C-36248

Regular Arbitration Panel

In the Matter of Arbitration	)	Grievant:	Jones, Tyler
between	)	Post Office:	Nashville (Green Hills) TN
The United States Postal Service	)	GATS:	G19N-4G-D 23131608
and	)	DRT:	08-600534
National Association of Letter Carriers, AFL-CIO	)	Local:	B4-000109-23

Before: Arbitrator J M. Sims

Appearances:

For the Postal Service: Paul Ahnert

For the Union: Cory Walton

Place of Hearing: 525 Royal Parkway
Nashville TN 37229

Date of Hearing: 08 August 2023

Date of Award: 14 August 2023

Award

The agency did not have Just Cause to issue the grievant a Notice of Removal. The removal action is reduced to a Long-Term Suspension without back-pay, but with no loss in seniority. The grievant will be returned to duty as soon as administratively possible.

J M. Sims, Arbitrator

Procedural Matters

This matter came for hearing pursuant to a 2019-2023 National Agreement between the parties. The hearing occurred on 08 August 2023, in a conference room of the postal facility located at 525 Royal Parkway, Nashville, Tennessee. Paul Ahnert, Labor Relations Specialist, represented the United States Postal Service. Cory Walton, National Assigned Assistant, represented the National Association of Letter Carriers.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The advocates displayed superb professionalism and fully and fairly represented their respective parties.

The Issue

Did Management violate Article 16 and Section 115 of Handbook M-39 via Article 19 of the National Agreement when they issued Letter Carrier Tyler Jones a Notice of Removal on January 27, 2023, for Improper Conduct? If so, what is the appropriate remedy?

Background

Tyler Jones, hereafter known as the *grievant*, was absent from 09 December 2022 through 30 December 2022. On 09 December, the grievant called into the Interactive Voice Response (IVR) system for that day requesting leave related to a serious health condition covered by the Family and Medical Leave Act (FMLA). The grievant's mother called into the IVR on subsequent days claiming the grievant was hospitalized following a seizure and provided medical documentation to support that claim. In reality, the grievant had been arrested in Atlanta, Georgia for an altercation, and was held in custody beginning the night of 09 December until 24 December 2022. The Postal Service imputed the grievant's leave type as *Family and Medical Leave Act/Leave Without Pay* (FMLA/LWOP) from 10 December 2022 through 30 December 2022. On or about 19 December 2022 local management was made aware from information provided by the Postal Inspection Service that the grievant was incarcerated in Atlanta. During this time frame, the grievant never divulged to local management that he had not been ill but instead had been in jail.

Upon the grievant's return to work, he was informed that Tennessee state law prohibited his return to driving duties because of his reported seizures until he received and provided medical clearance. It was at this time the grievant admitted that he had not been incapacitated by a seizure, as claimed. On 07 January 2023 the grievant was summoned to an Investigative Interview (II) and was confronted with the Postal Service's knowledge of his incarceration. At that point, the grievant was completely forthcoming and admitted that he had mislead the Postal Service about the nature of his absence because he was embarrassed by his actions and arrest. On 27 January 2023 the grievant was issued a Notice of Removal (NOR), charging *Improper Conduct*. The NOR was timely grieved and made its way through the grievance process and ultimately appealed to arbitration.

Contractual 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.

Section 5. Suspensions of More Than 14 Days or Discharge

In the case of suspensions of more than fourteen (14) days, or of discharge, any employee shall, unless otherwise provided herein, be entitled to an advance written notice of the charges against him/her and shall remain either on the job or on the clock at the option of the Employer for a period of thirty (30) days. Thereafter, the employee shall remain on the rolls (nonpay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure. A preference eligible who chooses to appeal a suspension of more than fourteen (14) days or his/her discharge to the Merit Systems Protection Board (MSPB) rather than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement or through exhaustion of his/her MSPB appeal. When there is reasonable cause to believe an employee is guilty of a crime for which a sentence of imprisonment can be imposed, the Employer is not required to give the employee the full thirty (30) days advance written notice in a discharge action, but shall give such lesser number of days advance written notice as under the circumstances is reasonable and can be justified. The employee is immediately removed from a pay status at the end of the notice period.

