C-35237

REGIONAL ARBITRATION PANEL

In the Matter of Arbitration	Grievant:	Madera
Between	Post Office:	Seminole, FL 33772
United States Postal Service	USPS No.:	G16N-4G-D 21089005
And	Union No.:	D9321019P
National Association of Letter Carriers		

BEFORE: Glenda M. August, Arbitrator

APPEARANCES:

For the U.S. Postal Service — Andrew Stanley

For the National Association of Letter Carriers — Joseph A. Henschen

Place of Hearing:	9355 113th St., Seminole, FL 33772
Date of Hearing:	May 26, 2021
Briefs Received	June 6, 2021
Date of Award:	July 7, 2021
Relevant Contract Provision:	Articles 16
Contract Year:	2016 - 2019
Type of Grievance:	Discipline

AWARD: The grievance is sustained. Management did not have just cause to issue the Notice Implementing (Reinstating) Removal under Last Chance Agreement. City Carrier Ashley Madera shall be immediately returned to duty and made whole for all loss wages and benefits.

Glenda M. August

Glenda M. August
Arbitrator

I. ISSUE (s)

Did Management properly implement the reinstatement of a Removal Notice under a Last Chance Agreement when they charged the Grievant with violating the terms of a "Last Chance Agreement"? If not, what is the appropriate remedy?

II. RELEVANT CONTRACT PROVISIONS

ARTICLE 16
DISCIPLINE PROCEDURE

Section 1. Principles

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.

III FACTS

The Grievant in the instant case, Ashley Madera, was issued a Notice of Removal on September 17, 2020, for "Unsatisfactory Attendance". On September 18, 2020, the parties entered into a Last Chance Settlement Agreement (LCA) in an attempt to help save the Grievant's career with the Postal Service; the Notice of Removal was placed in abeyance, pending the successful completion of the LCA period.

Management alleged that the Grievant continued to have attendance issues and on December 19, 2020, they conducted an Investigative Interview with the Grievant and her Union Representative. The Service subsequently issued a notice on December 22, 2020 reinstating the Notice of Removal under the Last Change Agreement, and charged the Grievant with violating the terms of the LCA. The Notice specified the charge as violation of the provision which allows the Grievant no more than 3 unscheduled absences in any rolling 6-month period; in the Notice, Management further cited a total of 11 unscheduled absences from October 24 to December 19, of which 9 were late, 2 were full day absences and 1 was an absence from overtime.

The Union filed the instant grievance alleging that Management did not have "just cause" to terminate the Grievant. The parties requested that the Arbitrator issue a decision on the merits in accordance with the National Agreement.

IV. MANAGEMENT'S CONTENTIONS

Management contended that the instant case involves a violation of a Last Chance Agreement. According to Management, the Grievant was issued a Notice of Removal on September 17, 2020, and the parties subsequently resolved the matter by entering into a Last Chance Agreement (LCA) on September 18, 2020. The Service contended that the agreement (LCA) clearly stated that the removal was issued for "just cause", and also clearly stated that if the Grievant violated the terms of the LCA, and was subsequently removed, the only issue in an appeal would be whether the terms of the LCA had been violated.

According to Management, the reason for the agreement (LCA) is apparent; the employee would receive one last chance to salvage her career with clear guidelines on how to do so; and, Management would get a last chance to have a productive employee and if not, clear guidelines were agreed to on how to remove the employee and limit the scope of an appeal of that removal. The Service argued that Arbitrators and the Courts have long viewed last chance agreements as acceptable and binding on the parties to the agreement. As such, Management argued that any argument made by the Union at hearing, that Management has not met the tenets of "just cause" is improper, based on the following:

1. The parties agreed that the September 2020 removal which was held in abeyance was issued for just cause; and,
2. The parties agreed that in the event a grievance was filed for violation of the LCA the only issue would be whether or not the terms were violated and not just cause.

Management contended that it is improper to allow any party to ignore the agreement that was freely negotiated and entered into. They further contended that all parties benefitted from and relied upon the terms of that agreement as an opportunity to save the Grievant's career.

