C-35490

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REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	*	
between:	*	Grievant: T. Blackburn
United States Postal Service	*	Post Office: Nashville, TN
and	*	USPS Case No: C16N-4C-D 20432877
National Association of Letter Carriers, AFL,CIO	*	NALC Case No: B4-00734-20

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Hiram Velez

For the Union: Corey Walton

Place of Hearing: Memphis, TN

Date of Hearing: January 20, 2021

Date of Award: March 21, 2021

Relevant Contract Provision: Article 16

Contract Year: 2016

Type of Grievance: Discipline

Award Summary:

The Grievant was issued a Notice of Removal charging Unacceptable Attendance. The Employer failed in meeting the just cause standards of Article 16. The Notice of Removal is expunged and the Grievant shall be reinstated and made whole in accordance with the Union's requested remedy.

Lawrence Roberts, Panel Arbitrator

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 20 January 2021at the postal facility located in Nashville, TN. Testimony and evidence were received from both parties. A was not used. The Arbitrator made a record of the hearing by use of a digital recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

The Grievant in this case is employed as City Letter Carrier at a Nashville, TN postal facility, the Bellevue Station. He has been employed by the Postal Service since March 2018.

On or about 1 September 2020 the Grievant was issued the following Notice of Removal letter, which reads:

> **"You are hereby notified that you will be removed from the Postal Service employment no sooner than thirty (30) days from the date of receipt of this letter. The reason for this action is:**
>
> **CHARGE: Unacceptable Attendance**
>
> **A review of your attendance record from April 28, 2020 to August 14, 2020, indicates that you have been absent from your official duties on the dates listed below. This record reveals a lack of dependability in maintaining your work schedule.**

Date	Number of Hours	Type of Leave
04/28-08/14/2020	624	AWOL

On August 10, 2020 you were mailed a notice to report for an Investigative Interview on August 14, 2020, affording you the opportunity to explain your actions. You failed to respond to the notice, therefore, based on all available information, you are charged as stated above.

Your actions are in violation of but not limited to the following pertinent sections of the Employee & Labor Relations Manual (ELM):

665.4
Section 665.41 Employees are required to be regular in attendance. Failing to be regular in attendance may result in disciplinary action, including removal from the Postal Service.

665.42 Absence Without Permission
Employees who fail to report for duty on scheduled days, including Saturdays, Sundays, and holidays, are considered absent without leave except in cases where actual emergencies prevent them from obtaining permission in advance. In emergencies, the supervisor or proper official must be notified of the inability to report as soon as possible. Satisfactory evidence of the emergency must be furnished later. An employee who is absent without permission or who fails to provide satisfactory evidence that an actual emergency existed will be placed in a nonpay status for the period of such absence. The absence may be the basis for disciplinary action. However, once the employee provides management with notice of the need for leave in accordance with Family Medical Leave Act (FMLA)-required time frames, the absence is determined to be FMLA protected, the employer must change the AWOL to approved FMLA-LWOP, and delete the AWOL to approved FMLA-LWOP, and delete the AWOL status from the record.

In addition, the following elements of your past record have been considered in arriving at this decision:

14 Day Suspension - Unsatisfactory Attendance - Issued April 21, 2020

Letter of Warning - Unsatisfactory Attendance - Issued May 3, 2019

Furthermore, while an absence may be approved, said approval is for pay purposes and/or administrative recording purposes only. It should be understood that approved leave can be the basis for disciplinary action.

You have the right to file a grievance under the Grievance/Arbitration procedure set forth in Article 15 of the National Agreement within fourteen (14) calendar days of your receipt of this notice.

If this action is reversed or modified on appeal, back pay may be allowed unless the award or decision specifies otherwise, only if you made reasonable efforts to obtain alternate employment during the potential back pay period. The documentation which you just maintain and present to support a back pay claim is described in Subchapter 436 of the Employee and Labor Relations Manual."

The Notice or Removal was issued by a Supervisor and Higher Level Manager was the concurring official.

The above Letter prompted the filing of the instant grievance. The Employer claimed the Notice of Removal was issued with just cause while the Union does not believe there to be any basis for the Employer's removal action in this particular case.

The Parties were unable to resolve the dispute mentioned above.

It was found the matter was properly processed through the prior steps of the Parties Grievance-Arbitration Procedure of Article 15, without resolve. The Step B Team reached an impasse on15October2020. Therefore, the matter is now before this arbitrator for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. The record was closed on 24 February 2021 following the timely receipt of post hearing briefs submitted by the respective Advocates.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.

2. Grievance Package

COMPANY'S POSITION:

Management insists the evidence will prove by the preponderance of evidence that there was just cause for the discipline. The Employer insists the evidence will show, more likely rather than not, that the Grievant committed the infractions as charged in the Notice of Removal and that the discipline was for just cause.