Section 8. Review of Discipline

In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

Section 10. Employee Discipline Records

The records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years.

Upon the employee's written request, any disciplinary notice or decision letter will be removed from the employee's official personnel folder after two years if there has been no disciplinary action initiated against the employee in that two-year period.

Article 19
Handbooks and Manuals
Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

Position of the Agency

The agency's argument is very simple and straightforward; the grievant lied. The grievant lied about his physical condition, he lied about medical documentation submitted concerning his health condition with the intent to deceive, and he conspired with his mother to supply fraudulent medical documents and to conceal his real whereabouts during his absence. Why? Because he was in jail, under arrest in Atlanta, Georgia.

There is absolutely no dispute that the grievant lied and attempted to defraud the Postal Service in order to obtain a benefit that he was not entitled to receive. The union and the grievant have admitted the lie. The Employee and Labor Relations Manual (ELM) Section 665.16 states explicitly that, [e]*mployees are expected to…be honest, reliable, trustworthy,…and of good character and reputation*. Lying, being deceitful and dishonest are inconsistent with those expectations.

The union has argued that this is all a big misunderstanding and the grievant merely "made a mistake." The union tries to portray that the grievant's actions were just a silly "goof" of poor judgement that can be brushed aside as a youthful indiscretion – no harm, no foul. However, that is far from the truth of the matter. The grievant intentionally tried to mislead management into thinking he was seriously ill. An illness the grievant knew all too well was a lie because the

truth was that he was in jail. The grievant, upon his return to work, attempted to conceal the truth and continue to perpetuate his fraud. It was only after he became aware that management already knew of his deception that he admitted his lies and attempts to hoodwink the agency into receiving benefits for which he was not entitled.

The Postal Service functions based on the trust it has with its employees. When an employee intentionally lies to mislead the employer, that trust is irrevocably broken.

The Postal Service is obliged to meet the *just cause* test when we issue discipline, as outlined by the parties, and we have met that test clearly through evidence and testimony. We ask that this grievance be denied in its entirety.

Position of the Union

On 23 January 2023 management issued Mr. Jones a removal charging him with *Improper Conduct*. Mr. Jones was incarcerated in an Atlanta jail from 10 December to 24 December 2022. Mr. Jones, instead of informing his managers that he was incarcerated, chose to be dishonest and say that he was being hospitalized for a seizure. Mr. Jones had his mother turn in falsified medical documentation to support his claim of being hospitalized. In his investigative interview, Mr. Jones was brutally honest about what he did and why he did it.

On page 43 of the case file is the NOR and it reads in the relevant part as follows:

> *Specifically, between December 9, 2022, and December 30, 2022, you engaged in a conspiracy to deceive Postal officials and to obtain an undo benefit, namely protection under the Family Medical Leave Act (FMLA) ... By requesting FMLA under false pretenses, you attempted to gain protections to which you were not entitled. Your conduct is a serious violation of Postal standards and cannot be tolerated.*

The union asked each management witness to prove this charge through documentation contained in the case file. Each management witness was unable to do so because it is blatantly false. What the union demonstrated is that it was management who inputted Mr. Jones for FMLA leave during his incarceration, against his knowledge, and then removed him for their actions.

In case# NC-W-15, 975-D, dated 09 April 1979, Arbitrator William Rentfro opined the following:

It has been said that the real heart of procedural due process is not even a question of the employee's guilt or innocence; it is how the company goes about arriving at its decision. When the decision is to impose a penalty as severe as discharge, care must be taken that all the relevant facts and evidence are considered. Discharge without a complete investigation or without affording the employee an opportunity to be heard falls short of minimum standards.

