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C-32958

NORTHEAST AREA REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL ASSOCIATION OF LETTER CARRIERS

) **Grievant: Nathan Mignacca**

) **Post Office: Putnam, CT**

) **USPS Case No. B11N-4B-C 17330871**

) **NALC Case No. 1606260004**

) **DRT # 14-386647**

Before:

**Jonathan I. Klein,
Arbitrator**

Appearances:

For the Postal Service:

**Glenn Smith
Labor Relations Specialist**

For the NALC:

**George Laham
NALC Advocate**

Place of Hearing:

Hartford, Connecticut

Date of Hearing:

May 16, 2017

Date of Award

June 29, 2017

Relevant Contract Provisions:

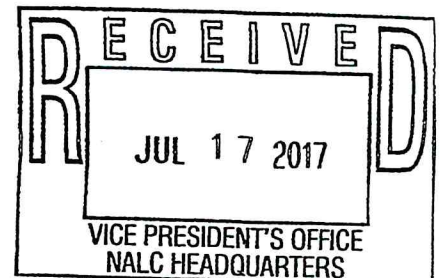
Article 12

Contract Year:

2011-2016

Type of Grievance:

Contract

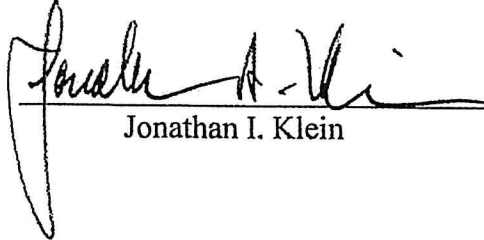


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AWARD SUMMARY

The Union presented sufficient evidence to satisfy its burden of proof that the Postal Service violated Article 12 of the National Agreement as a result of improperly denying the grievant's transfer request. Accordingly, the grievance is sustained as set forth in the Award.


Jonathan I. Klein

STATEMENT OF FACTS

The grievant, Nathan Mignacca, was hired as a casual employee by the Postal Service on February 3, 2007. He became a full-time regular letter carrier in 2015, and was assigned to the Putnam, Connecticut post office. (Postal Service Ex. 1). The grievant applied for a voluntary transfer to the Las Vegas, Nevada post office. On November 28, 2016, the grievant was notified by Michele Enk, an HR Generalist at the Postal Service's Las Vegas office, that his request for reassignment was being considered and that "[i]n order to continue processing your request we need the following information: Driver's Abstract, Driver's License Number with State and Expiration Date, and PS Form 2480." (Postal Service Ex. 2).

On December 6, 2016, the Postal Service issued the grievant the following notice informing him that his transfer request had been denied:

Your request to reassign to the Nevada-Sierra District has been reviewed by the Selecting Official.
The Postal Service determines approval of reassignment requests on work, attendance, and safety records. Due to your unacceptable

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Safety Record and Attendance Record, your request for reassignment for the following choice(s) has been denied:

LAS VEGAS(NV) POST OFC - INSHD, CITY CARRIER
CRAFT

We would like to thank you for having expressed a desire to reassign to the Nevada-Sierra District and regret that a more favorable decision could not be granted.

If you have additional choice(s) within this request that have not been closed or withdrawn, they will continue to be considered in date order as vacancies arise.

(Joint Ex. 2, at 22).

The Union filed a grievance on December 22, 2016, to protest an alleged violation of Article 12 of the National Agreement as a result of the Postal Service's improper denial of the grievant's voluntary transfer request. (Joint Ex. 2, at 6). A Formal Step A meeting was held on December 28, 2016, and the grievance was progressed to Step B on January 13, 2017. The Step B Dispute Resolution Team subsequently declared an impasse on January 14, 2017. (Joint Ex. 2, at 1-5). The parties proceeded to arbitration and a hearing was conducted on May 16, 2017, at which time the parties were afforded full opportunity to present documentary evidence, direct and cross-examine witnesses, offer rebuttal testimony and present argument. Each party presented an oral closing statement and several arbitration awards in support of their respective positions.

