

# Discharge of Postal Letter Carrier for Off-Duty Conduct

## CASE STUDY 13-2

### Background

This matter of arbitration stems from an indictment of Thomas Allen for one count of arson—first degree and ten counts of burglary in Quitman County, Mississippi, on March 28, 1999. In a letter dated March 30, 1999, Billy Como, postmaster, wrote:

*This is written notice that you have been removed from employment with the Postal Service. This action is being taken in accordance with Article 16 of the Agreement.*

*There is reasonable cause to believe you have committed a crime for which a sentence of imprisonment may be imposed.*

*Specifically, by the indictment dated March 28, 1999, you were indicted in the Superior Court of Quitman County for one count Arson—First Degree and ten counts of Burglary.*

*These aforementioned charges are so egregious in nature that retaining you in postal employment would not be in the best interest of the Service.*

In a letter dated April 9, 1999, Mr. Jesse G. Bolton, attorney for Mr. Allen, wrote to Walter E. Flatten, human resources manager:

*I have been asked to assist Mr. Allen in regard to his removal from the Postal Service.*

*Although there has been an indictment of Mr. Allen by the Superior Court of Quitman County, MS, it is probable that the indictment has overstated the underlying facts and it is also possible that some or all of the charges could be dropped or minimized.*

*The arraignment date in the case was set for March 28th, 1999, and this was suspended or continued on an indefinite basis.*

*Mr. Allen is 47 years old and has never been charged with any criminal offense involving moral turpitude. He has only had one speeding ticket, in the year 1968, while in the service of the United States Air Force.*

*His character and reputation in the community in which he lives are exceptional, and there is a reasonable possibility that a sentence of imprisonment will not be imposed. From the earliest days of the charges, restitution was made by the subjects and accepted by the affected party or parties. The hunting cabin for which the one count of arson was made,*

*according to my information, was unoccupied at the time, and restitution for damage to that house has largely been accomplished by and through the replacement of the house and acceptance of the same by the owner. The only reason that rebuilding the cabin has been delayed is because the accused parties have been doing all the physical labor themselves.*

On April 13, 1999, Mr. Allen filed the following Grievance:

1. Nature of Grievance: (Be specific: what, where, when, etc.)

This is a Step 2 Appeal filed on behalf of Thomas Allen, a reg. carrier at the Marks, Mississippi, post office, from an adverse decision rendered at Step 1. Mr. Allen was issued a Notice of Removal on March 30, 1999 in accordance with Article 16 of the National Agreement. Mr. Allen received the letter on April 4, 1999.

2. Contract Violation: This action is a violation of Article 16 of the National Agreement.
3. Corrective Action Requested:

The Union respectfully requests that the Notice of Removal be rescinded and the Grievant be made whole for all lost wages and benefits. The facts do not reveal reasonable cause to believe the Grievant is guilty.

On April 21, 1999, Mr. Flatten wrote the following letter to Mr. Bolton. This letter stated:

*In accordance with Article 1, Section 1 of the National Agreement, the Rural Carriers' Union is the exclusive bargaining representative for Mr. Allen. As such, I cannot grant your request for a summary outline of the evidence the Postal Service has obtained.*

*In accordance with Article 15, Section 3, Step 1 of the National Agreement, Mr. Allen has a contractual right to file a grievance on any action taken by the Postal Service. In the event Mr. Allen exercises this right, he would be represented by the Rural Carriers' Union.*

On the same date, Mr. Flatten wrote a letter to Mr. Allen. This letter stated:

*On April 4, 1999, you received a Notice of Removal from the Postal Service based on charges listed in indictment bill dated March 28, 1999. These charges included one count of Arson—First Degree and ten counts of Burglary.*

*You have not presented any rebuttal evidence on your behalf and the Postal Service has reason to believe that you are guilty of a crime for which a sentence of imprisonment may be imposed. Therefore, I find no basis to alter your removal.*