The reasons why due process requires that an investigation be made into all the relevant facts and circumstances, including the employee's explanation before disciplinary action is taken are several. If this is not done, the employer risks nondisclosure of essential elements of the case. A thorough investigation reduces the likelihood of impulsive and arbitrary decisions by. management and permits deliberate, informed judgment to prevail. By giving the grievant an opportunity to present his side of the story and point out mitigating factors raises the possibility that the employer would have been dissuaded from discharging him in the first place. The same evidence presented prior to decision may have a more important effect than when offered at the grievance level. This is so simply because it is human nature to stick to and defend a decision already made. This reluctance to reconsider, even in the light of new information, is more pronounced in labor-management relations because the employer has an additional institutional interest to "stand firm" and defend the authority of the supervisory personnel who made the decision to discharge.

The union asks at what point does a letter carrier's right to due process end? Does it end after the II? Does it end after the request for action? The union's position is that a letter carrier's right to due process never ends. What the union demonstrates is that management's entire removal process against the grievant has violated his due process rights.

The grievant is a 10-year letter carrier with no active discipline on his record. His testimony is clear that he was very forthcoming about his actions. That starting on 09 December 2022, he was unable to request FMLA during the period cited in his removal because he did not have his cell phone that contained his FMLA number.

The union argues that management denied the grievant's due process rights when it did not obtain concurrence before it initiated the removal action and when it falsified the II; all of which were unrebutted by management at the Informal Step A and Formal Step A meetings.

In case# S8N-3U-D-34704, dated 01 April 1982 Arbitrator Edmund Schedler, Jr. opined the following:

A "charge in a disciplinary matter has a similar meaning to an indictment in a criminal matter before a grand jury. Basically a "charge" is an accusation in writing that claims that the individual named therein has committed an act or been guilty by omission, and such act or omission was a violation of shop rules or usual good behavior expected of an employee and punishable by discipline. A letter of charges is the foundation of going forward with discipline; and, in the absence of a clearly written charge, what is to be the just cause for the discipline.

Management will simply not be able to support their charge against the grievant as it is written. It's akin to arresting someone for shoplifting a home stereo system and charging them with grand theft auto. The union argues, therefore, that the charge against the grievant cannot stand and asks that this grievance be sustained in its entirety and grant the union its requested remedy, which is as follows:

- That the notice of removal issued to Letter carrier Tyler Jones on January 27, 2023, for improper conduct, be fully rescinded and removed from all employee's files and records immediately and he be returned to duty upon receipt of your decision.

- Tyler Jones be made whole for all lost wages and benefits that occurred as a result of management's violation of Article 16 to include the average overtime hours worked in the Green Hills Station over the duration of the Off-Duty Status and interest at the Federal Judgment rate (in accordance with the MOU on p. 200 of the National Agreement).

- That all payments associated with this case be processed jointly by (USPS Designee and NALC Designee) as soon as administratively possible, but no later than (30) days from the date of settlement and proof of payment and adjustments be provided to Formal A Representative Jason Leath within that time.

- After all necessary backpay paperwork has been completed management provides the union within seven (7) days of proof of submission to Eagan Accounting Services and additionally provides the union with any discrepancies for the resubmission within seven (7) days.

- Whatever the Arbitrator deems appropriate.

Discussion

At the outset, let me state clearly that the type of undisputed dishonesty exhibited by the grievant in this matter is completely unacceptable and inconsistent with the reasonable rules and expectations of the Postal Service that cannot be swept away, notwithstanding the grievant's full and complete confession when confronted. It is not lost on this arbitrator that the grievant withheld the truth and did not offer his full and complete confession until he was presented with the clear understanding that his deliberate attempt to deceive the Postal Service had already been uncovered by management. I believe it was Sir Walter Scott who said, *O, what a tangled web we weave when first we practice to deceive!* Such is the case here.

