C-26281

REGULAR ARBITRATION PANEL

In the Matter of Arbitration	( )	Grievant:	Robert Lucero
between	( )	Post Office:	Aurora, CO
UNITED STATES POSTAL SERVICE	( )	USPS Case No:	E01N-4E-D-05107539
and	( )	NALC Case No:	DRT 04-042283
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	( )		

BEFORE:	Jonathan S. Monat, Ph.D., Arbitrator
For the U.S. Postal Service:	Shirley Pointer
For the Union:	Sandra Emerson
Place of Hearing:	Aurora, CO
Date of Hearing:	September 29, 2005
Date of Award:	November 25, 2005
Relevant Contract Provision:	Article 16
Contract Year:	2001-2006
Type of Grievance:	Removal

Award Summary:

The grievance is sustained. Management violated Article 16 of the February 2004 JCAM when it issued the Grievant a "Notice of Removal for Improper Disposition of Mail/Delay of Mail. Grievant shall be reinstated upon receipt of this award and made whole for all backpay, benefits and seniority. The removal shall be expunged from the grievant's OPF and Postal Service records.

Jonathan S. Monat, Ph.D.
Impartial Arbitrator

STIPULATIONS

The parties stipulated the matter was properly before the Arbitrator for a final and binding decision under the Regular Arbitration procedures of the National Agreement (J1) between the parties. Moving papers (J2:1-140) and photographs of the mail room at Highline Village Apartments (J3) were admitted as joint exhibits. All evidence and testimony were taken under oath administered individually at the time the testimony was given.

Further, the parties stipulated that the seven-day suspension is off the record. Also, the parties agreed that any piece of mail in joint exhibit 3 date stamped April 5, 2005, could not have been picked up on April 4, 2005, and run through CFS. These pieces numbered at least four.

ISSUES

The parties stipulated to the following issues to be decided by the Arbitrator:

1) Did the Postal Service violate Article 16 of the February 2004 JCAM when it issued the Grievant a "Notice of Removal for Improper Disposition of Mail/Delay of Mail?

2) If not, what is the appropriate remedy?

BACKGROUND

This matter arose out of an incident on April 4, 2005, at the Highline Village Apartments mail-room, a secure facility where access is limited to the Postal Service and which requires a special Postal Service key. On this date, Acting Station Manager Ken Price and Supervisor Customer Services Stephen Jones inspected the mailroom based upon a complaint alleging delay of mail. They found mail not disposed of properly and delayed mail. Postal inspectors conducted an investigation, finding mail dating back to November 9, 2004.

Interviewed on April 5, 2005, by two Postal Inspectors, the grievant admitted that he held mail beyond the 10-day limit and that he this was wrong. However, in a subsequent investigative interview, Management contended that the grievant did not accept responsibility for the delays. The grievant, a City Letter Carrier for over 18 years and the primary letter carrier on route 17066, was emergency placed in a

non-duty, non-paid status on April 6th; however, he has received back pay from April 6th to the present while remaining in a non-duty status. He was issued the "Notice of Removal" on May 17, 2005.

The Union grieved the matter immediately. The grievance moved through the grievance procedure in a timely manner. The DRT issued its Step B Decision to Impasse the grievant on June 20, 2005. The grievance was appealed to arbitration. A hearing was held on September 29, 2005, at the Aurora Post Office. The parties agreed to file post-hearing briefs which were received by the Arbitrator on October 24th and October 27th. The hearing was closed on October 27th.

POSITION OF THE AGENCY

The grievant did not follow Postal Service policy requiring letter carriers to hold mail for no more than ten (10) days after pulling it from a box for an HFC. His testimony at the hearing was inconsistent with his comments to a Postal Inspector (PI) when the held mail was discovered by management. At the hearing, the grievant claimed that he did follow policy but his comments to the PI were that he held mail "up to two months" after pulling the HFC. The grievant's earlier admission and his conflicting comments alone are sufficient to carry the burden of proof of preponderance of the evidence.