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STATEMENT OF ISSUE

The stipulated issue was set forth by the Step B DRT:

Did management violate the National Agreement Article 12 and the associated MOU's by improperly denying the grievant's voluntary transfer request to Las Vegas, Nevada and denied an opportunity to address the gaining facilities concerns regarding his request so a more informed decision could be made?

RELEVANT CONTRACT PROVISIONS

Article 12 of the National Agreement entitled "Holiday Work," provides, in part, as follows:

Section 6. Transfers

- A. Installation heads will consider requests for transfers submitted by employees from other installations.
- B. Providing a written request for a voluntary transfer has been submitted, a written acknowledgment shall be given in a timely manner.

CONTENTIONS OF THE PARTIES

Union's Contentions

The record reveals that the grievant's request to transfer to the Las Vegas Post Office was denied on the basis of his attendance and safety records. The Union contends that management's denial of the grievant's transfer request was arbitrary, capricious and unreasonable in violation of Article 12.6 of the National Agreement and a Memorandum of Understanding contained in the

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collective bargaining agreement. The Union objects to the introduction of any new evidence by the Postal Service as the case should have been developed at the lowest level in accordance with Article 15 of the National Agreement, rather than at arbitration. The Union points out that management's Step B representative stated that "... she cannot render a decision on the current case file as she is at a disadvantage, specifically because the case file does not contain Management's position and/or contentions from either the losing office (Putnam, Ct) or the gaining office (Las Vegas) on their decision to approve/deny the grievant the transfer request." (Union Opening Statement, 2).

In order for a transfer request to be approved, employees must have acceptable work, attendance and safety records, and meet the minimum qualifications for all positions to which they request reassignment. In the instant case, the Union provided an explanation regarding the grievant's sick leave usage and safety record. It points out that "[l]ocal management encouraged the usage of the leave and the email from supervisor Latino explained exactly the grievant's situation." (Union Closing Statement, 1). All of the grievant's sick leave was documented and approved by management to allow him to visit his family in Las Vegas. However, the Las Vegas officials relied on inaccurate records and did not consider any mitigating circumstances concerning the grievant's attendance issues when they evaluated his transfer request.

Although the JCAM does not specifically define an acceptable work record, Arbitrator Kathy Eisenmenger held in C-24389 that the use of the term "acceptable" is synonymous with "satisfactory" or "adequate," and it prohibits management from imposing a higher standard such

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as "exemplary" in evaluating employees who seek transfers. The Union points out that there is no documentation contained in the case file which raises any concerns regarding the grievant's evaluation. According to the Union, "[o]bjectivity must be the criteria if the deciding official is contractually required to be fair in his evaluation." (Union Closing Statement, 2).

The evidence of record presented in this case establishes that the Postal Service violated the National Agreement when it failed to give full consideration to the grievant's request to transfer to the Las Vegas Post Office. The Union cites several arbitration awards in support of its position that full consideration was not afforded the grievant in this case. Article 12 clearly requires that "evaluations must be valid and to the point with unsatisfactory work records accurately documented." (Union Closing Statement, 2). The Union maintains that management did not comply with this requirement in this case. According to the Union, "... nothing was brought forth in the course of the instant hearing that would serve to disqualify the grievant from being transferred." (Union Closing Statement, 2). It asserts that full consideration of the grievant's transfer request warranted a further investigation and determination, rather than a rejection without additional fact-finding. Although the grievant's attendance was one of the deciding factors in the decision to deny his transfer request, the Union maintains that the fact his attendance was described as "satisfactory" in the supervisor's evaluation cannot be ignored. Additionally, no documentation in the grievant's OPF raised any concerns regarding his sick leave usage. Furthermore, "... since the Grievant has never been disciplined for either poor attendance or on the job injuries ... his record on those two issues must have been acceptable to

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the employer.” (Union Closing Statement, 5). It also points out that the grievant did not miss any days of work as a result of the accident which occurred 2 ½ years ago, and no CA-1 form was filed. Moreover, Postal Service safety records do not distinguish whether letter carriers are at fault or not at fault for an accident.