The union proffered that the grievant is a 10-year employee that has no active discipline in his personnel file. Undoubtedly, this offering is meant to imply that, notwithstanding the seriousness of the grievant's behavior, removal is too harsh a penalty. While progressive discipline is the norm, that is not always the case. Arbitrator August[1] found that the seriousness of an employee's act may warrant discipline, if not removal for a first offense, quoting Arbitrator Dorshaw, in a case dealing with fraudulent submission of medical documentation:

> *There can be little doubt that the submission of a false medical document with intent to deceive Management into believing it is true is not honesty. But even in the absence of a published standard of conduct such as that set further in the ELM, a lack of honesty in the employment setting justifies Removal even for a first offender and even it (sic) committed by a long-term employee.*[2]

> *...that dishonest acts rise to a level of discipline that does not require progression and can very well result in removal on the first offense. The actions of the Grievant in the instant case has broken the trust of his employer; when an employer can no longer trust an employee, the employment relationship is most often terminated. In this case, Management determined that was their only option.*

I am in full agreement with both Arbitrators August and Dorshaw that this type of dishonesty rises to a level of discipline that does not require progression and can very well result in removal on the first offense because of the damage the dishonesty does to the trust the employer needs in the given employee that is the bedrock of the employee/employer relationship.

The union raised several arguments of defense in this grievance, frankly some have merit, but others do not. First, the union argued the grievant was *denied due* process because there was no review and concurrence of the proposed disciplinary action by a higher authority, therefore, it was fatally flawed as was the NOR by extension. The basis for this argument was that when the union requested all the materials relied upon for the NOR the *Request For Appropriate Action* (RFAA) – the proposed discipline – supplied to the union did not have a concurring signature. The agency at Formal Step A did provide a signed concurrence page when this argument was raised. The union posited that when management's Formal Step A designee stepped out of the Formal Step A meeting to make a phone call requesting the signed page, this was clear evidence of duplicity. While I understand the union's suspicion, the fact remains that a RFAA document with signed concurrence was in the case file. Unrebutted testimony from Manager of Customer Service Operations (MCSO) Hall indicated that he was presented with the RFAA, that

[1] Arbitrator August – C16N-4C-D 18429460 – 22 May 2019 – Rochester NY
[2] Arbitrator Dorshaw – H06N-4H-D 08134321 – 25 September 2008 – Coral Gables FL

he did review and concur with its findings, and that he signed and dated the RFAA on 11 January 2023. Absent definitive evidence from the union that MCSO Hall was somehow lying, the RFAA with concurring signature and date exists and was in the joint case file. Additionally, the JCAM provides very clear guidance concerning what is required to fulfill the agency's obligation for review and concurrence of proposed discipline when it states in relevant part:

> ***Article 16 Section 8. Review of Discipline***
> *In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.*
>
> *In post offices of twenty (20) or less employees, or where there is no higher level supervisor than the supervisor who proposes to initiate suspension or discharge, the proposed disciplinary action shall first be reviewed and concurred in by a higher authority outside such installation or post office before any proposed disciplinary action is taken.*
>
>> *Concurrence is a specific contract requirement to the issuance of a suspension or a discharge. It is normally the responsibility of the immediate supervisor to initiate disciplinary action. Before a suspension or removal may be imposed, however, the discipline must be reviewed and concurred with by a manager who is a higher level than the initiating, or issuing, supervisor. This act of review and concurrence must take place prior to the issuance of the discipline.* ***While there is no contractual requirement that there be a written record of concurrence, management should be prepared to identify the manager who concurred with a disciplinary action so he/she may be questioned if there is a concern that appropriate concurrence did not take place****.*
>> [emphasis added]

The union took great pains to argue that the absence of a signature on the supplied RFAA indicates a failure to properly review and concur, however, the JCAM explanation states that what is required is for the agency to provide the identity of the reviewing and concurring official. I understand this would appear to contradict the language in National Arbitrator Eischen's[3] award offered regarding the requirements that the review and concurrence must be in writing when it states in relevant part:

> *Compliance with Article 16.6 requires a substantive review of the matter by a higher authority's concurrence with imposition of the discipliary action proposed by the supervisor. Since the 1995 amendments Article 16.6 specifies that this statement of concurrence by the higher authority* ***must be set forth in writing****.*
> [emphasis added]

