

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	)	
Between	)	<b>GRIEVANT:</b> Kimberly Matheny
	)	<b>POST OFFICE:</b> Belpre, Ohio
UNITED STATES POSTAL SERVICE	)	
And	)	<b>CASE Numbers:</b>
	)	<b>USPS:</b> C11N4C-D 16228720
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	<b>NALC:</b> 04112016KM
	)	<b>DRT:</b> 11-367050

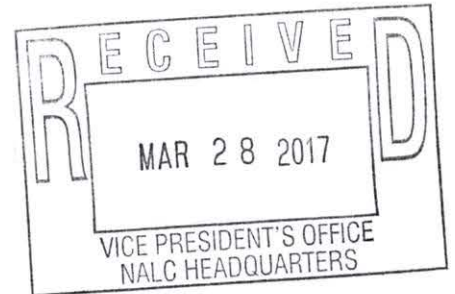
**BEFORE:** Sherrie Rose Talmadge, Esq., ARBITRATOR

**APPEARANCES:**

**For the U.S. Postal Service:** Jay E. Schild, Labor Relations Specialist

**For the NALC:** David A. Ditchey, Local Business Agent  
Dale Liptak, Pres. Br. 63, Technical Assistant

<b>Place of Hearing:</b>	275 Front Street, Marietta, Ohio
<b>Date(s) of Hearing:</b>	December 9, 2016
<b>Date of Award:</b>	January 26, 2017
<b>Relevant Contract Provisions:</b>	Articles 16
<b>Date of Contract:</b>	2011-2016
<b>Type of Grievance:</b>	Discipline (Removal)



**AWARD SUMMARY**

Management did not have just cause to issue the Notice of Removal dated April 11, 2016 to Kimberly Matheny for Unsatisfactory Performance for an unintentional accident when she stepped out of the LLV and twisted her ankle.

For the remedy the removal notice is to be rescinded and expunged, and Ms. Matheny is to be reinstated and made whole for any losses suffered, including back pay, less interim earnings. Accordingly, the grievance is sustained.

**RECEIVED**

**JAN 30 2017**

**DANIEL E. TOTH**

Sherrie Rose Talmadge, Arbitrator

Arbitration decision continued.

### **STIPULATED ISSUES**

1. Did Management have just cause to issue the Grievant, Kimberly Matheny, the Notice of Removal dated April 11, 2016?
2. If not, what shall be the remedy?

### **RELEVANT CONTRACTUAL PROVISIONS, HANDBOOKS AND MANUALS**

#### **Article 16, Discipline Procedure**

Section 16.1 Statement of Principle

#### **Article 19 Section 19.1 Handbooks and Manuals**

##### **Employee and Labor Relations Manual**

ELM Section 665.13 which states, "Employees are expected to discharge their assigned duties conscientiously and effectively."

ELM Section 814.2(d), which states, "it is the responsibility of all employees to perform all duties in a safe manner".

##### **M-41 Handbook.**

Section 112.4 of the M-41 states, "Conduct your work in a safe manner so as not to endanger yourself or others".

### **FINDINGS OF FACT<sup>1</sup>**

Kimberly Matheny, Grievant, is a City Letter Carrier at the Belpre Post Office. The Grievant has been a Letter Carrier with the Postal Service since January 1994.

On Saturday, March 12, 2016, the Grievant was City Route 3 her regular route. When delivering mail to 2201 Hill Street, a Laurel Estates apartment complex, the Grievant noticed that her usual parking spot beyond the handicap ramp was occupied by another car. As a result, the Grievant pulled up and parked before the handicap ramp that leads from the road to the sidewalk. The Grievant acknowledged having seen the handicap ramp. The Grievant locked the truck, turned around and stepped with her left foot on the curb portion of the handicap ramp and her right foot was still on level ground. The Grievant testified that her left ankle twisted and she fell on the handicap ramp. She also skinned her right knee and hit her elbow. The Grievant testified that at the time of her fall she was not listening to music, looking at dogs or fingering mail.

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<sup>1</sup> At the hearing the parties had the opportunity to conduct direct and cross-examination of their sworn witnesses, and to present relevant and material documentary evidence. At the end of the hearing, the parties presented closing arguments.