The email on page 31 of the joint case file shows that “. . . all the selecting officials did, is obtain a copy of his attendance record and safety record on line, and arbitrarily denied the request by filling up a questionnaire.” (Union Opening Statement, 3). The Union asserts that management failed to look at the qualifications of the “whole” individual. Additionally, the case file does not include one statement to show that the installation head considered the grievant’s transfer or that his opinion was ever solicited by Ms. Enk as required by Article 12.6 of the contract. For each of the aforementioned reasons, the Union requests that the arbitrator sustain the grievance and award the grievant a transfer to the Las Vegas Post Office as soon as possible.

Management’s Contentions

The Postal Service points out that the Union has the burden of proof to show by a preponderance of the evidence that management violated that National Agreement and MOUs regarding transfers. In the instant case, “[t]he issue turns on whether management acted properly in its failure to honor the grievant’s eligibility for a transfer in the first place.” (Postal Service Opening Statement, 2). The Postal Service maintains that the Union failed to provide any evidence that the denial of the grievant’s transfer request was arbitrary or capricious. The record

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establishes that no requests for information were submitted by the Union, and the Union failed to interview the grievant and any of the management personnel at both the Putnam Post Office and the Las Vegas Post Office who were involved in the decision to deny the transfer request.

The Postal Service asserts that Article 3 of the National Agreement provides management with a reasonably unencumbered right to transfer employees and to deny transfer requests. It maintains that "[t]he union challenging an employer's decision to deny a transfer must initially contend with the presumption that management exercised its right correctly in the absence of evidence that an employer's decision was arbitrary, capricious or unreasonable." (Postal Service Closing Statement, 1). The Postal Service notes that Article 12.6 of the National Agreement indicates that management will give full consideration to transfer requests. However, the contract language does not guarantee that a transfer request will be granted. The applicable provision provides that management must reasonably exercise its review of the transfer request.

The Postal Service points out that "[t]he contractual requirement for an employee wanting to transfer is that he or she have an acceptable record. This is the gateway requirement to gain entry into the pool of qualified applicants." (Postal Service Closing Statement, 2). The record establishes that the grievant had 64.89 hours of unscheduled sick leave, and his scheduled and unscheduled sick leave totaled 133.43 hours. Additionally, the grievant was also involved in an industrial accident. According to the Postal Service, the Las Vegas area is a very desirable location for employees to transfer to and the above factors "... weighed on the evaluator's decision to accept or deny the grievant's transfer." (Postal Service Closing Statement, 2). The

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Postal Service maintains that an acceptable work record is a minimal standard which must be met even to file a request for a transfer. It asserts that “[i]f the parties had intended to state that an acceptable work record guarantees approval, indeed requires approval of a transfer request, they would have done so.” (Postal Service Closing Statement, 2).

In the instant case, the Postal Service responded to the grievant’s transfer request by making a fair and reasonable decision. It asserts that the grievant’s record was not acceptable to the gaining facility which expected better work performance. An additional factor in the decision making process was the grievant’s accident record. The Postal Service points out that the grievant’s accident record is a valid factor to consider within this context. It maintains that “[t]he transfer was denied because the grievant failed to meet the threshold requirements for eligibility and therefore management did not violate the National Agreement.” (Postal Service Closing Statement, 2). Despite sympathy for the grievant’s situation, it cannot be held that his transfer request was arbitrarily or capriciously denied. There is no evidence that his request was not given “full consideration” as required by the MOU regarding transfers. The Postal Service notes that an email from the grievant’s supervisor to HR Generalist Enk, dated December 9, 2016, was sent after the decision to deny the transfer request was already made. Furthermore, the supervisor’s email failed to explain the grievant’s unscheduled absences, excessive sick leave, or his accident. The Postal Service also points out that the subject of the grievant’s sick leave balance was not a deciding factor in the decision to deny the transfer request.

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The Union claims that the grievant was denied an opportunity to address the concerns of the gaining facility regarding his request to transfer. However, "[t]here is no contractual requirement for the grievant to personally address the gaining facility listed in the National Agreement, the MOU's, or the transfer procedure." (Postal Service Closing Statement, 3). The Union is simply attempting to receive additional contract rights through the grievance process which were not negotiated by the parties.