The JCAM introduction states that, [t]*he narrative explanation of the Collective Bargaining Agreement contained in the JCAM should be considered dispositive of the joint understanding of the parties at the national level.* The Eischen award regarding the requirement that the

[3] National Arbitrator Eischen – E95R-4E-D 01027978 – 3 December 2002 - Washington DC

review and concurrence must be in writing came from an Interpretive dispute between the Postal Service and the Mailhandlers that would normally bind all the parties, but the JCAM language indicates the Postal Service and NALC have jointly negotiated a different understanding of what is required. Therefore, I find that the agency did fulfill its review and concurrence obligation prior to the issuance of the NOR and this argument must be dismissed.

The union's second challenge to the propriety of the NOR related to the failure of manager Talley, who issued the removal, to perform a thorough investigation that was fair and objective. This union challenge went directly to the *just cause* obligation in this matter. The questions and responses from the grievant were in the case file and testimony was provided related to some of these questions. The *just cause* test regarding a *thorough investigation*, as defined in the JCAM, states in relevant part:

> *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.* [emphasis added]

Testimony indicated that the II was the grievant's *day in court*. In my considered opinion, the series of questions asked were constructed to illicit a pre-determined response or outcome. To reiterate, it is my determination that the grievant's actions designed to deceive were unacceptable and inconsistent with the reasonable expectations of employee behavior, however, the II must still be executed objectively. Objective, defined as an adjective means, *not influenced by personal feelings or opinions*[4]. Talley's testimony indicated she foreknew the grievant had been incarcerated and was not hospitalized, yet I find the construction of her questions to be less than objective. For example:

> *11.) Not only was it not true that you had a seizure, but you also were claiming FMLA protection for these absences, correct?*
> *12.) So, you were falsely claiming a serious medical condition and then you attempted to seek FMLA protections for those false claims?*

These questions are loaded and accusatory and similar to the old entrapment question, *So, are you still beating your wife?* An affirmative answer is confession, and a denial is construed as a

[4] Oxford English Dictionary

confession of past behavior. Regardless, the construction of these questions, in my opinion, raises serious concerns about the objectivity of the investigation.

Additionally, Talley testified that she showed and asked the grievant about a number of text messages and their meaning during the II, but shop steward Crosby testified emphatically that Talley at no time presented text messages to the grievant during the II. The union argued that even though the screen shots of these texts were included in the case file they were added after the II had been conducted. Manager Talley testified that these text messages were a part of her investigative process and were considered in determining whether discipline would have been issued to the grievant. Since the screen shots of these text messages were in the case file, I would be inclined to accept that they were part of the II process, except for other testimony that causes me to question the accuracy of Talley's claim. Returning to the question of who signed and dated the concurrence of the NOR document, MCSO Hall affirmed clearly that he did sign the NOR document but that the date on the NOR document next to his signature was not his entry. MCSO Hall's signature on the RFAA and NOR appear to be quite similar, but the dates on the two documents next to Hall's name are unmistakably dissimilar. On cross examination, Talley was asked if she had dated the NOR next to Hall's signature and she denied dating the NOR document next to Hall's name. I am admittedly not a handwriting expert and would never claim to be, however, the date written next to Ms. Talley's signature and the written date next to Mr. Hall's signature on the NOR document are definitely very similar. Taken together, these two apparent inconsistencies in recollection gives me pause when weighing the accuracy in all of Talley's testimony. As such, I am not fully convinced the II constituted a thorough investigation that was fair and objective. I can understand the agency's position that it believed the grievant's actions went beyond the pale, but as reprehensible as the grievant's deliberate deceptions were a thorough, fair, and objective investigation is required and may have shed a different light on the situation, although that will never be fully known. In my opinion, the decision to remove the grievant was a foregone conclusion and the II was merely for the purpose of *jumping through the hoops* in confirmation of the prior determination.