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The Grievant immediately called the Belpre Post Office and spoke with Supervisor Customer Service Susie McClintock stating, "I'm calling to report, in case anyone has seen me that I fell and I twisted my ankle". The Supervisor asked the Grievant if she was hurt and needed to go to the hospital. The Grievant responded that she was okay. "I'm not hurt, I just wanted to report it in case anyone has seen me and called you." The Supervisor told the Grievant to wait a few minutes and let her find out what the procedure was and that she would get right back to her. In the meantime, the Grievant moved her vehicle and continued delivering the mail.

While driving to the Grievant, Supervisor McClintock called the Grievant who identified her location on her route. The Supervisor brought her the Declination letter to sign stating that she did not want any medical treatment. The Supervisor asked the Grievant why she had moved after she had told her to wait. The Grievant testified that because this had not been a car accident she did not understand the supervisor to have meant that she should not continue delivering her route.

When the Supervisor arrived the Grievant changed her mind and decided to go to the Emergency Room. However, prior to going to the ER, the Grievant and her Supervisor returned to the accident scene so that the Grievant could show her supervisor exactly how the accident happened. The next day was the Grievant's non-scheduled day and then the Grievant went on a previously scheduled vacation. After her vacation, the Grievant called in for a few days of FMLA leave. The Grievant returned to work without restrictions.

On March 12 the Supervisor called Postmaster Renee Clegg, who was not at work, to inform her about the accident. The Postmaster testified that after the call she visited the scene to investigate and asked the Supervisor to come to the scene and explain what the Grievant had said happened. The Postmaster testified that she returned to the scene on Monday, two days later, to see if she had missed anything. The Postmaster testified that the park points were fine. The Postmaster testified that she did not believe that the Grievant's accident was willful or intentional but it could have been avoided if the Grievant had been aware of her surroundings.

On March 25, 2016, Supervisor McClintock conducted a pre-disciplinary interview with the Grievant and her Union President Jeff Sparks. At the PDI the Grievant acknowledged that on March 12 while delivering mail on City Route 3 she called the Belpre Post Office and informed McClintock that she was calling to report, in case anyone had seen her, that she fell and twisted her ankle. She initially informed her

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Supervisor that she was okay and did not need to go to the hospital. The Grievant acknowledged that her supervisor had told her to wait a few minutes and let her find out the exact procedure and she would get right back to her. When asked why she had moved the vehicle and left the scene of the accident to continue delivering mail, the Grievant responded that she did not understand the supervisor's instructions to mean that the supervisor did not want her to move. The Supervisor also inquired that as a veteran carrier was the Grievant aware that she was not to move the vehicle so that an investigation can be done before conditions change. The Grievant replied that she thought that was for a vehicle accident and not a walking accident. The Grievant acknowledged that she had seen the handicapped ramp, and stated that there was nothing that she could have done differently to avoid having this act from occurring.

By memo dated April 7, 2016, Supervisor McClintock requested of the Postmaster that the Grievant be issued a Notice of Removal for Unsatisfactory Performance as a result of committing an unsafe act on March 12. The Supervisor noted that the Grievant had amassed 12 accidents during her 22+ year career as a City Carrier, of which 10 were industrial accidents and 2 were vehicle accidents. Although not all of the accidents were the Grievant's fault. In the last five years the Grievant had eight recordable accidents or injuries which included a dog incident, pulling from/to a higher level, dog bites, repetitive motion, collision/sideswipe motor vehicle and falls from curbs. The Supervisor indicated that the Grievant was aware performing her duties safely is a condition of her employment. After her investigation, the Supervisor concluded that that the accident was totally avoidable by the Grievant had she been paying attention to her surroundings. The Supervisor stated that the Grievant continued to exhibit an inability to perform her duties in a safe manner despite years of practice. She also noted that the Grievant's prior disciplinary record including a 14 day suspension dated October 13, 2015 for Unsatisfactory attendance and a 7 day suspension dated April 8, 2015 for Unsatisfactory Performance (safe manner)

On April 7, Postmaster Clegg concurred in writing with the request to issue the Removal Notice to the Grievant. Subsequently, in her Formal A contentions Postmaster Clegg wrote "A thorough investigation was completed by both the supervisor and Postmaster as much as could be." She also noted that, "The grievant was issued a Notice of Removal due to the egregiousness of the infraction."

