American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

August 17, 2017

Subject: All-Craft Conference 2017
Las Vegas, NV

Bruce Amey
National Business Agent
6951 Pistol Range Road
Tampa, FL 33
(813) 855-7023 Phone
(813) 855-7418 Fax

National Executive Board

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President

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John H. Dirzius
Coordinator, Northeast Region

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Coordinator, Southern Region

Omar M. Gonzalez
Coordinator, Western Region

Greetings Brothers & Sisters,

Welcome to Las Vegas, NV. I am grateful to be able to meet with you once again for what I hope to be an informative and productive conference to conduct the business of the Motor Vehicle Service Craft. Since we last meet in Orlando, FL in August 2016 for the 2016 National Convention there have been some changes made as to how we conduct the business of scheduling cases for arbitration.

On June 17, 2016, the Union and Postal Service agreed to a **Memorandum of Understanding (MOU) RE: Grievance Reviews & Arbitration Scheduling Procedures**. This MOU emphasized the process of timely discussions of cases appealed to Step 3 and Direct Appeal. In January 2017, the parties agreed to a moratorium on regular and expedited arbitration hearings from April 1, 2017 through May 31, 2017 to meet in pre-arbitration discussions of **ALL** cases pending arbitration.

Because of those pre-arbitration meetings and scheduled arbitrations, the cases pending arbitration in my region have been significantly reduced.

We have had tremendous success in contract violations such as conversions, subcontracting, establishment of preferred duty assignment, etc. For discipline only one denial, and that one should not been.

I look forward to having meaningful discussions with many of you during our gathering hear at this 2017 All-Craft Conference. Thanks, to every one of you.

Bruce Amey
National Business Agent, MVS
Southern Region-Sub-Region Southeast

Awards for Bruce Amey

Motor Vehicle Craft, Tampa NBA

Linda Byars - C10V-4C-D 15356205; C10V-4C-D 15365683 – Notice of Removal and Emergency Placement issued without Just Cause.

Matthew D. Wright – K10V-4K-C 15232391 – Grievance sustained. Service violate Article 7.2 of the Collective Bargaining Agreement when assigned the Lead Automotive Technicians to pull parts from the stockroom.

Linda Byars – K10V-4K-C 16438382 – The Postal Service did not justify emergency suspension under the circumstances of this case.

Linda Byars - K10V-1K-D 11462782 – Postal Service took the position that the grievance was not arbitrable. Arbitrator ruled that the grievant' s EEO representative did not have standing or authority to withdraw the Grievance.

Stephen Cook – K15V-4K-D 16777562; K15V-4K-D 17020104 – Notice of Removal and Emergency Placement issued without Just Cause.

Zachary Morris – K06V-1K-C 10014832 – Service argued the timeliness. Arbitrator ruled the grievance arbitrable. Grievance to be re-scheduled to hear the merits.

Frank Giordano – K10V-1K-D 13422685; K10V-1K-D 11462762; K10V-1K-C 12338136 – Arbitrator ruled the cases as arbitrable. Postal Service argued timeliness.

Christopher Miles – K10V-1K-C 12425621 – Grievance sustained. This case involved the exclusion of several pay periods from an award of back pay from a previous arbitration award. Arbitrator ruled, ***no pay periods shall be excluded for failure to "seek" (obtain) outside employment.***

Zachary Morris – K10V-1K-C 13393949 – The Postal Service violated Article 19 of the National Agreement by extending the term of Highway Contract Route 294M0.

Jane Desimone – K15V- 4K-D 16853880; K15V-4K-D 17091628 – The Postal Service lacked Just Cause to issue the Grievant(s) a Notice of Removal. The action taken was punitive in nature… The Grievant's removal is reduced to a 14-Day Suspension.

Zachary Morris – K15V-4K-D 16854620 – Grievance denied. Arbitrator ruled "Just Cause" for the removal issued to the grievant.

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNIONS

Grievant: Bennett

Post Office: Hickory, North Carolina

USPS Case No.: K10V-4K-C 16438382

BEFORE: Linda S. Byars, Arbitrator

APPEARANCES:

For the U. S. Postal Service: Andrew T. Smith, Labor Relations Specialist

For the Union: Bruce Amey, National Business Agent

Place of Hearing: Hickory, North Carolina

Date of Hearing: September 23, 2016

Date of Award: October 17, 2016

Relevant Contract Provisions: Article 16.7

Contract Year: 2010-2015

Type of Grievance: Emergency Procedure

Award Summary

The Grievance is arbitrable. The Postal Service did not justify emergency suspension under the circumstances of this case. Therefore, the Grievance is sustained, and the Grievant is entitled to be made whole for the period of the emergency suspension.

BACKGROUND

By memorandum dated March 16, 2016, Supervisor Vehicle Maintenance Barry Gaither notified Lead Automotive Technician Roger Bennett that he would be placed in an off-duty, non-pay status effective the same day pursuant to Article 16.7 of the National Agreement. [Joint Exhibit No. 2, p. 9.] VMF Manager Jo-Anna Freeman signed the notice as reviewing and concurring official. [Joint Exhibit No. 2, p. 9.] The notice states in relevant part as follows: "Pending investigation of your conduct regarding improper use of the EBR and misuse of a government vehicle, you are being placed in an off-duty status. . . ." [Joint Exhibit No. 2, p. 9.]

Mr. Gaither and APWU Craft Director for Hickory Vehicle Maintenance, Tracy Spencer, met on April 1, 2016 to discuss a Step 1 Grievance. [Joint Exhibit No. 2, p. 6.] The Union maintained at Step 1 that the charges were not within the scope of Article 16.7. [Joint Exhibit No. 2, p. 6.] By Step 2 Grievance Appeal Form dated April 15, 2016, the Union appealed, further maintaining that information requested of the Step 1 supervisor had not been received as of April 15, 2016. [Joint Exhibit No. 2, p. 5.]