*You have the right to appeal this action in accordance with Article 15, Section 3 of the National Agreement within 14 days of your receipt of this decision.*

In a letter dated May 22, 1999, Robert Thorne, state steward of the Rural Carriers' Union, appealed the Grievance. In a letter dated May 13, 1999, Mr. Statten, labor relations, gave Management's answer. Statten stated:

*In the instant case management contends that the employee was given the benefit of the doubt. Since we have a copy of the indictment, we have reason to believe that the grievant may be guilty of a crime for which a sentence of imprisonment may be imposed. Arbitrators have consistently ruled that by having an indictment, we have met the burden of having reasonable cause to believe that the grievant is guilty of a crime for which a sentence of imprisonment may be imposed. The grievance is therefore denied.*

On September 26, 1999, the Union appealed the Grievance to Arbitration.

#### **Issue**

Did the Postal Service violate Article 16 of the Agreement when it suspended Mr. Thomas Allen indefinitely? If so, what shall be the remedy?

#### **Relevant Articles of the Agreement**

##### **Article 16—Discipline Procedure**

###### **Section 1. Statement of Principle**

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.

When there is reasonable cause to believe an employee is guilty of a crime for which a sentence

of imprisonment can be imposed, the advance notice requirement shall not apply and such an employee may be immediately removed from a pay status.

#### **Position of the Parties**

##### **The Agency:**

Management stated that Mr. Allen was indicted on one count of arson in the first degree and 10 counts of burglary by a Grand Jury of Quitman County, Mississippi, on March 28, 1999. Each of the eleven counts carries a maximum sentence of 20 years' imprisonment as provided by Mississippi State Law. The total would equate to 220 years' imprisonment for the alleged crimes if he were convicted and given the maximum sentence.

The Postal Service obtained a copy of this indictment and questioned Mr. Allen. After he was removed from employment, a letter from Mr. Jesse G. Bolton, attorney at law, on Allen's behalf was forwarded to Mr. Flatten. This letter advised Mr. Flatten of arguments he thought were pertinent to Allen's case and requested information relative to the case at hand. Mr. Flatten advised Mr. Bolton that the Union was the authorized bargaining agent recognized to represent Allen and that no documents would be forthcoming.

Management argued that arbitral precedent had established that the burden of proof does not encompass the normal "doctrine of just cause" in these types of cases. Arbitral precedent has established that the proof required in similar cases requires that Management has only to establish that it had reason to believe that Mr. Allen was guilty of a crime for which a sentence of imprisonment may be imposed. Arbitral precedent has established that the proof required comes in the form of an indictment by a grand jury composed of the defendant's peers. Management removed Allen based on an indictment for which the charges have not been denied.

Management stated that Billy Como, postmaster, had obtained a copy of the indictment on the advice of Labor Relations. Allen was given an opportunity to respond to the indictment and did not deny any of the charges. Mr. Como testified that he had copies of two newspaper articles from adjoining counties that

pertained to Allen's situation before issuing him his removal notice. At no time did Allen ever profess his innocence of the charges.

Management explained that Mr. Allen and an accomplice burglarized a hunting cabin, took items, which according to a newspaper article, included a shotgun, and then burned down the cabin. The charge of first-degree arson indicates that the cabin was completely burned. The charges have yet to be dropped and are still pending.

The Grievant had his chance to convince Management that the charges were ill-founded, and he did not. Management argued that it has more than met its required burden of proof. Management proved that it had reason to believe that Allen was guilty of a crime for which a sentence of imprisonment may be imposed. Thus, removing the Grievant was done to protect the integrity of the Postal Service.