The Postal Service further asserts that "[f]or the remedy of ordering a transfer the union must prove that the contents of the evaluations were themselves unfair to the detriment of an otherwise qualified applicant. Even if a procedural violation had occurred, the grievant should not automatically be granted a transfer." (Postal Service Closing Statement, 3). According to the Postal Service, the procedural misstep must be shown to be the cause of the denial. In the instant case, the Union failed to establish that the Postal Service made a procedural error or failed to follow regulations when the grievant's transfer request was processed and denied. The grievance has no merit and should be denied in its entirety for each of the aforementioned reasons.

OPINION AND ANALYSIS

The issue before the arbitrator concerns the grievant's request for a transfer from Putnam, Connecticut to Las Vegas, Nevada. Article 12.6 of the National Agreement sets forth the contractual provisions regarding voluntary transfers and incorporates the following Memorandum of Understanding on Transfers into the contract:

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Re: Transfers

The parties agree that the following procedures will be followed when career Postal Employees request reassignment from Postal installations in one geographical area of the country to Postal installations in another geographical area. Local reassignments (reassignments within the same MSC, Division, or to adjacent MSCs or Divisions) are covered by the provisions of Section 2 of this memorandum.

Section 1. Reassignments (Transfers) to other geographical areas.

* * *

B. Installation heads will afford full consideration to all reassignment requests from employees in other geographical areas within the Postal Service. The requests will be considered in the order received consistent with the vacancies being filled and type of positions requested. Such requests from qualified employees, consistent with the provisions of this memorandum, will not be unreasonably denied. . . .

* * *

D. Managers will give full consideration to the work, attendance, and safety records of all employees who are considered for reassignment. An employee must have an acceptable work, attendance, and safety record and meet the minimum qualifications for all positions to which they request reassignment. Both the gaining and losing installation heads must be fair in their evaluations. Evaluations must be valid and to the point, with unsatisfactory work records accurately documented. An employee must have at least one-year of service in their present installation prior to requesting reassignment to another installation. . . .

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(Joint Ex. 2, at 12-14)

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The Joint Contract Administration Manual (JCAM) specifically provides on page 12-46 that transfer requests from qualified employees will not be unreasonably denied. Consistent with the above Memorandum of Understanding, the arbitrator determines that a "qualified" employee is an individual who meets the minimum qualifications for the position to which they request reassignment. In the instant case, no argument was put forth by the Postal Service that the grievant does not meet the minimum qualifications of a letter carrier, the position to which he seeks reassignment. The record establishes that the grievant has been a full-time regular letter carrier since 2015, and he has no disciplinary record. As a qualified employee seeking reassignment, the Postal Service is required to comply with the negotiated procedural requirements to be used by managers in evaluating transfer requests.

The Memorandum of Understanding on Transfers qualifies management's exclusive right to transfer and assign employees in positions within the Postal Service by directing managers to take into account the work, attendance and safety records of employees who are considered for reassignment. The JCAM specifically provides that managers will give "full consideration" to the above factors in evaluating transfer requests. Additionally, an employee's work, attendance and safety records must be "acceptable" as stated in the Memorandum of Understanding on Transfers.

The arbitrator determines that the standard of "acceptable" work, safety and attendance records must be objectively viewed based upon that which is expected of a reasonable employee. In this context, "acceptable" means that an employee's performance as it relates to the

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aforementioned factors is satisfactory and otherwise meets the employer's reasonable and objective expectations. Therefore, management cannot require a standard which is higher than "acceptable" in evaluating an employee's request for reassignment. The arbitrator further finds that management's contractual obligation to give full consideration to transfer requests means that their decision must be based upon objective reasons and the request must not be unreasonably denied.