The Service held the position that the Grievant violated the terms of the LCA by having more than three unscheduled absences within a six-month period. They noted that the grievance file and testimony at hearing supported their position, and the Removal Notice listed the following

11 occurrences which occurred over a two-month period:

Date	Hours	Leave Type
10/24/2020	0.33	Late
10/26/2020	8.00	SL
10/27/2020	8.00	SL/LWOP
10/29/2020	1.06	Late
11/23/2020	8.00	Absent from OT
12/05/2020	0.22	Late
12/07/2020	0.31	Late
12/08/2020	0.38	Late
12/12/2020	0.75	Late
12/14/2020	0.31	Late
12/18/2020	0.10	Late
12/19/2020	0.65	Late

Management contended that there was no real dispute regarding whether the Grievant was actually absent or late on the dates cited. They argued that the Union arguments are solely related to the reasons behind the occurrences and the reasons why the occurrences should not be counted against the Grievant; not that they did not occur.

Management maintained that the Union did not prove that there was any harmful error which could overturn the discipline. The Service asserted that they have demonstrated that the Grievant violated the terms of the LCA and the burden shifted to the Union to show why the Removal was not appropriate. Management contended that even if the Union demonstrated that an error was made in any part of the process, that would not be sufficient to justify rescinding the Removal. According to the Service, the Union must show that some harmful error to the Grievant occurred, which caused substantial prejudice to the Grievant's rights, by likely affecting the Agency's decision to take disciplinary action. Management contended that the Union could not provide such evidence.

Finally, Management contended that the LCA was a valid agreement and it was breached by the Grievant. They further contended that the Service made every effort to correct the attendance deficiencies of the Grievant but she continued to be habitually late. The Service asserted that Management even tried to accommodate the Grievant by allowing her to take an extended lunch break so that she could pick up her kids to bring them to daycare; however, the Grievant never corrected her attendance deficiencies. The Postal Service requested that based on

the evidence of record, and the fact circumstances of the instant case, the Arbitrator uphold the Notice of Removal, issued to the Grievant based on her violating the LCA entered into by the parties on September 18, 2020.

V. UNION'S CONTENTIONS

The Union contended that Management did not have "just cause" to issue the Notice of Removal (NOR) to the Grievant, Ashley Madera. According to the Union, Arbitrators have consistently held that Last Chance Agreements (LCAs) do not waive the "just cause" provisions of Article 16, Section 1. The Union asserted that each removal under an LCA must be reviewed on a case-by-case basis, with all extenuating circumstances considered.

It was the position of the Union that the record indicates that the Grievant has had issues with attendance and tardiness in the past few years. The Union asserted that it was Management's burden to demonstrate that they met the tenets of "just cause" including conducting a thorough investigation, when they decided to implement the Notice of Removal. The Union noted that the grievance file was void of any indication that Management attempted to assist the Grievant. While they acknowledged the approval of extended lunch periods, the Union maintained that there was nothing more done by Management, and no investigation to acquire more information about the Grievant's situation.

The Union cited the Investigative Interview, (JX-2, Page 35); they noted that in a separate interview with the Grievant's Supervisor, she was asked whether she was aware that the Grievant was driving to Land O' Lakes to drop off her son before work due to the quarantine, and the Supervisor acknowledged that she was not specifically aware that the Grievant drove to Land O' Lakes each day. The Union further cited the provisions of the M-39, Sections 115.2 and 15.3, where it discussed the responsibilities of Management, when dealing with their employees. They argued that Letter Carriers in particular have face unprecedented challenges during the COVID-19 Pandemic, particularly with their childcare responsibilities. The Union further argued that theses challenges led to numerous Memorandum of Understandings between the parties, particularly one which addressed the subject of Liberal Changes of Schedule and Leave which stated in pertinent part:

> If an employee requests leave for reasons related to COVID-19, such leave should be treated as scheduled (as opposes to unscheduled) leave. Leave taken for

> COVID-19 related reasons between February 29, 2020, and May 17, 2020, may not be cited in discipline for failing to maintain an assigned schedule under ELM 511.43.

The Union asserted that the cited Memo has been extended to June 4, 2021. They further asserted that instead of abiding by the Memo, Management chose to hold the LCA over the Grievant's head and continuously mentioned the agreement.

According to the Union, the Grievant, due to school closures, was out of work under the Family Medical Leave Act (FMLA) expanded leave afforded to Federal Workers from April to June, 2020. They contended that none of the information which was changing every day, was shared with those employees who were out of work. The Union asserted that Management had no contingency to share the information with employees, and they could have or should have offered liberal Changes of Schedules to assist the Grievant, since on most of the days in question, the Grievant completed her assignment and on many days worked overtime.