By memorandum dated June 1, 2016, Labor Relations Specialist Sloane Ferguson and National Business Agency Bruce Amey agreed in relevant part to the following: "Upon full discussion it has been determined that this case cannot be resolved, withdrawn or held and is therefore considered appealed to Regular Arbitration on the mailing date or, where alternative appeals methods are used, the date of receipt at the processing center." [Joint Exhibit No. 2, p. 2.]

The Grievance came before the Arbitrator at hearing on September 23, 2016 in Hickory, North Carolina. The parties agree to the following statement of issue and that the Arbitrator retains jurisdiction to decide a remedy, if necessary. The parties also agree to provide cites by October 7, 2016.

STATEMENT OF ISSUE

Did management violate Article 16.7 of the National Agreement?

OPINION

Arbitrability

The Postal Service maintains that the Union advanced the Grievance prematurely, without a second step response from management, and that, therefore, the Grievance is not properly at arbitration. The Postal Service further maintains that, if the Arbitrator finds the Grievance arbitrable, management's second step response is admissible at arbitration.

The Union maintains that the Grievance is properly before the arbitrator and that management's second step response is inadmissible, because the response was not issued until after the Grievance had been appealed to arbitration. Craft Director Tracy Spencer testified that, after calling VMF Manager Jo-Anna Freeman on May 10, 2016 and again on May 12, 2016, Ms. Freeman advised him that, "They were not going to be able to do anything and to send it on up." Mr. Spencer's notes for May 12, 2016 state in pertinent part: "Jo Anna Freeman by phone said she can't settle to send it on up for the 3 grievances." [Union Exhibit No. 1.]

Ms. Freeman testified that she and Mr. Spencer had a Step 2 discussion by telephone on May 11, 2016, that she did not provide a decision on May 11, that she did not contact the Union after May 11, and that she did not instruct Mr. Spencer to send the Grievance on up. She testified that she learned "around May 15th" that Mr. Spencer had appealed the Grievance without her decision. Ms. Freeman's decision denying the Grievance is dated May 20, 2016 and alleges that the Union violated Article 15 by appealing the Grievance prematurely. [Management Exhibit No. 4.]

Deciding the credibility of the two contradictory accounts of the second step meeting is unnecessary. Even if Mr. Spencer misinterpreted Ms. Freeman's intention, his decision to appeal the grievance without having received a second step response does not necessarily make the grievance untimely or non-arbitrable. As the decision of Arbitrator Bernard Cushman (C90C-4C-D 93009256/93009354, p. 25) demonstrates, a party's refusal to participate at Step 1 has been considered reason to set aside disciplinary action or to find a grievance not arbitrable. However, the record in the instant case fails to demonstrate that Mr. Spencer refused to participate at Step 2. On the contrary, the record demonstrates that he attempted on more than one occasion to discuss the Grievance at Step 2 with Ms. Freeman. Moreover, there is no mention in the June 1, 2016 memorandum appealing to arbitration and signed by the parties of the procedural issue. [Joint Exhibit No. 2, p. 2.]

There is also no dispute, however, that Ms. Freeman responded at Step 2 within the ten days permitted by contract. Therefore, the Union's objection to her response as inadmissible is overruled.

Merits

With respect to the merits, Ms. Freeman's Step 2 response states as follows:

> The loss of funds is grounds for suspension without pay. Loss of funds pertains to the grievant participating in unauthorized use of postal vehicles for personal gain, gambling on the clock, and stealing time for starters. [Management Exhibit No. 4, p. 2.]

Gambling on the clock is not included in the allegations made at the time of the emergency suspension. Also, the letter of charges does not rely on "loss of funds," as included in Ms. Freeman's second-step Grievance response. The Postal Service must prove that "improper use of the EBR and misuse of a government vehicle" justifies an emergency suspension.

In the national level decision jointly submitted by the parties, Arbitrator Richard Mittenthal states, "The 'emergency procedure' is, as those words indicate, a recognition that situations do arise where supervision must act 'immediately' in suspending an employee because of immediate risks or dangers which do not allow the more time-consuming procedures of Sections 4 and 5." [Case Nos. H4N-3U-C 58637 and H4N-3A-C 59518, p. 8.] As the cases cited by the Union demonstrate, arbitrators recognize that, when management foregoes the procedural protections otherwise guaranteed by Article 16, such action is an "extraordinary measure." [C98C-4C-D 02008839, Arbitrator Jacqueline Drucker, p. 5.]

Although it can be reasoned that the improper use of the EBR and misuse of a government vehicle has the potential for loss of funds, as management alleges at Step 2, such reasoning could apply to nearly every rule infraction. For example, unscheduled

absences result in loss of postal funds, but such conduct is not considered justification for emergency suspension.[1]

Where there are threats of violence, management has reasonably claimed an emergency justifying suspension. However, there is no such allegation against the Grievant, and the alleged "harassment," referred to in Mr. Gaither's testimony, was not included in the letter of charges.

When the allegation of misconduct was alleged in December 2015, management became obligated to conduct a fair and thorough investigation. Regardless of the reasons for the more than two-month delay before management invoked the emergency procedure, such a delay detracts from management's characterization of the circumstances as an emergency. The record demonstrates that management had sufficient time to provide the Grievant the protections guaranteed under Article 16 of the National Agreement. Under the circumstances of this case, management's decision to first suspend and then proceed with the investigation does not comport with the just cause standard.

The Grievant is entitled to be made whole for the period of the emergency suspension, i.e. until such time that the Notice of Removal became effective.[2] The Grievant's entitlement to pay for the subsequent period will depend on the decision and award in the removal case. Accordingly, the Arbitrator finds for the Union and makes the following Award.

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[1] In a case decided by Arbitrator Barbara Zausner Tener, management alleged that the employee was spending too much time pursuing his duties as a union steward and placed him on emergency suspension. Arbitrator Tener concluded that, "Even if all of the testimony is credited, the charges and the circumstances do not fall within the ambit of Article 16.7." [N7C-1N-D 20350, p. 3.]

