarks section of the grievant's Form 50 which referred to the Notice of Intent (containing the contingency requirement).

The National Agreement provides for returning employees to their original occupational group and level if they fail to coplete the requisite qualifications for

promotion. The National Agreement clearly provides for no exceptions or allowances for failure to complete requisite training or other qualifications necessary for permanent promotion. Article 38.5.C.4 states "In the event the employee fails to complete satisfactorily the required training discussed in paragraph 3, the employee shall remain as an unassigned regular in his/her current occupational group and level." **JCIM Article 38, page 6 further clarifies this point as follows: "Article 38.5.C provides that an employee who receives a promotion predicated on the successful completion of training and fails that training is declared inactive on the promotion eligibility register (PER)."**

Regarding the grievant's failure to complete the training required to retain his promotion, the NCED Student Failure/Withdrawal Analysis clearly indicates the grievant failed in 3 of the 6 required elements of his training. Notably, the Explanation provided by the class instructor states "**Student had difficulty assimilating the needed amount of information in the time frame of the class. Student unfamiliar with required mechanical fundamentals."** An explanation such as this from the class instructor leaves no doubt in the mind of the reader as to the significant shortcomings exhibited by the grievant during his training.

The union has contended in its papers that this action was an "involuntary downgrade." Nowhere in Article 38.5.C does one find reference to this term, *and in fact*

this does not describe the action taken. The grievant was fully aware of the requirements to retain his promotion. These requirements were clearly stated in the Notice of Intent, which indicated successful completion of required training was necessary for permanent promotion, and tehre is no dispute that the grievant clearly understood this point.

The union has also implied that others in the maintenance craft were treated differently, although, importantly has provided no documentation other than hearsay that the others were similarly situated to the grievant. Exhibit J-7 is only a list of names with the notation of "fail" in one of the columns next to the listed names, and has no nexus to the issue at hand.[3] This list does not indicate whether any of the named individuals had been promoted with the contingent requirement to satisfactorily pass a training course, or whether the failure occurred beyond the one (1) year time period. (Article 38.5.C.3). Neither does the listing show whether any or all of the individuals were restored to their original occupational code and level if they failed.

The union also attempted to make the case that the grievant had an injury that affected his ability to successfully complete the training. Documents were presented in

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[3]Exhibit J-7 is a list produced by the employer in response to the union's information request. As such, it is presumptively authentic for admissibility purposes. During the hearing, the employer did not provide any evidence that would tend to undermine the authenticity of this employer-provided document. Indeed, the employer stipulated to this document as a Joint Exhibit. Furthermore, the document may be considered an admissible business record – an exception to the hearsay rule.

an attempt to support the union's case *however nowhere in the documentation was there evidence that because of the injury, the grievant was not physically able to attend and successfull pass a training course.* More to the point, nowhere in the class instructor' Explanation for the failure was it stated that the grievant's failure had anything to do with a physical or medical problem. The union has stated the grievant visited the nurse frequently while he was in training, however no documentation was presented that the nurse or anyone else recommended he stop the training because of a medical problem. No one denied any accommodation to the grievant for any medical problem while he was attending the training class. The reason for the failure was that the grievant was "unfamiliar with required mechanical fundamentals." So, how did the grievant's stated injury affect his knowledge of required mechanical fundamentals?

As for the union's requested remedy, the union presented no documentation for potential losses in night differential, Sunday premium or out of schedule overtime. Overtime is not guaranteed, and there is no documentation to sow that the grievant would have been scheduled for, or worked, out of schedule overtime. However, the overriding point is this: *The remedy is not appropriate because the grievant suffered no loss resulting from a violation of the contract*. As such, the requested remedy is inappropriate and unfounded. For these reasons, among others, this grievance should be denied.

DISCUSSION AND ANALYSIS

Article 38.C.3 of the national agreement provides that where a notice of intent indicates that a promotion

> is contingent upon satisfactory completion of training. In these cases, within 14 days the applicant shall be reassigned as an unassigned regular in his/her current occupational group and level. The employee shall be placed in a detail assignment on the tour and non-scheduled days in the occupational group and level of the duty assignment for which the training is intended. For the duration of the detail assignment, the employee will be treated as if promoted to that position. Upon satisfactory completion of the required training or one (1) year from the date detailed, whichever occurs first, the employee shall be declared the successful applicant and promoted with a preferred assignment seniority date determined according to Section 2.G.2 of this Article.

Article 38.5.C.4 of the national agreement states:

> In the event the employee fails to complete satisfactory the required training discussed in paragraph 3, the employee shall remain as an unassigned regular in his/her current occupational group and level.

After careful consideration of the national agreement, the JCIM, the record evidence and the parties' arguments, upon reconsideration I still conclude that this grievance should be sustained.

The employer failed its obligation of good faith and fair dealing with respect to the provisions of Article 38.5.C.3. Generally, there is an implied covenant of good faith and fair dealing in every contract, whereby neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. Thus, whenever the cooperation of a promising party is necessary for

the performance of the promise, there is a condition implied that the cooperation will be given. The implied covenant of good faith and fair dealing requires the parties to perform, in good faith, the obligations required by their agreement, and a violation of the covenant occurs when either party violates, nullifies or significantly impairs any benefit of the contract.