It was the position of the Union that Last Chance Agreements can, given the right circumstances, motivate employees to turn their lives around, overcoming problems that may threaten their jobs, their relationships and even their lives. The Union contended that when you toss in the unusual circumstances presented by the Pandemic, and the Grievant's subsequent issues with childcare and school closures, those mitigating circumstances have to be considered. They further contended that M-01914 states that "***...managers and supervisors should accommodate employees who submit a 3189, Request for Temporary Scheduled Change for Personal Convenience".*** The Union held that the presence of an LCA does eliminate the Grievant's right to that benefit, and to not offer that option to her was simply wrong.

The Union contended that Management's investigation into the disciplinary action consisted of a six-question Investigative Interview, where the Grievant was never asked if the absences were necessary. According to the Union, if that question had been asked, they would have been reminded by the Grievant that the absences were due to her son's COVID-19 quarantine, and that the October dates were related to COVID as well. The Union maintained that the questions asked did not seek the Grievant's side of the story, because the determination of guilt had already been made.

Finally, the Union argued that the Grievant entered into a Last Chance Agreement in good

faith, and in an effort to salvage her career; however, Management did not share the same sentiment. According to the Union, the Service failed to meet their probative burden to support a finding that "just cause" existed to issue the Removal. Here, they contended that Management signed off on an LCA in September of 2020, and then within weeks they implemented a change in starting time then refused to allow the Grievant and other employees to apply for a change in schedule under the Liberal Leave Memo. The Union requested that based on the evidence of record and testimony at hearing, the Arbitrator sustain the instant grievance and Rescind the Notice of Removal issued to the Grievant. They further requested that the Grievant be immediately returned to duty and made whole.

VI. DISCUSSION AND OPINION

NALC-USPS
JOINT CONTRACT ADMINISTRATION MANUAL

Article 16
Discipline Procedure

16.1
Section 1. Principles

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.

Just cause principle

The principle that any discipline must be for "just cause" establishes a standard that must apply to any discipline or discharge of an employee. Simply put, the "just cause" provision requires a fair and provable justification for discipline.

"Just cause" is a "term of art" created by labor arbitrators. It has no precise definition. It contains no rigid rules that apply in the same way in each case of discipline or discharge. However, arbitrators frequently divide the question of just cause into six sub-questions and often apply the following criteria to determine whether the action was for just cause. These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

• **Is there a rule? If so, was the employee aware of the rule?** Was the employee forewarned of the disciplinary consequences for failure to follow the rule? It is not enough to say, "Well, everybody knows that rule," or "We posted that rule ten years ago." You may have to prove that the employee should have known of the rule. Certain standards of conduct are normally expected in the industrial environment and it is assumed by arbitrators that employees should be aware of these standards. For example, an employee charged with intoxication on duty, fighting on duty, pilferage, sabotage, insubordination, etc., may be generally assumed to have understood that these offenses are neither condoned nor acceptable, even though management may not have issued specific regulations to that effect.

• **Is the rule a reasonable rule**? Management must make sure rules are reasonable, based on the overall objective of safe and efficient work performance. Management's rules should be reasonably related to business efficiency, safe operation of our business, and the performance we might expect of the employee.

• **Is the rule consistently and equitably enforced?** A rule must be applied fairly and without discrimination. Consistent and equitable enforcement is a critical factor. Consistently overlooking employee infractions and then disciplining without warning is improper. If employees are consistently allowed to smoke in areas designated as No Smoking areas, it is not appropriate suddenly to start disciplining them for this violation. In such cases, management loses its right to discipline for that infraction, in effect, unless it first puts employees (and the unions) on notice of its intent to enforce that regulation again. Singling out employees for discipline is usually improper. If several similarly situated employees commit an offense, it would not be equitable to discipline only one.

• **Was a thorough investigation completed?** Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective. This is the employee's day in court privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves before the discipline is initiated.

• **Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?** The following is an example of what arbitrators may consider an inequitable discipline: If an installation consistently issues five-day suspensions for a particular offense, it would be extremely difficult to justify why an employee with a past record similar to that of other disciplined employees was issued a thirty-day suspension for the same offense. There is no precise definition of what establishes a good, fair, or bad record. Reasonable judgment must be used. An employee's record of previous offenses may never be used to establish guilt in a case you presently have under consideration, but it may be used to determine the appropriate disciplinary penalty.