[2] Although the parties agree that management issued a Notice of Removal to the Grievant, neither the Notice nor the date of the Notice is included in the record.

AWARD

The Grievance is arbitrable. Management violated Article 16.7 of the National Agreement. The Grievance is sustained. The Grievant shall be made whole for the period of the suspension. The Arbitrator retains jurisdiction to decide a remedy, if necessary.

_____ DATE: October 17, 2016

Arbitrator

Regular Arbitration Panel

In the Matter of the Arbitration
between
UNITED STATES POSTAL SERVICE
and
AMERICAN POSTAL WORKERS
UNION, AFL-CIO

Grievant: Roger Bennett
Post Office: Hickory, NC
USPS Case No: K15V-4K-D 16854620
APWU Case No: TS05HVMF20

BEFORE: Zachary C. Morris, Arbitrator

APPEARANCES:

For the Service: Andrew Smith, Labor Relations Specialist

For the APWU: Bruce Amey, National Business Agent

Place of Hearing: 231 Main Ave. SW, Hickory, NC 28602

Date of Hearing: Thursday, January 19, 2017

Date of Award: Wednesday, March 8, 2017

Relevant Contract Provisions: Article 16

Contract Year: 2010-2015

Type of Grievance: Discipline

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Award Summary:

The grievance is denied. The Postal Service had Just Cause to issue the Notice of Removal to the Grievant.

Zachary C. Morris, Arbitrator

I. PROCEDURAL BACKGROUND

This grievance was initiated in July of 2016 after the Grievant received a Notice of Removal, dated June 27, 2016. The Notice of Removal cites two charges: 1) Improper Conduct Specifically Misuse of a Government Vehicle, and 2) Improper Conduct Specifically Misuse of Employee Time Cards. The grievance was denied at each step of the grievance procedure.

Management claims that the grievance was never properly filed at Step 1. They argue, consequently, that the grievance is not arbitrable. Arguments and testimony were heard on this matter, as well as on the merits. The Service's arbitrability argument will be addressed in the body of this Award.

At the hearing, both the Postal Service and the Union were ably represented and were given a full and fair opportunity to present evidence, examine and cross examine witnesses, and make arguments. In reaching the conclusions and making the Award set forth herein, the Arbitrator has given full consideration to all evidence of record.

The parties made their closing statements at the hearing, but requested time to submit cites to the Arbitrator. These cites, which the parties agreed were to be postmarked by Friday, February 3, were properly postmarked by that date and received by the Arbitrator on February 6, at which point the record was closed.

II. ISSUE

1) Did the Union violate Article 15.2.Step 1(a) when filing this grievance?
2) Did the Postal Service have Just Cause to issue the Notice of Removal to the Grievant? If not, what shall be the remedy?

III. STATEMENT OF THE CASE

The Hickory Vehicle Maintenance Facility (VMF) is a small facility with only four employees. The Grievant, Mr. Roger Bennett, is a Level 10 Lead Tech who is in charge of the day-to-day operation of the facility due to the fact that Supervisor Barry Gaither oversees both Hickory and Charlotte VMFs, working in Charlotte most of the time – about an hour's drive away. The Grievant has been employed with the Postal Service since 1989.

I will first note that the Union elected not to let the Grievant testify, despite the fact that he was present at the hearing. As such, the only testimony concerning the facts of this case come from Supervisor Gaither, Manager of Vehicle Maintenance Jo Anna Freeman, and Lead Tech James Merique. Union Steward Tracy Spencer did testify, but only to the filing of the grievance.

On December 1, 2015, Supervisor Gaither was contacted by Lead Tech James Merique. Merique informed Gaither that Roger Bennett, Keith Childers, and Shannon Cochran were swiping each other's badges and using the government vehicle for personal business. Apparently this had been going on for around two years and while Merique admits that he took advantage of it at first, he began to feel uncomfortable about it and had not joined the other employees since at least a year prior to contacting his Supervisor.

Mr. Gaither was skeptical of this at the time because there was some bad blood between Merique and the other three Techs. Nevertheless, he went out once between December and March to Hickory and observed no problems. While he was there, the employees swiped their own badges and used their own vehicles.

However, Gaither later went out with Manager of Vehicle Maintenance Jo Anna Freeman on several "stake-outs". They positioned themselves so that they would be close enough to the VMF to see who was there and who was not, yet far enough away so that they would not be detected. They then cross-referenced what they saw going on at the VMF with the punches in TACS and determined that the employees were indeed punching in for each other.

On March 9, they observed Bennett, Cochran and a custodian from Winston leave on foot to a restaurant at 11:50 and return at 12:20. However, clock rings show that they clocked out at 12:26 and 12:25 respectively.

On March 11, they observed Cochran arrive at 7:10. His clock rings confirmed that someone had punched him in at 7:00. At 11:50, the VMF employees (minus Merique) left in a government vehicle and went to a Mexican restaurant. They returned to the VMF at 12:38. Bennett then took his lunch break from 1:00 to 1:30 and the others from 1:00 to 2:00.

On March 15, they again drove out to Hickory. Bennett left on foot for lunch at 12:01 and returned at 12:28, yet his clock rings show him being at lunch from 12:30 to 1:00. Having seen enough, Gaither and Freeman confronted the employees and put them out on an emergency suspension.

Pre-disciplinary interviews (PDIs) were held with Bennett on March 25, April 1, April 19, and June 10, 2016. At no point did he deny using the postal vehicle for personal use or swiping badges for other employees. Rather, in these interviews he claimed that what he was doing was standard operating procedure and that there was a past practice of this type of behavior in Hickory. Gaither looked into this and determined that there was never any such practice. Supervisor Gaither wrote and signed the Notice of Removal on June 27, 2016.

