



# **Winning Maintenance Grievances**



**REGULAR ARBITRATION PANEL**

In the Matter of the Arbitration	)	
	)	
between	)	Grievant: Flores
	)	
UNITED STATES POSTAL SERVICE	)	Post Office: Reno P&DC
	)	
and	)	USPS Case No.: F98T-1F-C 01231897
	)	
AMERICAN POSTAL WORKERS	)	APWU Case No.: EVP7301
UNION, AFL-CIO	)	
	)	

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BEFORE: Jan Stiglitz, Arbitrator

**APPEARANCES:**

For the U.S. Postal Service: Joseph Huotari and Douglas Alderman  
Labor Relations Specialists

For the Union: Charles Sundgaard  
National Business Agent

Place of Hearing: Reno, NV

Dates of Hearing: August 19, 2003; November 24, 2003

Date of Award: January 7, 2004

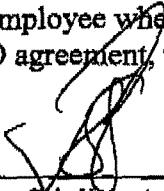
Relevant Contract Provisions: Articles 3 and 15

Contract Year: 2000-2005

Type of Grievance: Contract

**Award Summary**

Diana Flores withdrew a prior grievance over a removal notice after she entered into an EEO settlement agreement which provided for her voluntary resignation and subsequent eligibility to be rehired. In the instant grievance, Flores claims that the Postal Service failed to abide by its commitment to consider rehiring her after she became eligible. Because the Postal Service waived the issue, this grievance is arbitrable notwithstanding the fact that Flores was not an employee when the grievance was filed. Because the Postal Service failed to abide by the EEO agreement, the grievance is sustained.

  
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Jan Stiglitz, Arbitrator

## OPINION AND AWARD

### INTRODUCTION

Diana Flores filed a grievance claiming that the Postal Service failed to live up to the terms of an EEO settlement agreement it entered into. The hearing on this grievance commenced on August 19, 2003. At the time, the Postal Service was represented by Joseph Huotari. Flores was represented by the APWU. At the beginning of the hearing, the parties stipulated that the case was properly before the arbitrator. The parties agreed to five joint exhibits, including certain sections of the ELM and various stipulations.

Both sides made opening statements. The Postal Service did not raise a jurisdictional objection either before or after the APWU's opening statement. The union made no claim that because the Postal Service had failed to submit written responses at any step in the grievance procedure, the arguments in the Postal Service's opening statement were "new arguments" which should not be considered.

After the opening statements, the union presented three witnesses and introduced two documents as exhibits. The hearing was then continued by mutual agreement of the parties.

The hearing resumed on November 24, 2003. Because Joseph Huotari had taken a new position with the Postal Service, Douglas Alderman substituted in as the Postal Service's representative. At the beginning of this second day of hearing, the Postal Service objected to the arbitrability of the case. Both sides argued the arbitrability issue and presented relevant arbitral case law. I reserved my ruling on the issue of arbitrability and the parties completed their presentation of the case. The union put on one witness and introduced two additional exhibits. The Postal Service did not call any witnesses and did not offer any documents into evidence.

After the conclusion of the hearing, both sides provided written closing arguments. The Postal Service also submitted three documents which it had failed to mention or introduce at the hearing. Specifically, the Postal Service submitted: ELM sections 873.2-873.31 ("Attachment 1"); ELM sections 323.213-323.233 ("Attachment 2"); and an "EEO Investigative Affidavit of Reno Plant Manager Curtis McBride ("Attachment 3").

In anticipation of that possibility, the APWU's closing statement specifically requested that this arbitrator reject any new documents which the Postal Service sought to submit. That

request is granted.

The submission of new evidence after the record is closed is wholly unacceptable.<sup>1</sup> It deprives the opposing party of any opportunity to object or respond. Accordingly, this arbitrator will not consider any of these attachments or any argument which is grounded on these documents.

With that limitation, this arbitrator took the matter under submission for decision on December 29, 2003.

### ISSUES

1. Is the grievance arbitrable?
2. If so, did parties to the March 14, 2001, settlement agreement comply with the terms of the agreement?
3. If not, what is the appropriate remedy?