By letter dated April 11, 2016, Supervisor McClintock issued the Grievant the following Notice of Removal, which states in pertinent part:

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You are hereby notified that you will be removed from the United States Postal Service on May 13, 2016. The reason for this action are:

### **UNSATISFACTORY PERFORMANCE**

As a city carrier you are well aware of the requirement to properly perform the duties of your position and work in a safe manner at all times. You have received training and instructions concerning the delivery of mail safely, following management's instructions, and properly performing duties of your position. However, on March 12, 2016 you failed to properly perform your duties in a safe manner when you failed to pay attention to your surroundings at 2201 Hill St. After parking close to the handicap ramp, you dismounted from your LLV, you stepped on the curbed portion of the handicap ramp, twisting your left ankle and causing you to fall to the ground. Management will not tolerate your failure to perform your duties in a safe manner.

It is a basic and indispensable obligation of all postal employees to follow official instructions, perform duties conscientiously, effectively, and in a safe manner. Your refusal is prejudicial to the maintenance of good discipline and adversely affects the efficient operations of this office.

Your actions constitute a violation of USPS Standards of Conduct as expressed in the Employee and Labor Relations Manual (ELM).

ELM Section 665.13 which states, "Employees are expected to discharge their assigned duties conscientiously and effectively."

ELM Section 814.2(d), which states, "it is the responsibility of all employees to perform all duties in a safe manner".

Your actions also constitute a violation of the M-41. Section 112.4 of the M-41 states, "Conduct your work in a safe manner so as not to endanger yourself or others".

The following elements of prior discipline have been considered in taking this discipline:

**Fourteen (14) Day Suspension dated October 13, 2015 Issued for Unsatisfactory Attendance**

**Seven (7) Day Suspension (settled) dated June 15, 2015 Issued for Improper Conduct**

**Seven (7) Day Suspension dated April 8, 2015 Issued for Unsatisfactory Performance**

Supervisor McClintock testified that she did not draft the Notice of Removal and had not considered, and was not aware of, the settled seven day suspension dated June 15, 2015. The Supervisor testified that she only considered the fourteen day suspension

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for unsatisfactory attendance and the seven day suspension dated April 8, 2015 issued for unsatisfactory performance when the Grievant was delivering mail in the snow and, while following the tracks of another vehicle, drove over a tree limb.

### **POSTAL SERVICE POSITION**

The Service had just cause to issue the Grievant the Notice of Removal for Unsatisfactory Performance. The Grievant was aware of the Postal rules and regulations, ELM 814.2, which provides that employees are to perform their duties in a safe manner. The rule concerning employee safety is reasonable. The Grievant violated that rule by not working in a safe manner. Instead of parking in front of the handicapped ramp, the Grievant parked in a location that she does not normally park and after locking the vehicle she turned, stepped and rolled her ankle and fell. The Grievant, parking in a different location, should have been more diligent. Management has enforced this rule equitably, disciplining employees engaged in an unsafe acts. Management thoroughly investigated the incident. Both the Supervisor and the Postmaster visited the scene of the accident. The Supervisor spoke to the Grievant at the time of the incident and held a PDI with the Grievant and her Union representative. The discipline was reasonably related to the unsafe act.

Furthermore, the discipline was issued as promptly as possible. The incident occurred on March 12 and the PDI was held on March 28, after the Grievant returned from annual leave. The removal notice was issued on April 11, only 29 days after the incident, which was not unreasonable. The supervisor testified that it was her first removal and she wanted to do it correctly. The contract does not specify what constitutes issuing the discipline promptly. In this case the discipline was issued as promptly as possible, and there was no harm to the Grievant who was paid for all the time owed.

Management applied progressive discipline taking into consideration the Grievant's prior seven day and fourteen day suspensions. Although Management listed an expired 7 day suspension in the removal notice, which should not have been cited, that did not affect the progressive nature of the existing live discipline in the Grievant's record.