• **Was the disciplinary action taken in a timely manner?** Disciplinary actions should be taken as promptly as possible after the offense has been committed.

The instant case revolves around a Last Chance Agreement (LCA), which Management contended was entered into freely by the Grievant, who they now argue has violated the terms of that Agreement. According to Management, they have provided the Grievant numerous opportunities to correct her attendance deficiencies, and when the Service issued the Notice of Removal on September 17, 2020, Management again agreed to give the Grievant one final chance to improve her attendance. The Service maintained that on September 18, 2020, Management and the Grievant, along with her Union Representative, agreed to a Last Chance Settlement which would remain in her file for a period of 24 months. Further the LCA would serve to have Management hold the NOR issued on September 17, 2020, in abeyance.

According to the Service, the Grievant violated the terms of the LCA, specifically the requirement that the Grievant have no more than three (3) unscheduled absences in a rolling six-month period. Management argued that they have provided sufficient evidence to show that a violation existed by the inclusion of the Twelve (12) dates cited in the ***"Notice Implementing (Reinstating) Removal under Last Chance Agreement".*** The Service maintained that the Grievant did not adhere to the terms of the LCA and confirmed in the Investigative Interview, that she did not meet the terms of the LCA based on the absences listed.

The Union argued that the incidents cited, most of which were late arrivals or tardiness on the part of the Grievant, occurred due to extenuating circumstances, which the Grievant testified to at hearing. The Grievant and the Union contended that most of the absences and late arrivals were due to COVID-19 related issues, particularly concerning the Grievant's son who was quarantined for a period of time (Evidenced by JX-2, Page 47) and could not attend school/daycare. This situation required the Grievant to drop her kids to different locations, and oftentimes meant that she was a little late arriving for work, although she did arrive for work. Additionally, this came in addition to the long work hours cited by the Grievant during the Investigative Interview held on December 19, 2020.

The time period of the alleged violation came during a period where the Postal Service was experiencing major staffing shortages, due to the COVID-19 virus, and the parties recognized the challenges that postal employees, particularly letter carriers, were facing. The Memorandum of

Understanding (M-01914) cited by the Union, was a result of negotiations between the parties who acknowledged that Letter Carriers would face the same challenges as the rest of the Nation. Daycare issues, the need to quarantine when exposed to the virus, the inability for families to help if children could not go to school, because they themselves were infected, etc...Thus, the Memorandum of Understanding provided liberal leave policies so that employees could deal with their pandemic-related issues without fear of reprisal. The fact that the Grievant had entered into a Last Chance Agreement did not alter the fact that the rights extended to letter carriers by the M-01914 Memo, also applied to this employee.

(M-01914) states in pertinent part:

> ...To the extent operationally practicable, managers, and supervisors should accommodate employees who submit PS Form 3189, Request for Temporary Schedule Change for Personal Convenience as a result of childcare issues caused by daycare closures, school (Pre-K through Grade 12) closures, or the unavailability of the child's primary caregiver as a result of the COVID-19 pandemic.
>
> Managers and supervisors should also allow liberal sick leave usage for employees who are sick and liberal annual and leave without pay (LWOP) usage to the extent operationally feasible during this time period. If an employee requests leave for reasons related to COVID-19, such leave should be treated as scheduled (as opposed to unscheduled) leave. Leave taken for COVID-19 related reasons between February 29, 2020, and May 17, 2020, may not be cited in discipline for failing to maintain an assigned schedule under ELM 511.43.

The Memo was extended numerous times and according to the Union, was valid until at least June 4, 2021. The twelve incidents cited in the ***"Notice Implementing (Reinstating) Removal under Last Chance Agreement"***, covered the period of October 24, 2020, through December 19, 2020, and was definitely a period covered by the M-01914 Memorandum. Additionally, of the prior discipline cited in the Request for Discipline (Jx-2, Page 28), almost all were issued during the period covered by the MOU, with the exception of the Letter of Warning (12/16/2019) and the 7-Day Suspension (02/07/2020).

Management argued that the Grievant did not request a change of schedule on the dates in question, nor did she advise Management that the absences were COVID-related; however, the National Agreement, specifically Article 16 requires that "just cause" exists, before disciplinary actions can be issued. While Last Chance Settlement Agreements serve a very useful purpose,

final Removal still requires that Management satisfy the tenets of "just cause". Additionally, even though the language included in the LCA indicated that Management need only prove that the LCA was violated to substantiate the Grievant's termination, the Grievant cannot in this "separate contract" (LCA), waive her rights under the National Agreement at Article 16. This would be a violation of the Collective Bargaining Agreement.

