REGULAR ARBITRATION

In the Matter of the Arbitration Between	)	Grievant: Ernesto Casas
UNITED STATES POSTAL SERVICE	)	Post Office: Lakewood CA
and	)	Case No.: F11N-4F-D 16540604
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	DRT No.: 01-371880
	)	Union No.: LK-1422-16D

BEFORE: THOMAS F. LEVAK, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service: Elias Villegas

For the Union: James Henry

Place of Hearing: Lakewood CA

Date of Hearing: February 16, 2017

Date of Briefs: March 20, 2017

Date of Award: April 7, 2017

PANEL: Pacific, Region 1

Award

The Notice of Removal was not issued for just cause. The grievance is sustained. The Grievant shall immediately be reinstated to his former position with full back pay and benefits and without loss of seniority.

Thomas F. Levak
Arbitrator's Signature

I. THE ISSUE.

The issue is:

> Did the Employer establish just cause for the [May 25, 2016] Notice of Removal, issued to the Grievant for the charge of "Unacceptable Conduct" & "Lack of Candor"? If not, what is the appropriate remedy? Including but not limited to Articles 3, 5, 15, 19 of the National Agreement and JCAM (& documents referenced therein) M-39, Section 115.

II. THE FACTS.

Background.

The Grievant, a Letter Carrier since 2004, worked at the Lakewood CA installation. Tami McDonald was the Lakewood Postmaster, Lin Heng was an SCS with 20 years experience at Lakewood, and SCS Arthur Tillit was the Grievant's unit supervisor.

The Accident and Medical Treatment.

On February 18, 2016, the Grievant was next to his vehicle in the installation parking lot, when another Postal vehicle backed into his vehicle, which bumped into the Grievant's knee. Laughingly, the Grievant stated to others in the lot, including Tillit, "45 days, people," a common workplace joke. Limping, he reported the matter to Tillit and completed a CA1. Heng then took him to Long Beach Memorial Hospital, where he was prescribed ibuprofen for a swollen knee.

Immediately following that treatment, the Grievant asked Tillit to take him to his personal physician, occupational medicine specialist, Edward Middleton, who examined and treated him. (Middleton credibly testified at the arbitration hearing.) Middleton found that the Grievant had a contusion and was concerned that his meniscus might have been damaged, so he set up an MRI and referred him to an

orthopedic specialist in his office. (Ultimately, the Grievant went back to work before the orthopedic specialist could arrange an appointment.) He prescribed tramadol, a narcotic pain medication, set up regular physical therapy at his office—the Grievant subsequently performed therapy on all scheduled days—prescribed a knee brace, gave the Grievant home exercises to perform and told him to apply ice and keep the knee elevated while at home. He placed no "life" restrictions on the Grievant, such as driving his own car, or walking to perform ordinary functions such as shopping.

Middleton did place the Grievant on TTD because he did not want him to be performing CA17 work duties such as driving a Postal vehicle while possibly sedated, standing intermittently or walking for 8 hours, climbing for 6 hours, bending, stooping, kneeling, twisting, pulling or pushing, the latter of which Middleton explained might have had an adverse effect on his knee.

Middleton further explained that he probably would have returned the Grievant to work on February 22, but he was unable to examine him until February 24, at which time he did take the Grievant off TTD and returned him to work.

The Grievant's credible testimony supported Middleton's. First of all, the only evidence is that he complied with Middleton's instructions. In the second place, there was no evidence, nor even any suggestion, that he used any of his time off to "take a mini-vacation," to work for another employer or for himself, or to engage in any type of heavy or otherwise difficult activity.

The OIG Surveillance.

On February 22—the day that Middleton most likely would have returned the Grievant to work—Joel Straughn, an agent of the OIG, surveilled the Grievant for about 30 minutes and videoed him performing certain life duties, that including driving his personal vehicle, getting a haircut and shopping. The Grievant was wearing the prescribed knee brace. Straughn testified that he found that the Grievant lied about performing those functions until he was shown photos of himself doing them. The Grievant credibly testified that he simply was, at first, confused by the questions.

Tillet's Investigation.

Tillet examined the OIG report and the video and interviewed the Grievant. His testimony basically was that he agreed with Straughn's assessment. Subsequent to his investigation, he transferred to another installation and had nothing further to do with this case.

Heng's Role in this Case.

Heng testified that it was his decision, after consulting with Labor Relations, to issue the Notice of Removal. The Arbitrator finds, for the following reasons, that Heng was not a credible witness, and that McDonald played the central role in issuing the Notice.

First, this was Heng's first Removal case, so it is highly unlikely that he did not take some direction from McDonald.