The arbitrator references the following opinion by Arbitrator Kathy L. Eisenmenger in *USPS -and- NALC*, Case No. H98-N-4H-C 00084826 (Arb. Eisenmenger)(June 19, 2003), in support of the above analysis regarding management's full consideration of transfer requests:

The contractual obligation requires a 'full consideration' based on three specific factors: work, attendance and safety. By the use of the terms 'full consideration' and the overall tenor of the contractual provisions, the decision to grant or deny the request must be reasonable and based on objective reasons. Thus, the standard of review is higher than a mere avoidance of abuse of discretion or arbitrary and capricious action. Furthermore, the National Agreement requires that an employee have 'acceptable' work, attendance and safety records. By the use of the term 'acceptable,' the National Agreement prohibits a manager from instituting a higher standard than what would constitute an acceptable record for a reasonable employee. For example, a locally-established set of criteria of a perfect record or even an exemplary record would violate the contractually mandated standard of an objective reasonable standard of what constitutes acceptable work, acceptable performance or acceptable safety records. The word 'acceptable' is synonymous with satisfactory and adequate. Therefore, it would be contrary to the express terms of the National Agreement to impose a standard higher than acceptable (meaning satisfactory or adequate) on employees when requesting a transfer to another geographical area. Lastly, all three factors of work, attendance, and safety are to be considered in

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tandem, not merely individually. The terms 'full consideration' require a 'whole person' approach when evaluating an employee's transfer request. One single factor cannot be given a halo affect unless the negative impact of that one factor seriously outweighed the other two.

Id., at 6-7.

No evidence was presented that the grievant's work performance as a letter carrier at the Putnam Post Office has been other than satisfactory and acceptable to management. The arbitrator notes that the letter issued to the grievant denying his transfer request indicates that management's decision was based upon his unacceptable safety and attendance records. As it concerns the grievant's attendance record, the Employee Key Indicators Report contained in the joint case file reflects that he had nine occurrences of unscheduled leave during the period of December 12, 2015 through December 12, 2016. (Joint Ex. 2, at 23). Additionally, the grievant had 21 occurrences of sick leave totaling 113.43 hours during the same period. (Joint Ex. 2, at 24). The Employee Key Indicators Report also reveals that the grievant was involved in one accident during the past five years. (Joint Ex. 2, at 24). The documentation describes the grievant's accident which occurred on February 1, 2014, as a "Slipping/Twisting- Not Falling" incident that was classified as "3- Industrial." (Joint Ex. 2, at 24).

At the arbitration hearing, the grievant testified that he "needed days off and was given days off" due to his personal situation. According to the grievant, his "situation" was that his girlfriend moved to California and that he was "trying to get out there" to save his relationship with her and their daughter. The grievant pointed out that management knew about his absences,

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and they were not unscheduled. Moreover, his leave requests were approved because of his "situation" and "management said don't worry about it Nathan." The grievant indicated that he "didn't have to fill out a form for sick leave," and such leave was taken by "word of mouth." He noted that the Putnam Post is small and consists of only five city routes. The grievant stated that he was never disciplined as a result of his attendance. He also described his on-duty accident as a "little slip" which he reported to management as required. The grievant pointed out that he did not miss any work as a result of the accident and he maintained that he was "not at fault."

The joint case file contains the following email, dated November 28, 2016, from David Latino, the grievant's supervisor at the Putnam post office, to HR Generalist Enk:

Nate received a letter for reassignment in LV. He will be accepting this position if selected. The information will be forwarded as requested. If any references are needed please have the management of the facility that has the opening please contact me. Nat is an excellent carrier but unfortunately due to personal life problems he has been tak[ing] time off to be out there in LV, to rectify his problems. Once he gets this reassignment his problems will go away.

(Joint Ex. 2, at 28).

The record indicates that Ms. Enk provided the following response to supervisor Latino's email:

"Thank you for the information. Right now, all that is needed is the Supervisor Eval that was requested. I will be sure to share this information with the selecting official." (Joint Ex. 2, at

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29).¹ The grievant testified that he was never contacted by management at the Las Vegas post office to provide his "side of the story" regarding his attendance record.