### FACTS

Grievant Diana Flores worked for the Postal Service as a custodian in the maintenance department of the Reno P&DC for approximately 14 years. (Jt. Exh. 4.) Flores had been hired under a program for persons with disabilities. Flores has an IQ which places her in the "borderline" intellectual range. (Union Exh. 2.) Except for the incident which resulted in her resignation, she has no prior discipline. (Jt. Exh. 4.)

On January 15, 2001, Flores allegedly attacked a female co-worker. Based on this attack, the Postal Service issued an emergency off-duty placement and a notice of removal. The union grieved the emergency off-duty placement and the notice of removal. Flores also filed an EEO complaint.

Fred Stiteler, Flores' brother-in-law and APWU local president, testified that after the grievance was filed, he contacted Joseph Huotari, the Labor Relations Representative in Reno, to see if they could work out a way to resolve the dispute and get Flores back to work sooner than the normal three year period it would take to pursue reinstatement through arbitration. Huotari suggested that they enter into an agreement which called for a voluntary resignation, followed by

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<sup>1</sup> I will assume that this problem arose as a result of a gap in communication between the two Postal Service advocates and was not an attempt to gain unfair advantage.

reinstatement after a six months wait. According to Stiteler, this kind of agreement had been used before in Reno without a problem.

On March 14, 2003, the parties formally entered into a settlement of the EEO complaint. That settlement provided:

That Diana L. Flores shall immediately submit her resignation for "personal reasons." Upon receipt of such resignation, the Postal Service shall process a P.S. Form 50 to reflect that resignation.

Promptly thereafter, Ms. Flores shall enroll in an EAP co-ordinated program at no cost to herself.

Not earlier than 6 months from the date of this agreement, Ms. Flores shall be able to apply for employment at any postal agency in accordance with §§ 870 of the Employee & Labor Relations Manual, provided that Ms. Flores shall be, as determined by the EAP coordinator, not a danger to herself or other employees in the workplace.

In the event that Ms. Flores is accepted for employment at any postal agency in which Mrs. Jacinta Osothsongkuoh is employed, Ms. Flores shall not bid any tour that Jacinta Osothsongkuoh is on. (Jt. Exh. 3.)

The testimony indicated that the agreement was signed by Ralph Ferguson (Supervisor of Maintenance Operations), Jim Natali (Maintenance Manager), Bill Alikakos (Flores' EEO representative) and Flores.

APWU Shop Steward Steve Washburn came in after these individuals had drafted the agreement and signed on behalf of the APWU. His signature was needed because the grievance the union had filed over the emergency off-duty placement and notice of removal was withdrawn as a result of the EEO settlement.

Even though Washburn was not present during the negotiation of the EEO settlement agreement, at the hearing, the parties stipulated that Washburn "had a full understanding of the intent of the EEO Settlement Agreement." (Jt. Exh. 4.) Washburn testified that his understanding of the agreement was that if Flores fulfilled her obligations under the agreement, she would be hired once there was an opening.

#### **The Instant Grievance**

On April 30, 2001, the APWU Shop Steward Paul Maille filed a grievance on behalf of Flores claiming management failed to abide by the EEO settlement agreement. The union

complained, in part,<sup>2</sup> that the Postal Service failed to provide the counseling called for in the agreement. The union requested that Flores be restored to the roles of the Postal Service so that she could get any counseling needed. (Jt. Exh. 2, p. 8.) The parties met at Step 1 and Ralph Ferguson, on behalf of the Postal Service, denied the grievance. (Jt. Exh. 2, p. 7.)

On May 2, 2001, the union filed a Step 2 appeal, repeating its initial claims. (Jt. Exh. 2, p. 7.) On June 1, 2001, Huotari and Stiteler met at Step 2. At that meeting, Huotari requested that the union hold the grievance in abeyance so that he could do what was needed to secure the payment for the counseling which had been promised. Stiteler agreed.

Through Huotari's efforts, Flores obtained the counseling promised under the EEO settlement agreement. The parties have stipulated that Flores entered into the counseling program and as of July, had complied with what was required of her under the EEO settlement agreement. (Jt. Exh. 4; Union Exh. 2.)

#### **The Failure to Consider Flores for Openings**

Steward Maille testified that he spoke with Maintenance Manager Natali in July about Flores being eligible for openings. Even though six months had not passed (as required under the EEO settlement) Maille believed that the six month wait could have been waived because it had been based on a waiting period called for in ELM section 870 and that section of the ELM had been changed to eliminate the waiting period. According to Maille, Natali indicated that he was not going to put Flores back on the floor. Maille testified that Natali did not indicate that the six months waiting period was a problem. Instead, Natali said that he'd "get fired" if he brought Flores back.