Management argued that it has been well established through arbitral precedent that a party cannot make its case at arbitration. The Union has attempted to do so by bringing in character witnesses who testified on the Grievant's behalf. The Union presented the testimony of Mr. Como about his reluctance to remove Allen; this should not be considered in the ninth hour. These had not been contentions during the processing of the Grievance. If these had, Management may have provided rebuttal testimony. Other members of the community who may not have known Allen as intimately as the witnesses could have offered their opinions about suspending someone who had been indicted on 10 counts of burglary, stealing a shotgun, and burning down someone's property. Management could have provided Mr. Jim Smith, a labor relations specialist, to testify as to what advice he gave Mr. Como and whether he had the authority to make or instruct Mr. Como in either of these official capacities.

Management claimed that the only argument raised in Allen's defense during the processing of this Grievance was that Allen had made restitution and that the charges levied against Allen would be dropped; however, the charges have not been dropped. Mr. Robert Thorne testified that at Step 2 of the Grievance Procedure,

the Union did not mention anything about the community wanting Allen returned to work. Nothing pertaining to these arguments was raised before arbitration.

Management argued that Allen's character and standing in the community are irrelevant and have nothing to do with the action that Management took. Management's action was based on an indictment that was instituted by a jury of his peers, based on evidence examined pertaining to his alleged involvement of a crime for which a sentence of imprisonment may be imposed. Management gave Allen ample time to offer a rebuttal to the charges or time to have the charges dropped. Management did not profess the guilt or innocence of the Grievant. The Mississippi Bureau of Investigators evidently still believes that other matters have yet to be resolved because Allen may still face possible other charges for the indictment.

Management stated that the overwhelming majority of Arbitrators have consistently ruled that the standard of proof required to be sustained by Management in cases where the issue in dispute had criminal connotations is "reasonable cause." Where Arbitrators sometimes use the words "just cause," the burden of proof still does not rise to the level of the traditional doctrine of just cause.

Management addressed the principle of "nexus." Pertinent considerations on the disposition of this case are as follows:

1. Whether there in fact was a reasonable basis to believe Allen guilty of the alleged crime.
2. Whether there was a sufficient relationship between the alleged crime and Allen's job as a carrier or such other jobs to which he might be assigned in accordance with his seniority that would warrant removal.

Management has stated consistently that, if the charges had been dropped and evidence furnished stating the same, Allen would have been returned to work. In regard to establishing a nexus, Allen is a rural letter carrier and meets the public each day. His job requires constant contact with the public.

Management stated that Marks is a small rural community with about 2,200 to 2,300 residents who know of the charges brought against Allen. Allen was indicted by a grand jury of his peers. Evidently, they were not persuaded that his former image should cloud their duty; others may not

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also. The Postal Service has a responsibility to maintain the public's confidence. The drafters of the National Agreement recognize this responsibility and provided language in the form of Article 16.

Management admitted that Mr. Como initially testified that he had been directed by Management to take this action and would not have done so if he had not been directed. On cross-examination, Como was asked for whom he worked. Under oath, he said his boss was Mr. Jimmy Whitestone, manager of Post Office Operations. Whitestone directed Como in the performance of his duties to do what was expected of him. Labor Relations has a responsibility to advise Management officials of the proper procedures to take in disciplinary matters that are consistent with postal policies and contractual procedures. Mr. Como stated that Labor Relations advised him on how this type of situation is normally handled. Mr. Como read Article 16 in the National Agreement, and he was satisfied that he complied with Article 16.

Mr. Como testified that he felt like Allen and other employees of the Marks Post Office were family. This explained Como's reluctance to remove Allen. Como stated that he had no problem upholding Postal Service's policies once it was explained to him that the action taken was consistent with the postal policy on how to handle situations wherein an employee had been indicted for a crime for which a sentence of imprisonment may be imposed. Como issued the removal based on the indictment after he gave Allen an opportunity to respond.

Mr. E. L. Elton, the mayor of Marks, testified that he was surprised when he learned that Allen was the accused; however, he did not condone these types of actions. Mr. Willie Andrews, a postal customer on Allen's route, testified that he was shocked when he learned that Allen was the accused. Andrews also did not condone these types of actions. These individuals knew Allen on an individual, personal basis. They stated that they were speaking on his behalf for personal reasons. Management asked: "What about those who do not know the Grievant on a personal basis? I wonder what they might say?"