The Union's Step 1 representative, Tracy Spencer, filed the grievance using the Electronic Grievance System (EGS) rather than filing in person because he works in Winston-Salem. Management contends that the Union did not notify Management of their intent to do so. Because of this, the Grievant's immediate Supervisor had no notification that a grievance had been filed. This, they claim, amounts to a violation of Article 15.2.Step 1(a). However, Spencer testified that he had discussions with Gaithers on July 19 and July 22 of 2016, prior to the Step 2 meeting being held on July 28.

IV. POSITION OF THE UNION

The Union first points out that the Service has the burden of proving that it had Just Cause to remove the Grievant.

The Union also argues that the Grievant is a victim of disparate treatment. Merique admitted to having done these same acts that led to the Notice of Removal, yet he received no discipline. Consistent and equitable enforcement of a rule is one of the pillars of Just Cause, and yet it is absent here.

Secondly, Management did not tell the employees to stop when they first learned of the behavior. Rather, they allowed it to continue for months. Essentially, they just sat around doing nothing and then conducted a "sting operation" over the course of a few days. This should not be viewed as a thorough investigation, as is required under Article 16 and the JCIM.

The Union also took exception to Management's use of the term "stealing" when describing Bennett's actions. Management charged him with "Unacceptable Conduct" because they know it is easier to prove as there is no element of moral turpitude, but attempts to portray him as a "thief" of time.

Additionally, Merique's testimony and even his actions are suspect as he may have had an ulterior motive to whistleblowing on his fellow employees.

The Union also claims that the decision to issue a removal was a "command decision" made by Labor or Freeman, not Supervisor Gaither. Further arguments include the Notice of Removal being procedurally defective because it lacks specificity in regard to which time cards were being misused, the fact that there's only one documented case of using the postal vehicle without authorization, and that he should be getting paid because he's still on Emergency Placement.

While the Union certainly has many arguments, the two things Mr. Amey noted as "jumping out" are that Gaither did not make the decision to issue the removal, and the use of the term "stealing". If he's stealing, charge him with stealing.

Ultimately, the Union requests that the grievance be sustained and that the Grievant be placed back into his position with full back pay and benefits.

V. POSITION OF THE SERVICE

Mention has already been made of Management's argument concerning a violation of Article 15.2.Step 1(a). In essence, because the Union didn't give Management proper notice of the grievance at Step 1 and then proceeded to appeal the case to Step 2, Management lost its opportunity to settle at the lowest possible level.

Concerning the merits, Management argues that Just Cause existed to issue the Notice of Removal. The events leading up to the removal all occurred when Bennett was the Lead Tech in charge of the Hickory VMF. As such, his job is to report the very type of behavior that he, himself, was participating in. The Postal Service must be able to trust its employees and this is especially true for those in positions of authority.

His conduct essentially amounts to stealing. He was taking hour lunch breaks while only clocking out for thirty minutes and there is no telling how much time he has stolen away from the Service over the course of the years. His defense of Past Practice is misplaced. First, there is no evidence that there ever was a past practice to swipe badges for other employees or use government vehicles for lunch breaks. Second, if he thought it was okay to do these things, why

did he act one way when he knew Supervisor Gaithers was there and another when he was unaware he was being watched?

Management conducted a very thorough investigation, consisting not only of the stakeouts, but of interviews with prior Supervisors and multiple pre-disciplinary interviews. Throughout the process, the Grievant never admitted to doing anything wrong and showed no remorse. Because of all of this, a removal was warranted. The Service requests that the grievance be found not arbitrable. However, if the Arbitrator finds that the Union did not violate Article 15 when filing the grievance, Management would request that the grievance be denied on the merits.

VI. OPINION

Turning first to the procedural issue, I find that the Union did not violate Article 15. Consequently, the grievance is arbitrable. When claiming a grievance is inarbitrable, the burden of proof rests with Management. They did not meet this burden.

Union Steward Spencer used the EGS to file the grievance at Step 1 because he is stationed in Winston-Salem and Supervisor Gaither is in Charlotte – the distance between the two cities being roughly 80 miles. The APWU and USPS have agreed that the EGS will serve as a means for filing and appealing grievances. The purpose of EGS, I would think, is to facilitate the filing, tracking, and appealing of grievances. If the APWU were also required to directly contact the Supervisor every time they used the software, that purpose would be defeated.

Management argues that while there is nothing wrong with using the EGS once they've been alerted that a facility is going to use it, they never knew that Hickory was going to be using that system. As such, Supervisor Gaither was never looking for a grievance through the EGS.

As a practical matter, however, I don't see how the Service was harmed by the Union's use of the EGS. It was aware of the grievance prior to the Step 2 meeting, as evidenced by the testimony of Tracy Spencer. The Service claims that the violation caused them to lose the ability to settle the grievance at the lowest possible level. This may be true, but they retained that ability at Step 2 and Step 3, and yet they failed to do so. I fail to see any direct violation of Article 15.2.Step 1(a). As such, the grievance is arbitrable.

Concerning the merits of the case, the Union put forth a litany of arguments in defense of their Grievant. After all, it is the Union's duty to represent their members to the best of their ability. However, defending the indefensible is an impossible task. The grievant's actions certainly merit removal. One cannot have other employees swipe your time card so that you can come into work late, take paid lunch breaks, and then seriously expect not to get fired. This is not to mention the allegation concerning the unauthorized use of a government vehicle – a violation which, in and of itself, carries the penalty of removal. *31 U.S.C. §§ 1344, 1349.* I will also add that the Grievant's failure to express anything resembling remorse during the PDIs and the fact that he did not testify at the hearing only hurt his case.