Maille testified that he also discussed bringing Flores back with Plant Manager Curtis McBride. According to Maille, McBride indicated that Flores needed to be cleared by the Threat Assessment Team.

Steve Washburn testified that in his role as Shop Steward, he monitored openings that Flores would be eligible for. When an opening occurred, he contacted Fred Ferguson, Supervisor of Maintenance Operations, to make sure the Flores got the consideration promised. According

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<sup>2</sup> The union also suggested that Flores no longer needed to wait six months before applying for reinstatement since ELM section 870 no longer required a six months wait.

to Washburn, Ferguson said he was not going to consider Flores for the opening. Washburn testified that he went so far as to get Flores' file for Ferguson but Ferguson kept indicating that he would not "consider" Flores.

Washburn testified that this happened with more than one opening. Each time, Ferguson told him that the matter was being dealt with "upstairs" and that Washburn would have to take the matter up with McBride.

Fred Stiteler testified that he too spoke with Ferguson and Natali about getting Flores back to work. He spoke with Ferguson prior to the expiration of the six months to see if she could be brought back earlier. According to Stiteler, Ferguson said he'd need to speak with Natali.

Stiteler testified that he spoke with Natali, but Natali looked at the ceiling and said that the decision was out of his hands. Natali told Stiteler that he'd have to talk to McBride.

Stiteler testified that he spoke to McBride and discovered that there was a disagreement as to what the settlement agreement meant. Based on past experience, Stiteler believed that Flores was going to be given the first available position. However, McBride told Stiteler that he believed Flores was only entitled to "consideration" for a position.

According to Stiteler, in an August conversation, McBride indicated that he would be willing to raise the question of rehiring Flores at the next Threat Assessment Committee meeting. Stiteler testified that in his mind, this was a new condition. The EEO agreement does not indicate that Flores' rehiring was dependant upon clearance by that group.

Stiteler testified that McBride failed to bring Flores up at the August meeting of the Threat Assessment Committee or the October meeting. (The committee didn't meet in September.) On November 26, Stiteler sent McBride an e-mail about hiring Flores for a casual vacancy that existed. McBride responded, without explanation, that it was "not a good idea." (Union Exh. 3.)

Ralph Ferguson testified that he did consider hiring Flores but chose others because of the "pecking order" requirements of the ELM. According to Ferguson, first consideration is given to other Postal Service employees in the facility and the unit (maintenance). Second consideration is given to other craft employees in the Postal Service. Since Flores was no longer a Postal

Service employee, she was in the third category and need only be considered if no employees in the first two categories were interested in the position. No ELM provision reflecting such a "pecking order" was introduced into evidence at the hearing.

On September 22, 2001, Ferguson hired a person named Antonio Fernandez to be a T-1 Custodian. (Jt. Exh. 6.) According to Ferguson, Fernandez had transferred from another position in the plant. The opening given to Fernandez was one which Flores had applied for. The vacancy occurred after Flores had met the eligibility requirements under the EEO agreement.

### **Appeal to Arbitration**

On November 30, 2001, the union appealed the matter to arbitration. (Jt. Exh. 2, p 1.) Subsequent to the filing of the grievance, the Postal Service has hired four other custodians: Fernando Eagleheart (on December 29, 2001); Seven Van Ness (on August 24, 2002); Larry Salipidis (on March 22, 2003); and Bridget Wade-Barnhill (on April 5, 2003). (Jt. Exh. 6.) According to Ferguson, Eagleheart had been a custodian at another Post Office (Vallejo), Van Ness had been a custodian who transferred from Washington, Salipidis had been a clerk in another facility and Wade-Barnhill had been hired from within the facility with no prior experience as a custodian.

### **Additional Evidence**

The parties stipulated that if called, Natali would testify that he did not instruct Ferguson not to hire or reinstate Flores.

Maille testified that he was familiar with the kind of resignation and reinstatement agreement which had been entered into between the Postal Service and Flores. He testified that he had negotiated such an agreement for an employee named Drucker, who had gotten into trouble for providing false information. According to Maille, the Postal Service lived up to the agreement and rehired Drucker after her resignation.