The union raised the defense that improper past elements of discipline were cited, inconsistent with the JCAM provisions of Article 16.2, which states in relevant part:

> ***JCAM** Page 16-5*
> *Discussions cannot be cited as elements of an employee's past record in any future disciplinary action.*

However, I cannot find any past elements cited in the NOR document. It was raised in testimony that the RFAA cites a past Letter of Warning (LOW), that had been reduced to an *official discussion,* but neither the LOW or official discussion were cited as past elements on the NOR document itself. As such, I am not persuaded that the listing of the official job discussion on the RFAA constitutes a violation of Article 16.2 rendering the NOR fatally flawed.

Next, the NOR document states in the next to the last sentence of the first charging paragraph:

> *By requesting FMLA under false pretenses, you attempted to gain protection to which you were not entitled.*

There was significant testimony about PS Form 3971 – *Request for or Notification of Absence* – a supervisor's obligations under FMLA, what the notations were on the Form 3971's in the case file, who filled them out, and who requested what. To be clear, the grievant by his statement and testimony requested eight hours FMLA/LWOP for 09 December 2022 because he was not feeling well and used his correct FMLA case number. To the best of my understanding, based on evidence and testimony, it is unrebutted that the grievant had a valid FMLA case number on 09 December 2022 and unrebutted that he was not feeling well on that day. It is also unrebutted that on the evening of 09 December or early morning of 10 December, after driving to Atlanta, the grievant was arrested for a physical altercation and was in custody until 24 December 2022.

Testimony from manager Talley indicated that when she received information from the grievant's mother that the grievant was hospitalized for a seizure, she followed FMLA protocol and imputed the grievant for FMLA leave on PS Form 3971. It was unrebutted that several other supervisors, likewise, put the grievant in for FMLA leave on subsequent PS Forms 3971, and these 3971's were in the case file. In my opinion, these managers were acting correctly when they imputed the grievant with FMLA protection based on what they understandably believed to be true. While the grievant was fully willing to accept the largesse of his ruse, and let the Postal Service act on his deception, he did not request FMLA protection for these dates. Were his actions calculating and dishonest, without question; however, the fact remains that he did not actually request the FMLA leave himself, nor did he sign a fraudulent Form 3971. Therefore, I cannot find that the grievant acted specifically as charged in the above cited sentence.

Lastly, when the agency is considering whether to charge an employee for some sort of misconduct, as is the case here, it is free to charge what it will but then it must prove what it charges. The first and second questions in the *just cause* test are, *is there a rule* and *is the rule reasonable*? In the case before me the agency charged the grievant with multiple infractions of the ELM and Code of Federal Regulations (CFR). Specifically, the agency listed in its NOR charge that the grievant violated the following:

> ***662 Federal Standards of Ethical Conduct***
> ***662.1 Publication***
> *To ensure that every citizen can have complete confidence in the integrity of the federal government, each federal employee, including each postal employee, must respect and adhere to the principles of ethical conduct set forth in 5 CFR 2635, 5 CFR 7001, and 39 CFR 447.*
> *Note: The Code of Federal Regulations can be accessed at https://www.ecfr.gov/.*
>
> ***665 Postal Service Standards of Conduct***
> ***665.1 General Expectations***
> ***665.11 Loyalty***
> *Employees are expected to be loyal to the United States government and uphold the policies and regulations of the Postal Service.*
>
> ***665.13 Discharge of Duties***
> *Employees are expected to discharge their assigned duties conscientiously and effectively.*
>
> ***665.15 Obedience to Orders***
> *Employees must obey the instructions of their supervisors. If an employee has reason to question the propriety of a supervisor's order, the individual must nevertheless carry out the order and may immediately file a protest in writing to the official in charge of the installation or may appeal through official channels.*
>
> ***665.16 Behavior and Personal Habits***
> *Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably upon the Postal Service. Although it is not the policy of the Postal Service to interfere with the private lives of employees, it does require that postal employees be honest, reliable, trustworthy, courteous, and of good character and reputation. The Federal Standards of Ethical Conduct referenced in 662.1 also contain regulations governing the off-duty behavior of postal employees. Employees must not engage in criminal, dishonest, notoriously disgraceful, immoral, or other conduct prejudicial to the Postal Service. Conviction for a violation of any criminal statute may be grounds for disciplinary action against an employee, including removal of the employee, in addition to any other penalty imposed pursuant to statute.*
>
> ***665.3 Cooperation in Investigations***
> *Employees must cooperate in any postal investigation, including Office of Inspector General investigations.*