The Union claims Bennett is a victim of disparate treatment because nothing happened to Merique even though he admitted to having participated in what was going on in Hickory. However, the two employees are not similarly situated. Bennett is in a position of authority. Merique is not. Bennett continued the behavior until he was caught. Merique stopped of his own volition. Finally, Merique alerted the Service to the behavior, and it is quite normal for whistle blowers to receive lessened discipline, if any at all. The purpose of this, obviously, is to encourage people to speak out against improper or immoral conduct. The fact that Merique was not disciplined will not save Mr. Bennett.

But among the Union's many arguments, there were two that they emphasized: 1) The decision to issue the Notice of Removal was not made by Gaither, but rather a command decision from on high; and, 2) the Service portrayed his actions as stealing but did not cite stealing on the Notice of Removal.

To be sure, Article 16 is violated when "the initiating official is deprived of freedom to make his own independent determination to discipline by a 'command decision' dictated from a higher authority to suspend or discharge.." *Case No. E95R-4E-D 01027978, National Arbitrator Dana Edward Eischen,* (2002) *at 20.* However, Arbitrator Eischen goes on to explain that there is no violation for "consulting, discussing, communicating with or jointly conferring with the higher reviewing authority before deciding to propose discipline." *Id.* at 21.

During his testimony, there was a point at which Supervisor Gaither said Labor Relations decided to issue the removal. However, it was apparent to the Arbitrator at the time that Mr. Gaither was rather confused by the question being asked. This momentary confusion does not

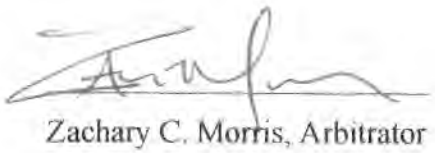
negate his earlier (and later) testimony that he decided to issue the removal after discussing the matter with Manager Freeman.

I am also not persuaded that Management was trying to lessen their burden of proof by charging the Grievant with Unacceptable Conduct instead of Stealing. While the Grievant's actions reek of theft, they are not. Theft, stealing, or whatever you would like to label it deals with the unauthorized removal of a physical object with the intent to deprive the owner of the property permanently. What Mr. Bennett did is not theft and that is why he was not charged with theft. What he did was improper conduct and that is exactly what he was charged with.

I cannot find any of the arguments put forth by the Union show that the Service violated Article 16 of the National Agreement when they issued the Notice of Removal to the Grievant. Consequently, the grievance is denied.

VII. AWARD

For the reasons stated above, the grievance is denied. The Postal Service had Just Cause to issue the Notice of Removal to the Grievant.



Zachary C. Morris, Arbitrator

March 8, 2017

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION

Grievant: Williams

Post Office: Johnson City, Tennessee

USPS Case No.: C10V-4C-D 15356205
C10V-4C-D 15365683
C10V-4C-C 15371082

BEFORE: Linda S. Byars, Arbitrator

APPEARANCES:

For the U. S. Postal Service: Scott Meadows, Labor Relations Specialist

For the Union: Bruce Amey, National Business Agent

Place of Hearing: Johnson City, Tennessee

Date of Hearing: July 14, 2016

Date of Cites: July 29, 2016

Date of Award: August 5, 2016

Contract Year: 2010-2015

Type of Grievance: Emergency Placement and Removal

Award Summary

The Postal Service did not have just cause for the emergency placement or the removal action because management failed to conduct a fair investigation based on properly obtained evidence. The Grievances are sustained.

BACKGROUND

By memorandum dated August 17, 2016, Manager of the VMF, Robert Bullard, issued to Mark Williams, an Automotive Technician with a seniority date of August 5, 2006, an emergency placement in off-duty status, stating the reason for the action as follows:

> Initial investigation found that while being interviewed by OIG Special Agents on August 14, 2015, you admitted to removing multiple (approx.. 20-30) G-10 "Penalty" postage labels from USPS property, for your personal use. Further, a search of your vehicle found that you had a loaded handgun in your personal vehicle on USPS property on August 14, 2015. [Joint Exhibit No. 3, p. 9.]

The Report of Investigation provided to management is dated August 18, 2015. [Joint Exhibit No. 4, pp. 31-49.] On September 2, 2015 management conducted an investigative interview with Mr. Williams and his Union representative, Local Union President Phil Clark. [Joint Exhibit No. 4, pp. 19-20.] By Request for Appropriate Action dated September 4, 2015, VMF Manager Bullard recommended removal. [Joint Exhibit No. 4, p. 18.] The Manager of Vehicle Operations for Territory 5, Joseph Long, is listed on the request as the concurring official. [Joint Exhibit No. 4, p. 18.]

By memorandum dated September 16, 2015, VMF Manager Bullard charged Mr. Williams with improper conduct, specifying the charge as follows:

> You took twenty to thirty G-10 Labels from the Johnson City VMF for your own personal use over the last year. Upon searching for labels in your vehicle parked on Postal Property, the OIG discovered a Glock 23, 40 caliber handgun and six (6) additional G-10 labels. A Report of Investigation (ROI) was submitted by the OIG on August 18, 2015 detailing their findings during the investigation. [Joint Exhibit No. 4, pp. 16-17.]

The Union grieved the emergency placement and the removal actions on Step 2 Grievance Appeal Forms dated September 11, 2015 and October 20, 2015. [Joint Exhibit No. 3, pp. 2-5 and No. 4, pp. 10-15.] By Step 2 Grievance Appeal Form dated December 28, 2015, the Union also challenged the use of a gaming video camera in the VMF parts room and using it to initiate the OIG investigation and the actions against Mr. Williams. [Joint Exhibit No. 5, pp. 18-19.] The Grievances were appealed through the grievance procedure but without resolution, and the Union appealed to arbitration. The parties agree that the Grievances are properly before the Arbitrator and that the Arbitrator retains jurisdiction to decide a remedy, if necessary. The parties asked the Arbitrator to frame the issue on the contract Grievance but agreed to the following statement of issue for the emergency placement and the removal.

STATEMENTS OF ISSUE

Did management have just cause to issue the emergency placement and the removal actions, and, if not, what is the remedy?