Management stated that this Grievance should still be denied if this higher form of just cause is applied. Arbitrators have ruled consistently that the "reasonable cause" standard is the only proof required before removing an employee for criminal considerations. Arbitral jurisprudence has

established the reason for the position taken by Management.

Management closed by stating:

*Management has stated consistently that management based its decision to remove the grievant on an indictment. Proof of the grievant's guilt, innocence, former standing in the community, or whether restitution has been made is irrelevant to this proceeding. What is relevant is, whether Management had substantive information in hand, prior to removing the grievant. Based on arbitral precedent, an indictment has been deemed to be the proper information on which one should base a decision of this nature.*

*The Union offered, in the grievant's defense, that the charges either would be dropped or are in the process of being so. However, they have not. If they are dropped the grievant will be put back to work. If not, our final decision will be predicated on the outcome of his arbitration. The grievant still faces the possibility of criminal conviction with sentencing ranging from 1 to 220 years imprisonment.*

*Whether the Arbitrator applies the reasonable cause or the just cause standard, Management has proven that the action taken was proper in accordance with Article 16 of the National Agreement. Management asks that the Arbitrator find the same and deny this grievance in its entirety.*

#### *The Union:*

The Union claimed that Billy Como, postmaster and Allen's immediate supervisor, testified that it was not his decision to remove Thomas Allen. Como testified that he did not notify the Labor Relations office in Jackson, Mississippi, after Allen was indicted. The Labor Relations office was informed about the indictment by a relative of Mr. Flatten, who attended a church service in Marks. When the Labor Relations office learned of Mr. Allen's indictment, it directed Como to obtain a copy of the indictment and forward it to Jackson. Como dutifully obtained a copy of the indictment, which is public record.

Como testified that, if it had been up to him, he would not have removed Allen, and Allen would still be working. Como testified that he

did not draft the notice of removal; he was told by the Labor Relations office to sign and deliver it to Allen. Como clearly indicated that this entire matter was handled by the Labor Relations office in Jackson, Mississippi.

The Union stated that where the imposition of discipline is not recommended or initiated by the employee's first-line supervisor, the discipline cannot stand. When higher-level authority does more than advise and when it takes over the decision-making role and eliminates the contractual responsibility of local supervision—and then concurs in its own decision—a substantive due process violation occurs. Such violation cannot be overlooked as a mere technicality. The bi-level disciplinary procedure provides a unique protection for employees. It cannot legitimately be disregarded, and the employer's neglect to follow it creates a breach of contractually established due-process requirements of such importance as to require that the resulting discipline be overturned.

The Union argued that the Postal Service did not have just cause to remove Thomas Allen. The record reflects that the Postal Service did not carry its burden in showing that just cause existed for Allen's removal. Throughout the Grievance Procedure and at the hearing, the Postal Service took the untenable position that, because Allen had been indicted, the Postal Service was privileged to remove him pursuant to Article 16 of the National Agreement. Article 16 only allows the Postal Service to immediately remove an employee from pay status when there is "reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed."

The Postal Service has taken the position that standards of just cause did not apply to this case, and the Postal Service made no serious efforts to show that just cause existed. The Postal Service is mistaken that "reasonable cause to believe" eliminates the overriding principle of Article 16 that all discipline must be for just cause.

The Union argued that the relationship between the "reasonable cause to believe" language and the "just cause" principles that underlie the party's discipline procedure was the subject of a previous arbitration decision. The Arbitrator stated that the parties appeared to recognize that in a

criminal case, disciplinary action must be for "just cause."

The Union claimed that the Postal Service cannot carry its burden and show either that it had "reasonable cause to believe" or that it had just cause to remove Mr. Allen. The Postal Service essentially admitted that it did nothing but rely on the indictment in removing Mr. Allen. The Postal Service offered no evidence that an independent investigation of any kind was ever considered or carried out. Thus, it is difficult to see how the Postal Service could have had "reasonable cause to believe."