Ferguson executed an "Exit Evaluation" of Flores on June 26, 2001. In it, he indicated that he would not rehire Flores because of safety concerns. (Union Exh. 1.) At the hearing, Ferguson testified that he was not aware that Flores had completed the counseling program required under the EEO settlement agreement. He testified that based on her completion of counseling that he would be willing to rehire her.



As of the second hearing date, there were two custodial vacancies in maintenance.  
(Union Exh. 3.)

### **POSITIONS OF THE PARTIES**

#### **The APWU**

The APWU claims that the grievance is arbitrable. Citing Case No. G90T-1G-C 92042480 [Vause, 1995], the APWU argues that arbitration must be allowed or else claims that the Postal Service failed to live up to agreements which settle arbitrations and include resignations could never be enforced. Citing Case No. W7C-5C-D18992 [Snow, 1990], the APWU also argues that the Postal Service waived its right to challenge arbitrability by stipulating to the issues to be heard and not including arbitrability as one of the issues.

The APWU argues that I should not consider any argument made by the Postal Service since it never took any position on the merits during the grievance procedure. The APWU argues that by virtue of this failure, any argument made at the hearing constitutes "new argument" in violation of Article 15.

On the merits, the APWU argues that the intent of the agreement was to give Flores the first available opening and that the Postal Service failed to abide by the agreement. It also argues that even if the agreement only required that Flores be given "consideration," the Postal Service failed to give any consideration to hiring Flores.

Finally, the APWU argues that the Postal Service has added new terms to the agreement such as requiring that Flores' reinstatement be cleared by the Threat Assessment Team.

#### **The Postal Service**

Citing Case No. H7N-5P-C 1132 [Mittenthal, 1990], the Postal Service claims that the dispute is not arbitrable because Flores was not an employee at the time the grievance was filed. Citing Case No. H7T-3W-C 12454 [Mittenthal, 1992], the Postal Service claims that an arbitrability issue can be raised, for the first time, at the arbitration hearing.

On the merits, the Postal Service maintains that it lived up to the terms of the EEO settlement agreement. According to the Postal Service, the EEO settlement agreement did not contain a promise to hire Flores. All Flores was entitled to under the agreement was "consideration" for any openings. The Postal Service claims that it did give Flores the

consideration required.

However, the Postal Service argues that it never had to really consider whether to hire to Flores because it followed a hiring "pecking order" set forth in the ELM and using that pecking order, it never got to the point where Flores needed to be considered. The Postal Service argues that the APWU was aware of the pecking order and that if it wanted a waiver of that process, it should have insisted that a waiver be included.

Finally, the Postal Service argues that under Article 3, it has the exclusive right to hire employees and that the union is attempting to achieve, through arbitration, a right that it was unable to obtain through collective bargaining.

### **DISCUSSION**

#### **Is the Grievance Arbitrable?**

Article 1.4 states that the Agreement is applicable to "all employees in the regular work force." The Postal Service argues that this grievance is not arbitrable because Flores is not an employee. In support of its position, the Postal Service cites an 1990 National Award by Arbitrator Mittenthal holding that an employee no longer on the rolls has no recourse to the grievance procedure. (Case No. H7N-5P-C 1132.) It also cites a 1992 National Award by Arbitrator Mittenthal indicating that the issue of arbitrability can be raised, for the first time, at an arbitration hearing. (Case No. H7T-3W-C 12454.)

In response, the APWU has cited two awards which limit the reach of those decisions. In Case No. G90T-1G-C 92042480 [1995], Arbitrator Vause rejected an arbitrability defense in a case where the underlying issue was whether the Postal Service had coerced an employee into resigning. Arbitrator Vause stated:

It would be circuitous logic to reason that such claims are barred in the present circumstances. The result of Management's position is untenable, in that it would allow Management to routinely coerce employees into filing premature resignations with the knowledge that the employee would never be permitted to challenge such coercive behavior. Grievant is entitled to a hearing on the merits to determine the validity of the resignation, and Management's refusal to accept the attempted rescission of resignation.

By a parity of reasoning, it would be unfair to allow the Postal Service to negotiate a settlement of a grievance which includes a resignation and then refuse to allow the employee to

challenge the Postal Service's failure to abide by the agreement because the employee had resigned.