The grievant admitted that it was wrong to hold mail more than ten days once the mail was pulled out of the box. He acknowledged a disservice to the mail patron by not returning the mail as required. These admissions combined with his conflicting testimony are clear indication that the grievant changed his story to avoid the consequences of his actions. On rebuttal, PI Quijas said normally he would have written notes if the grievant had said he held mail for only ten days. Quijas had nothing to gain by giving false testimony.

The sanctity of the mail has been recognized by many arbitrators. Arbitrator Erbs (J98N-4J-D 02047028) wrote that "rules and regulations regarding the handling of mail...do not contain a different standard depending on the class of mail. It is not up to the Carrier to determine the relative value of a piece of mail and how it is tp be disposed of." The grievant in the instant case failed to adhere to the

rules and regulations of the Postal Service when he took it upon himself to continue to hold mail well beyond the allotted 10-day time frame. That the grievant held the mail as a service to the recipient is of no consequence.

Contrary to the Union's contention, the grievant's removal was not tainted by a seven-day suspension for failure to follow instructions. That discipline had been expunged by an arbitrator. However, at the time the Notice of Removal was issued, the 7-day was cited properly as a past element because it had yet to be adjudicated. But Supervisor Jones testified that he would have reached the same determination whether or not the suspension had been on the grievant's record. Jones testified that the offense was so serious that removal was warranted on the improper disposition of mail alone.

There are no mitigating circumstances other than the grievant's long service of 18 years. However, length of service not sufficient to constitute mitigate the grievant's misconduct when such a serious offense is involved. The grievant had been instructed not to hold mail in the mailroom at the apartment complex, as he had admitted to the PI. The rule governing HFC mail is clear that 10 days is the limit after which the carrier must return the mail to the Post Office. Some of the mail in question contained a notation requesting "Return Service" or "Change Service." The sanctity of the mail is paramount, and employees who breach that trust and can no longer be relied upon to fulfill that trust, need not be retained in employment (Arbitrator Zumas, N7N-01E D 33896).

POSITION OF THE NALC

The grievant followed common practice at the Highline Village Apartments when he processed the mail in the secured mailroom. When a box became full, he would pull and bundle the mail, write HFC, and date the bundle. The bundle was place on a ledge above the mailboxes. After 10 days, unclaimed mail without change of address would be returned. Some mail was for customers who were about to move in. That mail could be held for up to 30 days or longer if apartment management indicated the customer was moving in later. Testimony of both prior regular carriers and the T-6 testified that this

was common practice for the past thirteen years.

Former Supervisor Zawatski testified that she had seen the mail above the boxes but did not instruct the grievant to change this practice. She assumed it was HFC and would be returned in ten days. She was aware that other carriers had done this and that the mailroom was secure. Supervisor Davis testified that she had visited the mailroom while a manager at Aurora Main and, upon seeing the mail above the boxes, did not instruct the carriers to change the practice. Carriers Hoare, Ragan and Robles testified that many managers were aware of the practice of holding mail above the boxes. At no time did they instruct the carriers to stop holding mail. Carrier Belo was issued a direct order to leave the mail in the mailroom. The grievant was only following established practice on Route 17066.

The grievant testified that he had never been instructed not to hold the mail in the Highline Village mailroom. The grievant testified that Manager Ken Price had been in the Highline Village mailroom on September 24, 2005, but only complained about a microwave and the room's cleanliness. The date was firm in the grievant's mind because that was the date his ex-wife died and he had to take custody of his two daughters.

Manager Price testified that he had visited the mailroom prior to April 4, 2005, perhaps in September 2004. Price admitted he commented about the microwave and the room's cleanliness, giving instructions to the grievant remove the microwave, clean the mailroom and stop holding mail and return it to the Post Office. Shop Steward Robles testified that he (Robles) told the grievant to stop holding mail at the mailroom. However, Robles did not remember Price giving that instruction. If Price had issued that instruction, the grievant should have been charged with failure to follow instructions but was not. The Union argued Management's claim is new argument and cannot be considered under the terms of the JCAM.