The Union contended that the charges contained in the indictment remain allegations and in no way prove that Mr. Allen is guilty of them. The Postal Service was provided with information from Mr. Allen's criminal attorney, who represented that "it is probable that the indictment has overstated the underlying facts, and it is also possible that some or all of the charges could be dropped or minimized." This information was obviously discounted by the Postal Service; no reasonable explanation has even been offered as to why. Any suggestion that this information was less valuable or could not be considered because it did not come from Mr. Allen's collective bargaining representative is ridiculous. This information goes directly to the question of "reasonable cause to believe." It is noteworthy that the Labor Relations office in Jackson had caused the removal letter to be issued to Mr. Allen within 48 hours of the issuance of the indictment, thus making it difficult, if not impossible, to engage in a meaningful investigation. The sequence of events is clear. The Labor Relations office in Jackson fortuitously learned of Mr. Allen's indictment and then required Postmaster Como to issue a notice of removal.

The Union stated that the Postal Service is required to demonstrate that Allen's alleged criminal conduct had a significant bearing on his ability to perform his job as a rural letter carrier. It is well established that the Postal Service may discipline an employee for off-duty misconduct only when it affects the employer-employee relationship. In this case, the Postal Service made little effort and was unable to show that Mr. Allen's indictment had any negative effect on the efficiency of the Postal Service's operations or its image.

Postmaster Como testified that Mr. Allen was a very good employee with no disciplinary history. There was no evidence that any of Allen's

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co-workers did not want to work with him or that any customers would object to his return to the route. Mr. Como testified that there was overwhelming community support for Allen. When the Postal Service attempted to remind Mr. Como of a conversation the day before the hearing at the Marks Post Office, where a female customer apparently had something negative to say about Allen, Mr. Como explained that the customer was not upset with Allen because of the indictment but because Allen was an outspoken supporter of the construction of a nearby medical waste incinerator. The female customer was one of the incinerator project's most vocal opponents. Thus, the Postal Service has been unable to produce a shred of evidence indicating any opposition to Allen's continued employment with the Postal Service. The Postal Service's own witness, Postmaster Como, suggested that there was overwhelming support for Allen.

The Postal Service introduced three newspaper articles to show that the Postal Service's image had been tarnished by the indictment. One article with the headline, "Ming: No arrests yet in arson case," made no mention of Allen. The other two articles indicated only that Allen had been indicted. Neither article made any mention that Allen was a postal employee. Marginal newspaper coverage, especially with no reference to the Postal Service, is meaningless. The newspaper clippings clearly were not considered when the Labor Relations office in Jackson issued the notice of removal. Mr. Como indicated that he had not sent the articles to the Labor Relations office at that time and that he had only shown them to the Management Advocate the day before the arbitration hearing.

The Postal Service was unable to show that Allen's indictment poses a threat to himself, his co-workers, or his customers or that the image of the Postal Service will be tarnished by his employment. Mr. Allen is well liked, the community wants him back on his route, and the image of the Postal Service will not suffer if he remains on the job.

The Union presented three witnesses on behalf of Mr. Allen. Mr. Willie Andrews, a psychiatric social worker and Quitman County Board of Education member, testified that Allen was an excellent carrier who often went beyond the call of duty. Andrews stated that he was happier with his mail service when Allen was carrying the route. Mr. Andrews had known Allen for 10 or 15 years and stated that he was shocked when he learned of

Allen's arrest and indictment. He indicated that the Postal Service's image would be improved if Allen were returned to work.

Mayor E.L. Elton testified that he has known Allen all of his life and was in disbelief when told that Allen had been indicted. Mr. Elton was a very satisfied customer and would like to see Allen return to his duties. As mayor, Mr. Elton was in a unique position to gauge community sentiment and testified credibly that there was "very strong support" for Allen's return to work. He believes that the image of the Postal Service will not be tarnished if Allen returns to work.