I would note that 5 CFR 2635, cited in ELM 662.1, is over 100 pages in length and covers everything from *receipt of gifts* to *conflicting financial interests* to *misuse of government property* to *participation in professional organizations*. 5 CFR 7001 is a supplement to 5CFR 2635

addressing, *restrictions on outside employment and business activities* and, the *statutory prohibition against interest in contracts to carry mail and acting as agent for contractors.* Lastly, 39 CFR 447 - *Rules of Conduct for Postal Employees* – addresses everything from *Prohibited Conduct* to *Post-employment activities* to *Political Activities* to *Holding of State or local office by Postal Service employees* to *Bribery, Undue Influence, or Coercion.*

In my considered opinion, the agency did not demonstrate that the grievant had been disloyal to the U.S. Government (ELM 665.11), nor that he failed to discharge his assigned duties (ELM 665.13). There was also no evidence or testimony that the grievant failed to obey the instructions of his supervisor (ELM 665.12), and during the II the grievant was forthcoming with the truth and admitted his wrongdoing and was cooperative (ELM 665.3). The Postal Service could have very well drafted a Notice of Removal using far less overreach that could have easily been demonstrated and proven, but it did not. In my considered opinion, the precision used when crafting a removal document is as important as ensuring an affirmative response to each of the *just cause* questions. The agency must prove what it charges.

Since the issue in this discipline questions whether the agency had *just cause* to issue the NOR, then *just cause* is the standard. As I have found previously[5], even though a cited rule in a disciplinary action may be reasonable, if it does not apply to the grievant's actions, then the cited rule is not reasonable, and the discipline fails to meet the second element of the *just cause* test. Therefore, based on the totality of the testimony and evidence presented I cannot find that the agency has met its burden to remove the grievant from employment for his obvious misdeeds and dishonesty. To paraphrase Arbitrator LeWinter[6], *the employer may object that this is a "technicality", and in truth, it is. However,* the proper citation and proof of charges *is as much a part of the collective bargaining agreement as the right to remove. The arbitrator may not side-step it because he worries that the merits might have validity as to the issuing of discipline. I am as bound by the contract as the parties. My personal likes, dislikes or feelings cannot permit me to evade the responsibility to uphold the agreement.*

That said, I feel compelled to address the grievant directly in this matter. Mr. Jones, your embarrassment when you found yourself in jail and your wish to keep that concealed is understandable. No one wants to have their worst side exposed or their regrettable behavior

[5] Arbitrator Sims – J19N-4J-D 22051866 – Hamilton OH
[6] Arbitrator LeWinter – S4N-3W-D 4915 – S4N-3W-D 8429 – Miami FL

found out. We are all human beings in that way. However, what you did was disgraceful when you sought to cover up your misdeeds and you betrayed a number of people, not the least of which was your mother, in that futile effort. Mothers instinctively try to protect their children, even adult children, but at what cost? Your selfish and deceitful actions have tainted you and your mother's reputation – shame on you. You will keep your job, for now, albeit with considerable financial loss. Whether you choose to try to repair the broken trust you are responsible for rupturing may well determine for how long you will keep your employment in the future. If you do choose to repair that trust, understand it will take a long time and considerable effort, if ever, to fully restore. If you find that supervisors do not find you trustworthy, don't blame them because that responsibility rests squarely on your shoulders.

Award

The agency did not have Just Cause to issue the grievant a Notice of Removal. The removal action is reduced to a Long-Term suspension without back-pay, but with no loss in seniority. The grievant will be returned to duty as soon as administratively possible.