Based on the above, the Service had just cause to issue the Notice of Removal to the Grievant. The Service requested that the grievance be denied and dismissed.

### **UNION'S POSITION**

Management did have just cause to issue the Grievant the Notice of Removal. The Union asserted that there were three threshold issues. The discipline was not issued in a timely manner. The JCAM states that discipline will be issued "as soon as possible" after the infraction. In this case it took Management 30 days to issue the discipline. Management had no explanation for why it took so long to issue the discipline, other than asserting that Management took their time. After holding the PDI, Management took between 16 to 18 days to issue the NOR. The Union does not know how this lapse of time impacted the three witnesses that the Union interviewed for this grievance. The grievance should be overturned based on the untimely issuance of discipline.

Management should not have included a settled disciplinary element in the NOR that should have been expunged. Although the Supervisor said she did not consider the settled discipline, she signed the NOR and is responsible for issuing the removal notice correctly. Management improperly relied upon the expunged discipline and Management cannot claim there was no harm by listing the settled element when the Grievant lost her job. Management's inappropriate reliance upon discipline that had been removed violates the National Agreement and should render the removal improper. Of the two remaining disciplinary elements, there was a 7 day suspension for improper conduct in which the Grievant got into an accident and drove over a tree limb while driving in the snow when delivering mail. The second disciplinary action was a 14 day suspension concerned an attendance issue which is not relevant to this matter.

Management conducted an improper investigation. The Postmaster wrote in her Formal A contentions that "A thorough investigation was completed by both the supervisor and Postmaster as much as could be." She concluded, "From what I can determine, she twisted her ankle." The Postmaster seems to infer that this was a flawed investigation. At the PDI the Supervisor told the Grievant that this matters pertains to your "Unsatisfactory Performance" indicating that the Supervisor had predetermined that the Grievant was guilty and expect the Grievant to prove her innocence, although the burden is on the Employer.

The Postmaster testified that they decided to remove the Grievant based on the severity of the incident and her prior accidents. However, four of the accidents were not the Grievant's fault (when she was hit by a car and three dog incidents). In this case the Grievant followed instructions. This was a minor industrial accident. The Grievant twisted

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her ankle when she got out of her vehicle. The Grievant testified that when she called her supervisor, McClintock said "Just give me a few". The Supervisor testified that she told the Grievant to stay where she was but there was no proof.

Letter carriers who walk and drive every day will have accidents that are not preventable. The Service did not specify what the Grievant did that led to the twisted ankle. The Postmaster wrote that the Grievant's twisted ankle was not intentional. If it was not intentional there is no basis for discipline. There was no lost time, just a skinned knee and bruise on the ankle. This was not an egregious accident. Arbitrators have held that accidents will occur in the absence of any violation of work rules.

Management failed to establish that there was just cause for the removal. Management did not prove that the Grievant violated the rules or that she chose not to be aware of her surroundings. Therefore, no discipline is merited. The Union requested that the removal be rescinded, the Grievant reinstated and made whole for all lost pay and benefits.

### **DISCUSSION**

At issue is whether Management had just cause to issue the Grievant a Notice of Removal on April 11, 2016 for unsatisfactory performance. I do not find that the Service met its burden of proof. The just cause standard requires the Postal Service to prove that the disciplinary action was issued after an objective pre-disciplinary investigation resulting in proof of an employee's infraction of a clearly communicated, consistently applied work rule. The Postal Service must communicate the disciplinary consequences of the employee's infraction. The administered discipline must be consistent with the charged offense and the employee's past record. Furthermore, the Postal Service must establish that its discipline was imposed in accordance with the procedural requirements of the parties' National Agreement.

Following safety regulations is a high priority for the Postal Service both for the protection of the workforce as well as the public. The Service has the right to adopt and enforce any safety rules and regulations which can be reasonably related to the efficient conduct of its enterprise and to the protection of all employees. Accidents which occur from an employee's violation of a specific safety rule would constitute proof of an improper or unsafe practice by that employee. Nonetheless, as Arbitrator Sobel has pointed out in USPS and NALC, S4N-3R-D 35445 (1987), "However, accidents can occur in entities which have excellent training programs and in which employees



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exercise reasonable caution, are not careless or heedless, and do not violate any specific rules or regulations.”