OPINION

The Union frames the issue on the contract case as follows: "Did the use of the camera by management make the evidence used in the emergency placement and removal inadmissible?" The Postal Service frames the issue as follows: "Was the use of the camera in violation of the National Agreement?"

There is no dispute that VMF Supervisor Kevin Lowe, who was an acting supervisor at the time, installed the gaming camera at the direction of Joseph (Mark) Long, who was

the Manager of Vehicle Maintenance for the Tennessee district, in violation of ASM 273, as conceded by Eastern Area Labor Relations Specialist Karen Barber at Step 3. [Joint Exhibit No. 5, pp. 2-3.] Ms. Barber also agreed that management would "cease and desist" and "has removed the subject gaming camera." [Joint Exhibit No. 5, p. 3.] The Postal Service is, however, unwilling to destroy the evidence used from the video and the OIG Report and return the Grievant to work with a make whole remedy. The Postal Service contends that such a remedy is outside the scope of the main issue, i.e., whether or not the placement of the gaming camera was a violation of the ASM Manual. [Joint Exhibit No. 5, p. 3.]

At Step 2 of the grievance procedure, the Postal Service asserts that it was the Grievant's admissions that brought about the actions against him and, if Grievant had not stolen the labels and had a loaded weapon in his vehicle, there would have been no discipline. [Joint Exhibit No. 4, p. 8.] However, such argument ignores the Union's position that, without the improper video surveillance, there would have been no OIG investigation and no search of the Grievant's vehicle. As the Union maintains, the record demonstrates that management used the video surveillance to initiate an investigation by the Inspection Service.

Referring to the video surveillance, Manager Long testified on direct examination, "Now I have something to give to the Inspection Service." The record demonstrates that management violated the ASM, used the product of the improper surveillance to initiate an investigation by the Inspection Service, and then used the improperly obtained evidence to justify its own investigation and the actions against Grievant. Such conduct reflects on the integrity of the investigation and the discipline that issues from it.

Also going to due process, is the Union's claim that Mr. Williams was not provided a Union representative when he asked for one during the interview with the Special Agents. Mr. Williams' written statement includes the claim that he requested, and was denied, Union representation on three different occasions during the more than three hour interview. [Joint Exhibit No. 3, pp. 12-15.] Mr. William's written statement also includes the assertion that at approximately 2:00 p.m., and approximately two hours into the interview, he asked to go to the bathroom and tried to text Local Union President Phil Clark but received no response. [Joint Exhibit No. 3, p. 13.] Mr. Williams' testimony was consistent with his statement that he asked for, but was denied, Union representation on several occasions during the interview, that he sent a text to Phil Clark while he was in the bathroom but received no response, and that he then asked for, but was denied, a coworker, Henry Smith, to sit in on the interview when he could not get in touch with Clark. Mr. Clark, who was the steward of record for all three Grievances, testified that he received the text message from the Grievant about Union representation but that the search of Grievant's vehicle had already occurred when he received it.

Special Agent Kevin Jobkar testified, consistent with his email response during the grievance procedure, that Williams asked him, and Special Agent Beth Hendren, if Grievant needed Union representation, and he recalled his response as, ". . . that's up to you, let's go over the facts of this allegation, then you can make that determination." [Joint Exhibit No. 3, p. 20.] Agent Jobcar's email response also includes the statement, "After I said that to Williams, I never heard him mention the word "Union" again during our interview with him." [Joint Exhibit No. 3, p. 20.] Agent Jobcar also testified consistent with his email response , that, if Williams had asked for Union representation,

he would have "automatically accommodated his request as we do in every case." [Joint Exhibit No. 3, p. 20.] The Memorandum of Interview (MOI) that is part of the Report of Investigation refers to the Agents advising Williams of his Garrity Rights and Waiver and states that, "Williams verbally advised he understood and signed the acknowledgement form." [Joint Exhibit No. 4, p. 41.] However, the MOI does not mention Grievant's question and response concerning Union representation.

The Special Agent recalls Grievant asking one time if he needed representation but not specifically asking for Union representation. Although, as implied, under such circumstances, theAgents are not obligation to stop the interview until a Union representative can be brought in, the record is not persuasive that Special Agent Jobkar's recollection of the request is more reliable than that of the Grievant. The other agent involved, Special Agent Beth Hendren, did not testify to provide her recollection of the Grievant's question about Union representation.[1]

There are also serious allegations concerning Supervisor Lowe's lack of cooperation with the Union's investigation during the grievance process, i.e., telling VMF employees they did not have to talk to the APWU and refusing, himself, to talk to the APWU Steward until the Union asked a Labor Relations Specialist to intervene. [Joint Exhibit No. 3, p. 3 and Joint Exhibit No. 4, p. 11.] Mr. Clark testified that when he first asked Lowe for a statement, he refused, that he called the Labor Relations Specialist, Eric Conklin, and that Lowe then responded that he "did not recall" in response to many of his

[1] Special Agent Jobkar's email response to Mr. Bullard is copied to Hendren, and there is no evidence in the record that she agreed, or disagreed, with Jobkar's recall of Williams' question concerning Union

questions related to the Grievances.[2] The Postal Service did not refute the allegation in its response to the Grievances dated November 9, 2015. [Joint Exhibit No. 3, p. 6 and Joint Exhibit No. 4, pp. 5-9.]

As the Postal Service contends, the charges against Grievant are serious. However, as the Union contends, the record demonstrates significant procedural error, including that management insists on using improperly obtained evidence in support of its case. The video evidence from the improperly placed surveillance is not part of the record at arbitration, as the Postal Service points out. However, the Postal Service insists that the still pictures from the video are admissible and should be considered at arbitration. During closing statement, the Postal Service maintained that the video "had no relevance." However, the record demonstrates that, without the video, there would have been no OIG investigation, no search of the Grievant's vehicle, and no emergency placement and removal. The finding distinguishes the instant case from those submitted by the Postal Service. Moreover, the cases cited by the Postal Service to show that emergency placement and removal are warranted for bringing a loaded firearm onto Postal property include findings concerning intent that are distinguishable from the findings in the instant case.