The second case cited by the APWU also justifies the rejection of the Postal Service's arbitrability defense. In Case No. W7C-5C-D18992 [1990], Arbitrator Snow held that a party can waive its right to challenge arbitrability by stipulating to the issues to be heard and not including arbitrability as one of the issues. That is exactly what happened here. Prior to the commencement of the hearing, the parties entered into a series of stipulations, including:

- This case is properly before the arbitrator
- Both parties agree that the issue before the Arbitrator is whether the signatories to the EEO Settlement Agreement of 3-14-01 have complied with the terms of the agreement. (Jt. Exh. 4.)

The question of arbitrability was not raised on the first day of the hearing. It wasn't raised until the second day of the hearing, when the original Postal Service advocate had been replaced by another advocate. Under these circumstances, I find that the Postal Service waived any challenge to arbitrability.

#### **Did the Postal Service Fail to Abide by the Agreement?**

The critical language in the EEO settlement agreement states: "Not earlier than 6 months from the date of this Agreement, Ms. Flores shall be entitled to apply for employment at any postal agency in accordance with §§ 870 of the Employee and Labor relations Manual provided that Ms. Flores shall be, as determined by the EAP coordinator, not a danger to herself or other employees in the workplace." (Jt. Exh. 3.) ELM section 873.11 clearly states that "Requests for reinstatement ... should be given *serious* consideration...." (Jt. Exh. 5. Emphasis added.) I find that the Postal Service violated the EEO settlement agreement because Flores' request for reinstatement was not given serious consideration as mandated in the agreement and in the ELM provisions incorporated into the agreement.

That failure to consider Flores was illustrated by Plant Manager McBride's flat out rejection of Stiteler's suggestion that Flores be hired as a casual. An equally telling example was McBride's explaining to Stiteler that Flores' reinstatement needed to be reviewed by the Threat Assessment Committee and then failing to raise the issue with that committee.

I completely reject the Postal Service's argument that it did not have to get to the point of giving consideration to the Flores' reinstatement request because it never got to her when it followed the "pecking order." First, and most significantly, nothing in the EEO Agreement refers to this "pecking order" which is allegedly contained somewhere in the "300" section of the ELM. Second, no such ELM provision was ever cited by the Postal Service during the grievance procedure. Nor was any such ELM provision cited in the Postal Service's opening statement or offered as evidence at the hearing. In fact, the Postal Service didn't even attempt to offer any such ELM provision with the "attachments" submitted with its Closing Argument.

There may well be some ELM provision which contains a "pecking order" for hiring. But if the Postal Service wanted Flores to be bound by it, that provision should have been included in EEO settlement the agreement. The absence of any reference to such an ELM provision suggests that it is irrelevant, or worse, a pretext raised to avoid a legitimate contractual obligation.<sup>3</sup>

As indicated, the Postal Service also argued that under Article 3, it has the exclusive right to hire employees and that the union is attempting here to achieve, through arbitration, a right that it was unable to obtain through collective bargaining. That argument is unpersuasive. The Postal Service ceded some of its Article 3 rights when it entered into the EEO settlement agreement. The extent to which the Postal Service ceded those rights is properly the subject of arbitration because a properly filed grievance was settled based on that agreement.

### **The Remedy**

The union has requested that Flores be immediately reinstated and be made whole for a period of time beginning March 14, 2002 (which is one year after the EEO agreement was signed). I think such a remedy is both reasonable and appropriate. Two others were hired instead of Flores prior to that date. In addition, Flores should have been hired as a casual prior to that date.


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<sup>3</sup> Because I find that the Postal Service didn't give Flores any consideration, I need not reach the question of whether the intent of the agreement was to give Flores the next available opening. However, in light of this dispute, the parties would be well advised to make sure any future agreements clearly specify whether reinstatement is to be automatic or subject to other rules and considerations.

**AWARD**

The grievance is arbitrable and is sustained. The Postal Service shall immediately reinstate Flores to her former position. In addition, the Postal Service shall pay Flores all lost non-overtime wages from March 14, 2002, to the date of reinstatement (less other dollar compensation from employment received by Flores since March 14, 2002), and lost seniority.

The Arbitrator shall extend his jurisdiction for an additional 90 days from the date of this report in order to resolve any difficulties arising from the award.

  
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Jan Stiglitz