Second, Lakewood shop steward Jacqueline Haney credibly testified that after the Notice issued she interviewed Heng and he told her that he did not know what the charges were; that he did not know what the Notice said; that he did not know what the evidence was; that he only read part of the OIG report, and later said that he did not know that there had been such a report; and that he did not know what the term TTD meant.

Third, Heng testified first that he only "skimmed" the Notice, but later claimed that he actually read it all and used the word "skimmed" because of a language barrier. The Arbitrator noted that Heng showed no difficulty in expressing himself or understand questions, and Haney testified that he in fact had no barrier.

Fourth, in her Formal A position statement, McDonald confirms that after Tillit left the installation, the finalized Notice came back from Labor Relations, and that "The review and concur had already been completed. The issuing Supervisor [Heng] was apprised and concurred with the action."

In sum, all the persuasive and convincing evidence established that Heng simply "rubber stamped" a decision made by others.

III. POSTAL SERVICE CONTENTIONS.

First, established Postal Service arbitral precedent supports Management.

Second, persuasive and convincing evidence established that Heng made the decision to remove the Grievant, with McDonald giving her concurrence.

Third, the testimony and statement of OIG agent Joel Straughan supported Management.

Fourth, Haney's claim that Heng did not know anything about the case was unsupported by any persuasive or convincing evidence.

Fifth, the Grievant's testimony was false in some areas, which created the presumption that it was also false in others. Moreover, he only became truthful when confronted with the surveillance tape.

Sixth, the Grievant's OWCP case was ultimately denied by the Department of Labor, and he had to repay benefits received.

Seventh, all of the "7 tests" of discipline were satisfied.

IV. UNION CONTENTIONS

First, The Grievant did not act as charged—there was no wrongful intent. The life functions he performed while on TTD had been medically approved. *See*, F01N-4F-D 07340672 (Levak); F06N-4F-D 12232343 (Monat); F06N-4F-D 11325978 (Lumbley); F98N-4F-D 01200171 (Ames).

Second, a fatal flaw exists in that the Postal Service did not show the video tape to the Grievant before questioning him. B11N-4B-D 14222775 (Talmadge).

Third, the purported review and concurrence actually took place before Heng issued the Notice of Removal: What occurred was a "command decision" from higher

authority —a "fatal violation." *See*, E95R-4E-D 01027978 (Eishen). Further, Heng did not independently review the evidence and did not even know what TTD is. Moreover, because McDonald acted as both Formal A representative and concurring official, the Grievant was denied due process.

Fourth, the delay in issuing the Notice of Removal rendered it untimely.

V. ARBITRATOR'S CONCLUSION.

The Arbitrator concludes that the Postal Service failed to prove by clear and convincing evidence that the Grievant was removed for just cause. Accordingly, the grievance must be sustained, with the Grievant being reinstated with full back pay and benefits.

Preliminarily, the Arbitrator would note that the apparent denial of the Grievant's OWCP case is irrelevant, as (1) the standards applied by the DOL are different than those utilized in a labor arbitration and (2) the evidence and arguments considered by the DOL are not a part of this record.

Turning then to the merits, all the persuasive and convincing evidence supports the Union.

In the first place, two independent physicians examined the Grievant shortly after the accident, both found that he suffered from an injury to his knee, and both prescribed medication and treatment. In particular, Middleton demonstrated great familiarity with the Postal Service's policies and procedures, and superior knowledge of the medication, treatment and time off necessary to relieve the injury. Moreover, Middleton made it clear in his instructions to the Grievant and at the arbitration hearing that the TTD limitations applied only to the Grievant's work and did not constitute "life" restrictions.

In the second place, it is crystal clear that the Grievant followed Middleton's instructions to the letter, including engaging in therapy and wearing the prescribed brace, and that he did not engage in any actions, either planned or spontaneous, that went beyond normal life activities. As such, those activities were "protected," and

were not properly utilized to discipline the Grievant. *See*, F01N-4F-D 07340672 (Levak); F06N-4F-D 12232343 (Monat); F06N-4F-D 11325978 (Lumbley); F98N-4F-D 01200171 (Ames).

In the third place, because the unacceptable conduct charge totally failed, the charge of lack of candor was improperly utilized as a second ground for the removal. The reason is simple: Where a primary charge is totally without merit, interrogations will ordinarily confuse the innocent employee and may result in a patchwork of guessing answers aimed at trying to defuse the questioning. In the instant case, the life activities engaged in by the Grievant had been permitted in advance by his treating physician, so he had no way to figure out what and why he was being asked. The entire process must have been a terrible experience for him.

This brings us to the independent grounds for sustaining the grievance: It was absolutely clear that Heng did not make the decision to issue the Notice of Removal—the persuasive and convincing evidence established that it was a command decision made by higher authority. Indeed, that evidence established that Heng had nothing at all to do with the decision.

For all the above reasons, the grievance must be sustained.