Mr. Williams testified that he intended to use the gun for target practice with a friend, that, after returning home, his girlfriend pulled her vehicle in behind the vehicle he customarily drove to work, and that he left for work forgetting that the gun was in his vehicle. He testified that he remembered the gun when the Agents asked him about searching his vehicle.

[2] For example, in response to the Union's questioning of Kevin Lowe on September 9, 2015, when asked if any other employee was caught on camera taking a G-10 Label, Mr. Lowe allegedly responded, "I don't remember." [Joint Exhibit No. 3, p. 22.]

The record demonstrates that neither the Special Agent nor management considered that the Grievant posed a threat to anyone. Special Agent Jobkar testified that Grievant "cooperated" and was "open and honest" during the interview and there was "no perceived threat." He also testified that he dismantled the gun and returned it to the Grievant after the search.[3]

The Postal Service does not deny the Union's argument (Joint Exhibit No. 3, pp. 8 and 44) that management violated CFR Part 232.1 when management failed to post, until after the incident for which the Grievant received emergency placement and removal, a prominently displayed sign advising employees that vehicles and their contents are subject to inspection when entering the restricted nonpublic area, while in the confines of the area, or when leaving the area. Contrary to Mr. Bullard's argument in his response to the Grievance, the fact that Grievant consented to the search does not excuse management's failure to comply with the CFR. Under some circumstances, e.g. where the employee intentionally brings a gun to work, management's failure to post a sign in the parking lot in violation of the CFR would not constitute reason for reversal of the emergency placement and removal. However, contrary to the position of the Postal Service, where, as in the instant case, the act was unintentional, management's failure to post the sign is a relevant consideration.

As the Postal Service maintains in its closing argument, "In Johnson City a lot of people have guns." The record demonstrates that the question posed by the Special

[3] VMF Manager Bullard concluded that Grievant was deceptive during management's Investigative Interview of the Grievant on September 2, 2015 because the Grievant responded to questions by asserting he was unaware that loaded firearms are not allowed on USPS property (Joint Exhibit No. 4, pp. 19-20). However, the record of the Investigative Interview demonstrates that Grievant explained the reason for the firearm found in his vehicle (Joint Exhibit No. 4, p. 25) in essentially the same way he had in his written statements that are contained in the record (e.g. Joint Exhibit No. 4, p. 61) and as he did at arbitration, i.e., he forgot it was there and did not intend to bring it to work.

Agent reminded Grievant that he had forgotten to remove the gun from his vehicle. A prominently displayed sign may have a similar effect on employees before they enter the employee parking lot with a firearm.

The evidence that Grievant did not intentionally have the firearm in his vehicle on postal property distinguishes the case from the one decided by Arbitrator Mark Lurie (H01N-4H-D 04178044). Arbitrator Lurie compared the case to his earlier decision in H90N-4H-D 95074828 where he ordered reinstatement because he found that the threat of violence or injury had not been proven.

In another case cited by the Postal Service, Arbitrator Christopher Miles found emergency placement and removal for just cause under the "particular circumstances" before him that included intentionally having a firearm at work. Arbitrator Miles based his decision on a record revealing that the employee had a history of encounters with the police related to altercations with his son and that police were informed that the employee left his residence with a gun. [Case No. G90C-4G-D 93039041, p. 29.]

Similarly, in the case cited by the Postal Service that was before Arbitrator Charlotte Gold (G90C-4G-D 93039041), the employee intentionally brought a handgun to work with her. Arbitrator Gold based her decision on the seriousness of the offense, stating, "What we have in this instance is an employee who persisted in bringing a weapon to her place of employment, once before receiving an official warning not to do so and twice afterwards." [G90C-4G-D 93039041, p. 9.] Also distinguishing the case before Arbitrator Gold from the instant case is her statement, "On two of these occasions, the gun was close at hand, in a purse by the Grievant's side in a lounge area." [G90C-4G-D 93039041, p. 9.] Arbitrator Gold summarized the threat posed in the case before her,

where the employee's stated intention included her apparent belief that use of the gun would be warranted if a situation arose at work that was sufficiently "life threatening" and required "extreme force" in situations that do not require such a response. [G90C-4G-D 93039041, p. 10.]

The case decided by Arbitrator Glenda August (G00C-1G-D 04171650), and cited by the Postal Service, involved the intentional carrying of a firearm to work and disposing of it in a trash can after brandishing the gun during a verbal altercation with a private citizen on the way to work, significantly unlike the facts in the instant case. Among many distinguishing characteristics in the case cited by the Postal Service and decided by Arbitrator Thomas Levak (Case No. E01N-4E-D 02241306/02205350), the evidence persuaded Arbitrator Levak that the employee's testimony, that he forgot the gun was under his car seat, was not credible.

As the Union contends, the record demonstrates that there is mitigating evidence with respect to the second charge of violating Section 667.331 of the ELM, i.e., the prohibition against the use of Postal Service property for personal enjoyment, private gain, or other unauthorized activity. The Union's position that the VMF has a lax policy with respect to the use of Postal time and property for personal use is also supported by evidence.

To some extent, the Postal Service witnesses provided reasonable explanations for the examples of personal use of Postal property, and Supervisor Lowe specifically denied on direct examination allowing employees to take "parts" for personal use. The record also demonstrates that employees have been warned about taking G-10 labels for personal

use. However, the Grievant provided other examples of improper use of Postal time and property, by management and bargaining unit members, which remain undisputed.[4]

The Manager of Vehicle Operations, Mark Long, testified that he did not consider the gasoline, which he authorized Mr. Lowe to give away, a "personal gain" for the individuals to whom it was given. If the gasoline had to be removed at a cost to the Postal Service and, by giving it away, the Postal saved such expense, as Long and Lowe testified, management's decision was reasonable, and Mr. Lowe's choice of the recipients may have been reasonable, but Mr. Long's assertion that it is not a personal gain to the person to whom it was given is not reasonable.