The Agency contends the Grievant was not regular in attendance. In the view of the Employer, the case file more than sufficiently establishes that the Grievant was aware of the rule of the requirement to be regular in attendance as a term of employment.

Furthermore, the Service points out the Grievant was reminded of the rules and the consequences of his continued failure to be regular in attendance every time he was issued progressive corrective action, as the Notice of Removal cites a

Letter of Warning for Unsatisfactory Attendance and a 14 Day Suspension for Unsatisfactory Attendance.

In the Employer's opinion, the facts and evidence in the case file show that the Grievant knew his attendance had put him in a position where his employment was on the line.

Management mentions the applicable regulations were included in the removal notice. As indicated by the Employer, this is a reasonable rule, attendance as poor as the Grievant's adversely impacts the Postal Service's ability to conduct its operations.

The Employer also notes their customers suffer and the Postal Service incurs unnecessary financial hardship when it's forced to pay other employees at the overtime and penalty rate to cover the Grievant's assignment. And, in the opinion of Management, the morale of those that are regular in attendance suffers as well.

The Agency suggests the rule is consistently and equitably enforced with progressive disciplinary action. Management also suggests the file fully supports that there was a thorough investigation.

The Service maintains the Grievant was provided his "day in court" but failed to report or respond to the Investigative Interview.

The Employer suggests their actions have been corrective rather than punitive and the Grievant has been provided plenty of opportunities to try and correct his behavior which he has time and time again failed to do.

Management mentions the past discipline the Grievant had been issued.

According to the Employer, the evidence presented will shift the burden of proof to the Union to prove a violation of the Parties Agreement occurred when the Notice of Removal was issue to the Grievant.

The Agency argues that Union proof must be in the form of evidence instead of arguments, assumptions, guesses, conjectures, allegations or speculations. And in this case, it is the Employer's argument the Union has failed to evidence a violation of the Agreement.

As concluded by the Employer, the fact is that the Grievant was not regular in attendance.

In their view, the Postal Service cannot force employees to comply with the rules and regulations but we owe it to our customers and to these employees that are regular in attendance to address and issue corrective action to those who show continued and blatant disregard to the Postal Rules and Regulations and Postal Policies.

It is the position of the Agency that they cannot continue to tolerate this type of behavior.

Management requests the instant grievance be denied and dismissed in its entirety, the Notice of Removal be sustained and that no back pay be awarded to the Grievant.

UNION'S POSITION:

In the Union's opinion, this case is one of the more disturbing, unethical and unsavory removals that the Union has had to deal with in the Nashville Installation. Management's actions, according to the Union, provide a plethora of violations.

While mentioning the injury is not in dispute, the Union insists the Grievant has done everything to be in compliance and is still working with OWCP to be rehabilitated.

It is the claim of the Union that Management knowingly submitted falsified reports with the sole purpose of justifying the Grievant's removal.

The Union predicts the evidence will overwhelmingly show that Management not only failed in having just cause but also intentionally fabricated documents to support it. The Union argues these types of action can never be allowed to stand, in any discipline regardless of the charge. The Union asks the instant grievance be sustained and the following remedy be granted:

1. The Notice of Removal issued to Carrier Terry Blackburn on September 1, 2020 be fully rescinded and removed from all employee files and record and the Grievant be returned to work immediately.

2. The Grievant 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 over the duration of the off-duty status and interest at the Federal

Judgment rate (in accordance with the MOU on Page 197 of the National Agreement.
3. The Grievant be reimbursed for any penalties, fees, or debt incurred from being placed in an off-duty status from his position punitively via he provides receipts where these penalties, fees or debts were directly related to being issued the Notice of Removal.

4. That all payments associated with this case be processed as soon as administratively possible, but no later than fourteen (14) days from the date of settlement and proof of payment and adjustments be proved to Informal A Representative Jason Leath, within that time.

THE ISSUE:

Did Management violate Articles 16 and 19, via Section 115 of Handbook M-39 of the National Agreement when issuing Terry Blackburn a Notice of Removal for unacceptable attendance on September 1, 2020?If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 16
DISCIPLINE PROCEDURE

SECTION 1. Principles

DISCUSSION AND FINDINGS:

This matter involves a Notice of Removal, wherein the facts, circumstances and reasoning surrounding the incident bringing rise, is contrasting between the Parties. Regardless of circumstance or respective argument, the burden of proof falls on Management to establish reason for their actions.

While Article 3, Management Rights, provides the Employer with the power to "suspend, demote, discharge, or take other

disciplinary action...", the Employer is limited in any decisions as restricted by other Articles or Sections of the Agreement.