Ms. Hortense Balk, a lifelong Marks resident, owned the property that was destroyed in the fire that Allen is accused of intentionally setting. The destroyed property was a hunting cabin that Ms. Balk rented to hunters. Ms. Balk was shocked when she learned that Allen had been indicted because she had known Allen all of his life. Ms. Balk testified that she did not press charges against Allen and noted that Allen had already rebuilt the hunting cabin. Ms. Balk testified that he did such a great job that she thought about moving into it. The Union noted that the fact that Allen made restitution to Ms. Balk should not be construed as an admission that he is guilty of a crime for which a sentence of imprisonment can be imposed. If anything, Allen's gesture reflects favorably on his character. Despite the personal loss felt by Ms. Balk, she does not believe that Allen should lose his job.

The Postal Service did concede that if the indictment is dropped or Allen is acquitted in a trial, he will be returned to work immediately. The Postal Service must do its part in managing its employees and imposing discipline where appropriate. The Postal Service has ceded all judgment to the criminal process and to a district attorney who has sat on this indictment for almost ten months with no specific date set for trial. During these ten months, Mr. Allen has been an effective postal employee, and no other employee's performance has been affected.

The Union stated that the Postal Service had an affirmative duty to investigate on learning of the indictment but did not. The Postal Service is required in cases of alleged off-duty misconduct

to determine whether that alleged misconduct would affect the integrity of the operations of the Postal Service. If the Postal Service had been able to offer credible testimony in this regard, it may have met its burden under just cause. However, the Postal Service made no efforts to address these issues.

The Union concluded:

*The removal of Thomas Allen was not properly initiated by Mr. Allen's supervisor, Postmaster Como. Instead, the removal was forced on Postmaster Como by the Labor Relations office in Jackson. This is a clear violation of Article 16 of the National Agreement. There is no exception that allows the Postal Service to ignore the judgments and desires of its front line supervisors, even in cases where employees have been indicted for off-duty misconduct.*

*The record reveals that the Postal Service failed to meet its burden to show that it had "reasonable cause to believe that Mr. Allen was guilty of a crime for which the sentence of imprisonment could be imposed." The Postal Service also failed to show that removal was for just cause.*

*The record reflects that Thomas Allen is an Air Force veteran and an exemplary 18-year postal employee. He does not pose a threat to his postmaster, his co-workers, or his customers. Indeed, these people want him back on the route. The Postal Service never had and does not now have a valid reason for removing Allen.*

*The Union requested that the Arbitrator hold the Postal Service to its contractual promise that all removals be supported by just cause. As none exists here, it is requested that the grievance be granted and that Mr. Allen be reinstated with full*

*back pay with interest and benefits to the date of his removal.*

### Questions

1. Explain the principle of "nexus" as it applies to off-duty misconduct. How does it apply in this case?
2. Distinguish between arrests, indictments, and convictions.
3. How much weight should be given to the following:
  - a. Mr. Como's testimony that he did not make the decision to remove Allen
  - b. Ms. Balk's testimony that Mr. Allen has restored the burned cabin
  - c. The district attorney has not taken the case to trial
  - d. The support from Allen's customers and community support
  - e. The effect on Allen's co-employees
4. Does it make any difference that Mr. Allen is employed in the public sector, instead of the private sector? Give your reasoning.
5. Did the Postal Service act appropriately when it did not grant Mr. Bolton's (attorney for Mr. Allen) request for information relevant to Mr. Allen's Grievance? If so, explain. If not, explain.
6. Should the Union be allowed to provide "character" witnesses on behalf of Mr. Allen? If so, why? If not, why not?
7. What level of proof should be used in this matter? Why?
8. Weigh the evidence and consider the burden of proof and the levels of proof. Be the arbitrator and support your decision.