The National Agreement protects employees by requiring Management to show "just cause" existed to take the disciplinary action, the Collective Bargaining Agreement does not provide Management with unfettered rights to terminate its' employees; nor does it recognize a waiver of the appeal rights of the bargaining members, based on the tenets of "just cause". The Joint Contract Administration Manual (JCAM) provides that in the application of Article 16, *"no employee may be disciplined or discharged, except for just cause"*. The JCAM explains that prior to the issuance of discipline, Management must review the elements of "just cause" and be able to satisfy all questions, which were established by the arbitration process for reviewing disciplinary actions. These elements, which are essentially six (6) sub-questions, are utilized by Arbitrators to determine if Management did indeed prove that there was a need to take action, as well as prove that the action was necessary at the level imposed. In the instant case, the questions reviewed by Arbitrators would indicate the following:

- **Is there a rule? If so, was the employee aware of the rule?** The Postal Service most assuredly has rules regarding attendance and the Grievant, was or should have been aware of the rules, based on prior discipline issued and training provided by the Postal Service.

- **Is the rule a reasonable rule**? Attendance rules are well-established to be reasonable. All employers expect their employees to be regular in attendance and to report as scheduled.

- **Is the rule consistently and equitably enforced?** There was no indication in the case at bar, that Management does not enforce the attendance rules equitably among employees. The Union did not provide any evidence that the Grievant was disparately treated.

- **Was a thorough investigation completed?** Thorough investigations must include an opportunity for employees to provide any mitigating circumstances, and Management must acknowledge those issues and determine if the employee could be assisted by options available to employees. In the instant case, the Memorandum of Understanding, M-01914 provided options which could have been advantageous

to protecting the Grievant's absences, which were due to the unprecedented challenges presented by the COVID-19 Pandemic

• **Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?** Although the Grievant had a prior history of disciplinary action, there is no precise definition of what establishes a good, fair, or bad record. Managers and Supervisors must use reasonable judgment, and the "employee's record of previous offenses may never be used to establish guilt in a case presently under consideration, but it may be used to determine the appropriate disciplinary penalty". Here, the Removal would have been the next progressive step in the disciplinary process, based on the prior disciplinary actions cited; however, the mitigating circumstances revealed, which were all related to the COVID-19 Pandemic, must be considered. Additionally, the fact that all but 2 of the prior disciplinary actions issued, occurred during the same protected period, gives rise for the need to consider whether Removal was reasonably related to the Grievant's infractions or the cited violations of the LCA.

• **Was the disciplinary action taken in a timely manner?** Disciplinary actions should be taken as promptly as possible after the offense has been committed, and there was no allegation posed by the Union to support a finding that the action was not timely.

• **Lastly, the final element of just cause requires that discipline be "*Corrective Rather than Punitive*"** and it is an essential element of the "just cause" principle. The basis of this principle of "corrective" or "progressive" discipline is that it is issued for the **purpose of correcting or improving employee behavior and not as punishment or retribution**. The Grievant in the instant case is an 8-year employee of the Postal Service who apparently, over the past couple years, has developed some attendance deficiencies. The moderate "bank of goodwill" developed during her years of Service has been blemished by circumstances related to unprecedented times; a world-wide Pandemic which wreaked havoc on the lives of individuals and families. The pandemic hit families with children particularly hard and when forced to make a choice between caring for her children and work, the Grievant's work suffered somewhat. The Last Chance Agreement, no doubt weighed heavily on this employee whose own Supervisor, Carolyn Brewster, in a statement found in the grievance file (JX-2, Page 72), stated that, when advised that her absences and late arrivals were in violation of her "Last Chance Agreement", this is how the Grievant responded:

> "Both times, Ms. Madera indicated that she understood and signed her leave slips. It seemed that Ms. Madera took both attendance conversations seriously. She was polite and did not controvert the leave slips. I did not make note of the specific dates of these conversations."