In this case, as stated above, the national agreement requires certain employees to successfully complete required training before they are finally declared the "successful applicant" for a posted job. For the BEM position awarded to the grievant, the Environmental Control I HVAC (EC I) course, required completion of two prerequisite courses: "Intro to Refrig" and "IES." The undisputed record shows that the employer scheduled Mr. Pfalzgraf to complete the EC I course without ever scheduling him to take the "Intro to Refrig" prerequisite course. For the employee to realize the benefit of the employer's promise under Article 38.5.C.3, the employer must cooperate by scheduling the appropriate courses in the appropriate order. There was no evidence presented at the hearing to indicate that this was an impossible task–particularly where the employer has a one year period to schedule "detailed" employees to take course prerequisites and the required courses. The employer's failure to cooperate, i.e., properly schedule the "detailed employee" for training (scheduling for prerequisite courses before scheduling for the required courses), deprives the employee of the right

to receive the fruits of the collective bargaining agreement.[4]

Indeed, in at least in one prior instance, an employee was allowed to re-take a course that he had failed because he had not taken the required prerequisite course. Mr. Timothy D. Reed, Manager Maintenance, testified that Mr. Kenneth Logan was scheduled to attend a course on the FSM 100. At the time, this was "fairly new" equipment. Mr. Reed testified that Mr. Logan was told that the employer would not "hold it against him" if he failed the course because "he did not have IES, [a] building block" prerequisite course. He admitted on cross examination that it would not be "fair" to hold it against Mr. Logan under those circumstances. Mr. Reed further admitted that "building block" courses, provide "basic fundamentals to do this type of work." But, in this case, despite the fact that the grievant did not have one of the "building block" courses before taking the required course, the employer *is* holding the grievant's failure to successfully complete the required EC I course against him. The fact that some employees feel comfortable enough to do without the prerequisite courses before taking the required course, as testified to by Mr. Reed, does not relieve the employer of its contractual obligation to cooperate so that employees can realize the

[4]The parties engaged in a lengthy dispute about whether Mr. Pfalzgraf was "detailed" into the BEM position or if he was "promoted" into the position. Presumably, the union's argument includes the underlying claim that since the grievant was "promoted" and not "detailed," management did not have authority to "restore" (demote) him to his "former" occupational group and level. Because this grievance can properly be decided without resolving the "promotion" versus "detail" issue, I do not address it. In this Opinion and Award, I assume, without deciding, that the grievant was "detailed" into the position.

fruits of the contract. In any event, the employer did not offer evidence to show that Mr. Pfalzgraf was offered to take but declined to take the prerequisite courses before taking the EC I training.

The employer vigorously argued that because the grievant did not pass the required training, he could not be considered the successful applicant and "promoted" into the BEM job. But, the employer never addressed the union's contention that the grievant did not have the prerequisite courses before attending the EC I course. The union specifically raised this issue during its interview of Mr. Reed and the results of this interview were exchanged during the grievance procedure. Moreover, the arbitration decisions submitted by the employer for consideration do not directly address this point. Those decisions simply support the employer's contention that an employee must pass required courses before being deemed the successful applicant and ultimately "promoted." This is an unremarkable position and one with which I wholeheartedly agree. The collective bargaining agreement requires me to do so. These decisions, however, do not discuss whether the grievants had been scheduled to take the required courses without having been scheduled to take the prerequisite training for those courses. When the employer agreed to promote employees upon satisfactory completion of the required training and undertook to provide that training, it agreed by implication to do everything to help employees accomplish the result intended by the

parties – the promotion of the selected applicant – after taking the required training (if required) which necessarily includes the taking of any prerequisite courses. As the employer did not meet its obligations under the national agreement to schedule the grievant for both prerequisite courses before scheduling him for the EC I course, the employer's position cannot be sustained.[5] I note that Arbitrator Armendariz in Matter of the Arbitration of Daniel R. Brott, gave some weight to the fact that although the grievant in the case before him had taken the IES test twice, "the first test was taken without the benefit of the Grievant taking the Basic Electricity prerequisite courses." Accordingly,

AWARD

The grievance is sustained and the remedy issued as follows: When the employer failed to schedule the grievant to take required prerequisite courses before scheduling him to take required courses needed for "promotion" to the BEM position, the grievant is entitled to be made whole for all losses, including but not limited to, fringe benefits, higher level wages, night differential and Sunday premium pay that he may have been entitled to due to his schedule as a BEM. If he would not have been entitled to nigh

[5]The employer asserted that under Article 38.5.C.3, if the failure [to satisfactorily complete the course] occurs within the one year period, the employee shall remain as an unassigned regular in his/her current occupational group and level regardless of whether the employer notified the employee of the failure within the year. The union, of course, disagrees with the proposition offered by the employer. This Opinion and Award is not intended to resolve the parties' arguments on this issue.

shift differential and Sunday premium pay as a BEM, he, of course, is not entitled to these remedies. The grievant is awarded out of schedule pay where the employer knew or should have known that the grievant had not been scheduled for the prerequisite courses before returning him to his previous occupational group as an unassigned regular. I find that out of schedule pay is also appropriate where the employer did not produce evidence to explain why Mr. Pfalzgraf was not given an opportunity to retake the required training where he had not been scheduled for the prerequisite courses but where a similarly situated employee had been allowed to retake required training where he had not completed a required prerequisite course because it was not "fair." As the union did not provide evidence to show that the grievant would have been scheduled to receive overtime pay, I do not award such a payment. I retain jurisdiction of this matter in the event of issues arising concerning the interpretation or application of this Opinion and Award.

Dated: Brooklyn, New York
June 22, 2010

Irene Donna Thomas, Arbitrator