According to the Agreement, no Employee may be disciplined or discharged except for just cause. In my view the "just cause" provision is ambiguous; however, its concept is well established in the field of labor arbitration. The Employer cannot arbitrarily discipline or discharge any Employee. The burden of proof is squarely on the Employer to show the discipline imposed was supported with sound reasoning.

In addition, the just cause standard cannot be gauged in the same matter in all cases since each discipline case is unique to its own set of facts and circumstances.

The chief negotiators of Article 16 suggest progressive discipline. In many cases, that guideline prevails and progressive discipline works to serve both the Employer and Employee. There are certain acts that are oftentimes corrected with progressive discipline.

Then, there are those infractions, whereby progressive discipline, is simply improper. Theft would certainly be a good example of one of these instances. In this business, such an

act would be intolerable and removal following the first occurrence would only be appropriate. I'm sure the chief negotiators would agree with this reasoning.

However, each matter of discipline rests solely on its own merits. What is found to be applicable in this case cannot be applied evenly to other similar issues.

The one constant is the burden of proof rests with the Postal Service. It's their obligation to establish just cause or, at the very least, via their case in chief, demonstrate the existence of clear and convincing evidence in support of the imposed discipline.

It is not up to the Union to prove innocence, instead, for the moving party to establish guilt. In order to prevail however, Management need not prove their case beyond a reasonable doubt.

Instead, in arbitral matters, the preponderance of evidence rule applies. Clear and convincing evidence is proof via the preponderance. Regardless of the specific term employed, this Agreement, like most others, requires a showing, via evidence, that, more likely than not, the Grievant is guilty as charged.

This is based on the probability of the evidence, its probable truth and accuracy, not necessarily the quantity. In any case, the meaning is somewhat subjective and this forum lacks a steadfast rule that can be applied to all cases. Instead, only a guideline delineates the evaluation of the evidence and accordingly, is considered on a case by case basis.

Discipline matters involving absenteeism are usually straightforward. Most of the evidence is well documented and the respective arguments of the Parties are based on the documentation and the specific facts of the case.

In this instance, the Employer clearly failed to initially meet their requisite burden of proof. The burden of proof is that of Management and, when that burden is not satisfied, the Union is not required to offer any defense. In this case, the documentation found in the case file along with Management's own testimony was simply not convincing.

A Supervisor Customer Services testified extensively as to various documentation found in the case file that was mailed to the Grievant. Most of that documentation was sent via certified mail and some with separate tracking numbers as denoted on the respective correspondence.

A Supervisor testified he was sure that documentation, including a **"Report for Duty Notification," "Report for Investigative Interview," "Documentation Requirements," "Report for Another Investigative Interview," "Final Directive-Report for Investigative Interview," "Final Notice," "Return to Duty,"** and a **"Report for Investigative Interview"** were all received by the Grievant.

Paramount here is the fact that none of that claimed supporting documentation was contained in the case file. In fact, the Supervisor was unable to conclude that any return receipts were personally verified or even existed for that matter. In my considered opinion, the purpose of certified mail is to show the letter sent was received by the recipient. It seems suspicious the header of most of that documentation indicates certified mail, yet the witness that claimed responsibility as the originator was unable to offer any validation of proof to that end.

The same witness testified the discipline was progressive, however, when questioned about a seven (7) day suspension; he was unaware that it had been reduced to a Letter of Warning. In my considered opinion, all of the above was not only suspicious to me, but certainly caused me to doubt the credibility of any of his other testimony.

Additionally, the Station Manager, who was also the Notice of Removal Concurring Official, testified that she had conducted an investigation prior to providing the concurring signature. However, her testimony revealed that she had not seen the Grievant's medical records and furthermore, was not even aware the Grievant had been injured on the job.

All of this proves fatal to the Employer's case in chief. I am of the considered opinion that Management's decision to issue the Notice of Removal was nothing but pure happenstance based on conjecture, at best. The Agency failed in meeting even the most requisite requirements of those Article 16 just cause provisions.

At best, the testimony of the Supervisor Customer Service was obviously flavored in more than one instance. It was also clear the concurring official failed in performing even a cursory review of any of the details of this case. The Agency failed to meet the just cause requirements found in Article 16 of the Parties Agreement.

I must add that the Management advocate made an excellent presentation. Unfortunately, there were too many inconsistencies presented by Management's witnesses.

Accordingly, the grievance is sustained and the Union's requested remedy, noted above in the "Union's Position" is hereby granted in its entirety.

I will retain jurisdiction over this matter for 90 days in nthe event the parties need further assistance.

AWARD

The Notice of Removal shall be expunged and the Grievant will be made whole.

Dated: March 21, 2021
Fayette County PA