Virtually all witnesses testified that when a mailbox becomes full, it is pulled and brought back to the Post Office to be held for ten days after which the mail is returned. The carriers testified that mail

for customers who had moved was to be handled in the same manner if no change of address is received. A box might not fill for 2 - 6 months or more depending on the customer. Former Supervisor Zawatski testified that there were no set guidelines on when to pull a full mailbox and that it sit for months before being pulled. She further testified that she would allow mail to be held longer than ten days, as Management had that discretion. Both Price and Jones testified that they had allowed mail to be held longer than ten days, some of which was soup mail, vacation hold, and first class.

When interviewed by the PI, the grievant told Quijas that it was a mistake to hold mail longer than ten days; however, management of the apartments would advise him of move-ins. The grievant felt that the PI did not know the difference between HFC, hold for move-in and vacation hold mail. At no time did the grievant admit that he wilfully or intentionally delayed the mail. He has not violated the rules as specified in the M-41, section 112.

Considering the facts, management did not prove just cause to remove the grievant. He was aware of the rule (M41.241.15) but did not know the consequences for not following the rule. Supervisor Price testified that he knew of carriers who held mail longer than ten days but held discussions instead of taking disciplinary action. Supervisor Jones testified that he issued the removal because of the extreme nature of the offense, stating management no longer held discussions with employees. Yet witnesses Belo and Robles testified that management held stand up talks after the grievant was removed to advise carriers of the new rule.

Clearly, management is inconsistent and changes the rules at their discretion, making it difficult for the grievant to know that he could be removed if he violated this rule. The rule of no mail being left in the Highline Village mailroom has not been enforced for thirteen years. Supervisor Zawatski did not enforce the rule prior to the grievant's removal and knew of the practice of previous carriers of holding mail. Although route inspections and many management visits to the mailroom had taken place, no one was ever instructed not to hold mail in the secured mailroom.

Station Manager Price's testimony made it clear that the rule is not equitably enforced. He was aware of employees who had violated M41.241.15 receiving discussions instead of being removed from the Postal Service. Article 16.2 of the National Agreement states that management has a responsibility to discuss minor offenses and that discussions are not discipline. Price, Jones and Zawatski testified that they allowed mailed to be held longer than ten days. Yet the employees involved were not disciplined. Only the grievant was disciplined and he was removed. This is an egregious inconsistency.

Furthermore, a through investigation was not conducted. Inspector Quijas, a PI for two years, did not understand M41.241.15 nor the different categories of hold mail. He did not understand that the ten day hold rule which does not mean that mail in a box longer than ten days had to be returned. Even though he took notes when he interviewed the grievant, his memory was inconsistent. Quijas never asked the grievant how long the mail had been on hold or how long it was in the mailbox before it was removed to be held for change. His lack of knowledge of the rules compromised his ability to objectively investigate the incident.

The grievant was denied his *Weingarten* rights in the investigative interview held on April 22, 2005. The shop steward was not allowed to speak or offer the grievant assistance. He was not allowed a pre-interview consultation with the grievant nor was he allowed to provided information to justify the employee's conduct.

The questions prepared for the investigative interview were structured in a way that showed management had made up its mind before the interview began. The grievant was asked if he had ever been instructed not to stack mail on top of the PO boxes and to return it after ten days. The grievant said that he had not been so instructed. Yet the next questions were, "why did you fail to follow these instructions and why did you continue to disregard this policy?" In a similar case, the arbitrator found that the questions "were more accusatory in nature than fair and objective....(in) essence...the grievant's "day in court" was not fair and objective.

Supervisor Jones signed the Supervisory Worksheet for Disciplinary Action, yet admitted he did not complete the form. Also, Jones stated that he considered an unadjudicated 7-day suspension. Yet he did not right the notice of removal which he signed, a procedural defect under the National Agreement.

Finally, discipline is supposed to be corrective rather than punitive. Discipline for most offenses should be issued in a progressive fashion in order to correct the employee's behavior. The statement of Supervisor Zawatski speaks to this point. She writes (J2:54-55), "When I approached Ken Price (on April 5, 2005) and told him I felt that he had gone too far by removing (the grievant) from the workroom floor, Ken Price replied, "I don't like him and I have already talked to Labor." I felt this was done out of dislike for and it was already premeditated....I have been a 204B for five months, and in that time I have go to witness the punish, not correct attitude of the management team." Zawatski testified that she stood by her statement. Management has chosen to be punitive rather than corrective by removing the grievant what management has shown to be a minor infraction.