In Case No. H98-N-4H-C 00084826 referenced above, Arbitrator Eisenmenger also noted the parties' 1993 Memorandum (M-01223) which states, in part, that "... where there are one or two questions with regard to the viability of the employee ... that it is incumbent upon responsible management to obtain additional information into that situation." *Id.*, at 7. Based upon the grievant's testimony and the documentary evidence contained in the joint case file, the reason for many of the grievant's absences while assigned to the Putnam post office would cease to exist if his transfer to the Las Vegas post office was approved. In the instant case, there is no evidence that management attempted to obtain any additional information regarding the grievant's absence record or the nature of his "personal life problems" referenced in the email sent by supervisor Latino -- both of which are related to one another.²

There is also no documentary evidence contained in the joint case file that management conducted an investigation, or that it even looked into the grievant's on-duty accident to

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1. The arbitrator notes that the supervisor evaluation form referenced by Ms. Enk in her email was not contained in the joint case file, nor was it presented at hearing by either party.
 2. There is no record contained in the joint case file regarding the specifics of the full consideration afforded the grievant's transfer request. The Step B Decision provides, in part, as follows:

The USPS B Team Representative has determined she cannot render a decision on the current case file as this Team member is at a disadvantage. Specifically because the case file does not contain Management's position and/or contentions from either the losing office (Putnam, CT) or the gaining office (Las Vegas, NV) on their decision to approve/deny the Grievant the transfer request.

(Joint Ex. 2, at 4).

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determine whether he was at fault. The grievant noted that he was not contacted by the Las Vegas post office regarding this matter. There is no evidence that the installation head of the Las Vegas post office had any knowledge regarding the specific circumstances of the grievant's accident. In *USPS -and- NALC*, Case No. B01N-4B-C 05105544 (Arb. Robert T. Simmelkjaer)(October 15, 2005), Arbitrator Simmelkjaer discussed an employee's accident record and management's lack of knowledge regarding the specifics of those accidents:

In this regard, this Arbitrator concurs with Arbitrator Maher who found in Case No. A94N-4A-C 99036999 'that a denial of a transfer request based on the existence of accidents, where the manager has no knowledge of the specifics of those accidents, amounts to ministerial processing of the transfer request as opposed to full and fair consideration.' In this connection, there is evidence that the Service's accident reports do not distinguish among categories of accidents so that an employee's safety record contains all accidents irrespective of whether the employee is at fault or the Service incurred liability.

Id., at 14.

As noted above, the documentation contained in the joint file provides no information concerning the circumstances of the grievant's accident. The arbitrator determines that management at the Las Vegas post office should have inquired into the nature of the grievant's sole accident in order to afford him a fair evaluation as required by the Memorandum of Understanding on Transfers. In the event that such an inquiry had been conducted, management may have discovered that the grievant was not at fault for the accident and he did not miss any work as a result thereof.

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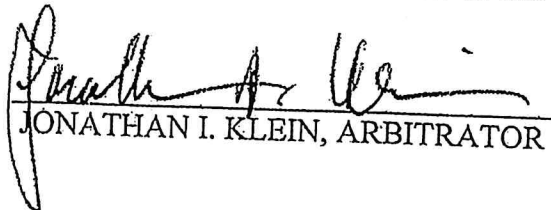
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The "full consideration" of a transfer request which is required of management under the Memorandum of Understanding on Transfers involves a "whole person" approach and a fair evaluation based upon an employee's work, attendance and safety records. It is clear that management failed to give full consideration to the grievant's attendance and safety records in this case. As such, the arbitrator concludes that the grievant's transfer request was unreasonably denied for the reason that management improperly determined that his attendance and safety records were unacceptable without first giving full consideration to those factors.

For each of the foregoing reasons, the Union has satisfied its burden of proof that the Postal Service violated Article 12 of the National Agreement by improperly denying the grievant's transfer request. Management at the Las Vegas Post Office is ordered to accept the grievant's transfer request. The arbitrator notes that the JCAM specifically provides for such a remedy. Accordingly, the grievance is sustained as set forth in the Award.

AWARD

The grievance is sustained. The Postal Service is ordered to effectuate a transfer of the grievant to a city letter carrier position, Level 1, at the Las Vegas, Nevada Post Office within thirty (30) days from the date of this Award.


JONATHAN I. KLEIN, ARBITRATOR

Date of Issuance: June 29, 2017.