A review of Management's contention that the LCA was violated by the Grievant, is on the surface, supported by the evidence of record, and the incidents listed in the ***"Notice Implementing (Reinstating) Removal under Last Chance Agreement"***. However, testimony and evidence presented, demonstrated that there was more to the infractions than what was evident on the surface. There is no doubt that the Grievant's son was affected by a 14-day Quarantine required by the Pinellas County School System (JX-2, Page 47), and this occurred during the time period covered in six (6) of the twelve incidents listed. One of the listed incident dates charged the Grievant with Unscheduled Sick Leave and Unscheduled LWOP, however, the Grievant testified that she herself had to undergo COVID-19 testing during this time (10/26/2020-10/27/2020). A thorough investigation, which is required by the tenets of "just cause" could have uncovered the circumstances facing the Grievant, and such issues would have been covered under the provisions extended in M-01914.

Based on my review of the evidence and testimony provided in this grievance, the Arbitrator finds that the case lacked a thorough investigation by Management, with regard to the LCA violations alleged. The record indicated that there were mitigating circumstance surrounding the Grievant's attendance violations which were related to the COVID-19 Pandemic and the care of her children. M-01914 provided protection for letter carriers, including Ms. Madera, irrespective of the fact that she was under a Last Chance Settlement Agreement with the Service. Given the protections provided by the cited MOU, the severity of the discipline imposed, was not reasonably related to the infractions, nor was the discipline (Removal), corrective in nature. There was no evidence provided which indicated that the Grievant was beyond rehabilitation if given an opportunity outside of the conditions presented by the current world-wide pandemic. For those reasons, the grievance must be sustained.

The Last Chance Settlement Agreement entered into on December 18, 2020, was freely negotiated and under normal conditions, and without the circumstances revealed in this case, it would be enforceable. That enforcement, however, would still be subject to the principle of "just cause". In support of their position, the Union cited the opinion of National Arbitrator Carlton J. Snow in case number W7C-5E-D 10681 C-09746 (1989), where the Arbitrator opined, when citing "A Potpourri of Defects" in the case under review:

It is "black letter" law in arbitration that an employer must conduct an adequate

> investigation before drawing conclusion about a grievant. It is especially important in a case involving an employe's removal carefully to gather all relevant documentary evidence. (See, for example, A.O Smith Corp., 66-1 ARB 8025 (1965); Goss Company, 52 LA 201 (1969); and Aerosol Techniques, Inc., 48 LA 1278 (1967)). As one arbitrator has aptly observed, "While this arbitrator does not believe that all the complexities of due process that exist in judicial proceedings are equally applicable in arbitration matters, certain 'basic notions of fairness or due process' must be followed." (See, Flintkote Company, 59 LA 329, 330 (1972)).
> ...
> Second, it would appear that inappropriate information was used in deciding to remove the grievant. Supervisor Morris testified that the grievant had a serious problem with tardiness, but the problem was not reflected by the grievant's attendance records because she had been permitted to work late in order to compensate for coming in late....

Likewise, in the instant case, the fact that Management held the position that the Grievant's attendance deficiencies, set against the backdrop of the Last Chance Agreement, was sufficient to remove the employee without a thorough investigation, definitely was a defect in the due process rights afforded to the Grievant.

The Union further supported this fact with the arbitral opinion of Arbitrator Linda DiLeone Klein, in case number C7N-4Q-D 30833, where she states:

> An agreement dictating that certain behavior automatically constitutes just cause for removal is likewise unenforceable. The grievance-arbitration procedure allows for other Managers or an arbitrator to be involved in the decision making process as it relates to the determination of just cause. Despite the existence of a last chance agreement, the grievant is entitled to a review of the facts which occurred subsequent to said agreement for the purpose of determining the existence of just cause and the appropriateness of the penalty.

The undesigned arbitrator is in agreement with Arbitrator Klein, that where a last chance agreement exists, the Grievant is still entitled to a review of the facts for the purpose of determining the existence of "just cause" and the appropriateness of the penalty. Here, Management did not prove that "just cause" existed to reinstate the removal which was settled by the Last Chance Agreement entered into on September 18, 2020.

For the foregoing reasons, the grievance is sustained. The Grievant shall be immediately returned to work and Management shall make the Grievant whole for all lost workhours and benefits caused by her improper removal.

AWARD

The grievance is sustained. Management did not have just cause to issue the Notice Implementing (Reinstating) Removal under Last Chance Agreement. City Carrier Ashley Madera shall be immediately returned to duty and made whole for all loss wages and benefits.

Glenda M. August

GLENDA M. AUGUST
Arbitrator

July 7, 2021

New Iberia, LA