The grievant should be made whole for all lost wages and benefits, and the removal expunged from all Postal Service records.

ARBITRATOR'S FINDINGS AND OPINION

The Arbitrator has reviewed the testimony and extensive evidence submitted at the hearing, as well as the post-hearing briefs and prior regular arbitration decisions. The issue for the Arbitrator is whether management had just cause to remove the grievant for delay of mail. The grievant, an 18-year letter carrier assigned to Route 17066 sometime in 2004, was issued a notice of removal for improper disposition of/delay of mail, among the most serious of offenses a letter carrier can commit. Arbitrators, the Postal Service and the NALC take this offense lightly. The sanctity of the mails is of paramount importance and value. The arbitration decisions entered into evidence by the parties show that removal of a Postal employee who intentionally and wilfully delays or improperly disposes of mail is routinely upheld when management has met its burden of proof.

The incident of April 5 and subsequent events have been interpreted differently by each party. Management saw the grievant's conduct as so egregious as to make it a singular event under a rule it alleged was strictly enforced. The NALC argued that the incident must be taken in the context of how management has treated similar events in the same locale in the past. From a close and careful review of the record and of the arbitration decisions submitted by the parties, it is apparent that the facts of this case do not support the removal of the grievant.

The decisions submitted by management involved employees who committed intentional and wilful delay of mail and/or a criminal act upon the mail (e.g., theft of the contents of express mail, colluding to steal packages wilfully throwing the mail in the trash) leading to their removal. What happened at the Highline Village Apartments mailroom, a secure facility that could only be entered by Postal employees with a specific key, was not wilful or criminal. There was no theft of or opening mail. The grievant was alleged to have delayed the mail in violation of M41.241.15, conduct for which he was issued a Notice of Removal.

Former Route 17066 carriers and a 204B supervisor offered corroborating testimony giving weight to the Union's claim that the mailroom was used to hold mail for a somewhat transient apartment population, mail that would overwhelm letter carrier cases and facilities at the Post Office. Several carriers testified that a box up could take up to several months before it would fill up and require that all the mail be pulled. There is no dispute that the mail found and identified by PI Quijas was postmarked from November 4, 2004 to April 4, 2005, including 101 pieces of first-class mail and 119 pieces of other mail (J2:63). This mail had been bundled and marked "HFC" by the grievant who admitted that he held some mail beyond the 10-day limit specified in M41.241.15. There was no attempt by the PI or others to identify why the mail was held.

Acting Manager Ken Price, at Aurora since September 2004, testified that he gave the grievant instructions to clean up the mailroom and remove the microwave. He claimed to have given the instruc-

tion that "no mail was to be held in the mailroom, period (Price testimony)." Nor did Price write a statement about the April 4th mailroom visit. NALC witness John Robles testified that Price did not issue an instruction not to hold mail in the mailroom, corroborating the grievant's claim no such instruction was given.

There is evidence on the record which contradicts Price's contention that the grievant's conduct was a removable offense. The grievant, in his written statement of September 24, 2004, about Price's visit to the mailroom, stated that Price was aware of the held mail and why it was there saying, "(Price) had no problem with the mail being there (J2:60)." Robles testified that Price "never instructed the grievant not to put mail on top of the case (testimony)." Robles thought Price was much more concerned with removal of the microwave.

Supervisor Zawatski, a 204B at the time, both testified and submitted a written statement (J2:54-55) that she had no problem with holding the mail in the mailroom and issued no instructions to change the practice. She stated that the carrier before the grievant had followed the practice, a statement corroborated by Letter Carriers Robles, Hoare and Ragan, and Supervisor Davis. Hoare and Ragan had been through route inspections at Highline Village when the practice was observed and ignored. Hoare testified that it was more practical to leave the hold mail in the mailroom because there was no room at the Post Office to track the high volume of hold mail. The photograph of the mail not only shows two or three bundles of mail on top of the boxes, it shows several virtually full of mail (J2:66). There is no evidence to show how long the mail had been in those boxes. All three witnesses gave unrebutted testimony that Price and other supervisors, including Andy Weaver, were aware of this practice and issued no instructions to change it over a period of thirteen years prior to the incident of April 4, 2004 (J2:109).