The Service has a history of emphasizing that accidents themselves are not the appropriate basis for discipline without establishing an employee’s action violated a Postal Service safety rule or regulation. As noted in the April 7, 1980 Memo by the Senior Assistant Postmaster General Carl C. Ulsaker who wrote, in pertinent part:

Accidents or compensation claims, even when in a manager's view excessive, are not in themselves an appropriate basis for discipline. What must be cited in any such disciplinary action are the actions of an employee in a specific situation which are violations of a Postal Service safety rule or regulation.

The Service discharged the Grievant for an incident on March 12, 2016 when the Grievant, after locking her vehicle, stepped out of the car, twisted her ankle and fell to the ground skinning her knee and elbow. The removal notice states, in part:

However, on March 12, 2016 you failed to properly perform your duties in a safe manner when you failed to pay attention to your surroundings at 2201 Hill St. After parking close to the handicap ramp, you dismounted from your LLV, you stepped on the curbed portion of the handicap ramp, twisting your left ankle and causing you to fall to the ground. Management will not tolerate your failure to perform your duties in a safe manner.

Management has not pointed to a specific safety rule or regulation that the Grievant violated by stepping out of her vehicle and twisting her ankle. Management stated that the Grievant should have been more aware of her surroundings. They seem to be saying that if an accident occurred, this is proof that the employee was careless and should be subject to discipline.

Management failed to prove that the Grievant’s fall was caused by or related to any unsafe act on her part which either violated a safety rule or regulation or even an instruction. There was no assertion that the Grievant’s accident was intentional or willful. The Grievant was not listening to music, fingering mail or otherwise found to be distracted. The Grievant’s regular parking spot had been occupied by another vehicle and although she parked close to the handicap ramp, these were approved parking points. Immediately after falling, the Grievant called and informed her supervisor. The Grievant did have her ankle checked at the Emergency Room the same day. However, she did not miss any work as a result of her accident. This was a minor industrial accident and an egregious accident as Management has portrayed it.

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Although the Management witnesses mentioned that the Grievant had left the scene of the accident to continue delivering mail while the supervisor was driving to meet her with a Declination Letter, and there was contested testimony about whether the Supervisor had directed the Grievant to wait, Management did not charge the Grievant with leaving the scene of the accident.

I also find that the case was flawed by its reliance upon expired disciplinary action in support of the removal. Management testified that the Grievant's accidental twisting of her ankle, although an unsafe act, would not have been sufficient to warrant a removal, but that this incident was considered with her prior disciplinary record as part of progressive discipline. The Employer argued although the settled 7 day suspension was mistakenly cited in the removal, there was still progressive discipline applied because the Grievant's record included both a live seven day and fourteen day suspension. Nonetheless, it is difficult to distinguish whether Management relied upon the discipline that should not have been considered in deciding to issue the removal. As noted by Arbitrator Braverman in USPS and NALC, C11N4CD 13092009, (2013):

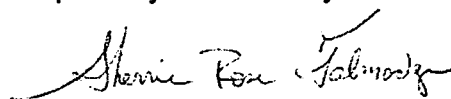
Such reliance is a violation of the Step 4 Settlement M-00889 quoted in JCAM at 16-12 which provide that such disciplinary actions "shall be deemed not to have been 'initiated' for purposes of Article 16.10 and may not be cited or considered in any subsequent disciplinary action". Whether there was other discipline which showed a progression is not relevant. What is critical is that the Employer inappropriately relied upon discipline which had been reduced or removed. The reliance was in violation of the National Agreement, and rendered the removal improper."

As a result of the aforementioned finding, I do not need to address the Union's additional arguments. I find that the Service did not have just cause to issue the Grievant the Notice of Removal.

#### **AWARD**

Management did not have just cause to issue the Notice of Removal. For the remedy, the NOR is to be rescinded and expunged. The Grievant is to be reinstated and made whole for any losses suffered, including back pay, less interim earnings. Thus, the grievance is sustained.

Respectfully submitted by:



Sherrie Rose Talmadge, Arbitrator