With respect to appropriate discipline for the grievant's alleged conduct, Manager Price testified that the offense was so severe that the only corrective action was removal. Even though past elements were cited in the Notice of Removal, Price said that he did not consider them. The seven-day suspension

should not have been cited in the letter because it had not been adjudicated at the time of the removal and was ultimately overturned by an arbitrator. Price claimed to have given the grievant several discussions but was unable to recall when or under what circumstances. There is no corroborating evidence on the record showing the discussions ever took place between the time Price came to Aurora and the grievant was placed on suspension pending removal. The grievant denied the alleged discussions ever took place.

There is no record of removal or other discipline of any other letter carrier for delay of mail at Highline Village. The grievant's removal stands alone. Such inconsistent treatment was underscored when management held discussions on the floor about holding mail after the grievant was removed. In her written statement about the incident, Sarah Zawatski gave unrebutted testimony that she discussed Price's harsh treatment of the grievant with Ken Price. Price responded, "I don't like him and I have already talked to Labor," lending merit to the Union's claim that this matter may have been decided before the investigative interview had taken place. The Union showed that the investigative interview questions were phrased in a manner presumptive of guilt rather solicitous of information. The questions were designed to be accusatory rather to give the grievant a fair and objective "day in court."

The Union contended that the investigative interview was flawed because the grievant had been denied his *Weingarten* rights. Jones and Price testified that the steward, Corey Belo, was allowed to be present at the grievant's request. However, statements in the record (J2:27, 30, 102) show that Price and Jones restricted the amount of time the grievant could meet with his steward before the interview. The steward had to ask for more time twice, a request granted only once (J2:27). In a memo to file, SCS Jones said, "When I concluded the interview, it is not appropriate to "open the floor" for discussion. The interview is for fact finding and giving the grievant the opportunity to express their (sic) side of the story, not for the Steward to turn it into a debate (J2:30).

The Union filed a grievance and, contrary to its admonition to the Arbitrator that the grievance not be misinterpreted, was upheld. The Step B Decision was resolved in favor of the Union. The Step B

Decision admonished Price and Jones and said:

> "The Step B Team mutually agrees to RESOLVE this case. The parties will abide by the National Agreement and the JCAM Article 17.4 and pages 17-7 concerning steward and employee rights. Based upon the pre-consultation prior to the investigative interview management will cease and desist pre-determining the amount of time a steward may speak with a grievant. However, such time will not unreasonably denied."

The Step B decision went on to list several specific rights and limitations of the steward in the investigatory interview, as well as a detailed discussion of *Weingarten* rights. Thus, the Arbitrator concludes that the grievant's rights to due process in the investigatory interview were infringed upon.

Article 16.1, Discipline Procedure, states the principle that "discipline must be corrective rather than punitive." The facts of this case mandate that the discipline should have been progressive, given the long history of mail being held beyond ten days at the Highline Village mailroom. Management, including Ken Price, had been aware of this practice for some time but issued no instructions to stop the practice. Removal was not an appropriate response under these circumstances. It was punitive and, from some comments in the record, personal.

For all these reasons based upon the Arbitrator's analysis of the evidence in this case, the grievance is sustained. Management did not establish just cause for the grievant's removal.

AWARD

The grievance is sustained. Management violated Article 16 of the February 2004 JCAM when it issued the Grievant a "Notice of Removal for Improper Disposition of Mail/Delay of Mail. Grievant shall be reinstated upon receipt of this award and made whole for all backpay, benefits and seniority. The removal shall be expunged from the grievant's OPF and Postal Service records.

November 25, 2005
Long Beach, CA

Jonathan S. Monat, Ph.D.
Arbitrator