Mr. Lowe testified, as did Mr. Long, that Lowe had authorization from Long to take the concrete rebar left over when the gas tanks were removed. Mr. Lowe testified that he "offered it to everyone" and that he took it when no one else wanted it, again to save the cost to the Postal Service of having it removed. Mr. Lowe also testified that he allowed employees to take home tools and equipment if they ask him first and that the employees "usually had (the tools and equipment) back the next day." The Union's argument that such conduct violates Section 667.331 of the ELM, i.e., the prohibition against the use of Postal Service property for personal enjoyment and gain, is reasonable. As the Union also submits, the record does not contain a Management Instruction that allows for the violation of the ELM under the examples provided by the Union of improper use of Postal property.

[4] The Union's interview of employees during its investigation also support the allegation of a loosely enforced policy of Postal property being taken for personal use.

Although the Postal Service did not prove, or allege, that Grievant used the G-10 Labels as postage, taking the labels out of the Post office for any use, as the Grievant admits, is improper conduct. Regardless of the value of the Postal property, its personal use is prohibited. Even if, as the Grievant testified, he removed the labels from the post office for personal use before having been specifically advised by management not to do so, his conduct was improper.

The decision in this case turns primarily on management's failure to provide a fair process. Without a fair investigation, discipline fails the just cause test. The "just cause" standard also requires consistent enforcement of rules in order to justify disciplinary action. As the parties' JCIM points out, "Consistent and equitable enforcement is a critical factor, and claiming failure in this regard is one of the union's most successful defenses." [Joint Contract Interpretation Manual, p. 148.]

The Postal Service maintains that, to reinstate the Grievant, "opens up a can of worms" that will set a precedent for overturning discipline in other such cases of improper conduct. Although a regional award is not precedent-setting, the argument is an appropriate consideration in this case. The decision is not intended to condone Grievant's conduct but is intended to recognize and remedy the deficiencies that preclude the enforcement of discipline in this case. To sustain the actions by the Postal Service, or to reinstate without back pay, would permit management to inflict a severe penalty while disregarding their own responsibilities.[5] Accordingly, and for the reasons stated, the Arbitrator finds for the Union and makes the following Award.[6]

[5] The conclusions make findings and conclusions unnecessary with respect to many of the Union's arguments, including the timeliness of the discipline, the supervisor responsible for issuing discipline, concurrence, the timeliness of management's response to the Grievance, the Grievant's nine year record

AWARD

Management did not have just cause to issue the emergency placement or the removal action. Therefore, the Grievances are sustained. The Grievant shall be reinstated and made whole in accordance with the National Agreement. The Arbitrator retains jurisdiction to decide any dispute arising over the interpretation and/or implementation of the remedy.

_____

Arbitrator

DATE: August 5, 2016

without discipline as mitigating, as well as management's failure to pay the Grievant for a 30 -day period prior to removal.

[6] The decision with respect to the Grievances challenging the emergency placement and removal is consistent with the Union's position on the Grievance challenging management's improper use of the camera.

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	)	Grievant: Cheryl Hill
between	)	Post Office: Charlotte, NC
UNITED STATES POSTAL SERVICE	)	USPS case No.: K10V-4K-C 15232391
and	)	
AMERICAN POSTAL WORKERS UNION, AFL-CIO	)	APWU Case No: 62915JH1

Before:	Matthew D. Wright, Esq., Arbitrator
Appearances:	
For the U.S. Postal Service:	Stacy R. Alston, Labor Relations Specialist
For the Union:	Bruce Amey, National Arbitration Advocate
Place of Hearing:	U.S. Postal Facility 2901 Scott Futrell Drive, Charlotte, NC 28228
Date of Hearing:	August 2, 2016
Date of Award:	August 31, 2016
Relevant Contract Provision:	Article 3, 7, 13, 15, 19
Contract Year:	2010-2015
Type of Grievance:	Contract

Award Summary:

The grievance is sustained.

/s/ ***Matthew D. Wright***
Matthew D. Wright, Esq., Arbitrator
Birmingham, Alabama

ISSUES

Did Management violate Article 7.2 of the National Agreement when it allowed a Lead Automotive Technician to perform stockroom duties assigned to the Grievant?

BACKGROUND

The Grievant is a Storekeeper Auto Parts clerk at the Charlotte, North Carolina VMF. The Grievant's complaint stems from when times she is not present, especially after scheduled hours or non-scheduled days for the Grievant or when she is intentionally sent home by Management, instead of being allowed to work overtime when work is available, Lead Automotive Technicians are performing her job duties.

One of the Grievant's duties is to receive, store, and issue parts at the requests of automotive technicians and other employee's authorized to do the same. The Grievant is the storekeeper for the VMF's stockroom. The Grievant's complaint arises from the fact that Lead Automotive Techs are able to enter the stock room and perform the Grievant's duties as storekeeper and pull their own parts for specific jobs and repairs. This action has caused work, that would normally be done by the Grievant, to be done and performed by the Lead Automotive Technicians.

PARTY POSITIONS

A. POSTAL SERVICE Management:

Management asserts that the functions currently being grieved are well within the prescribed requirements of the Lead Automotive Technician position. The requirements are: the ability to prepare and maintain paperwork refers to the ability to complete forms and oversee vehicle maintenance, stockroom, safety, and environmental records for the operation of a facility to include recording estimated repair time (ERT). The requirements apply to every Lead Automotive Technician in every vehicle maintenance facility in the United States Postal Service regardless of assigned fleet or employee complement. The practice of utilizing Lead Automotive Technicians to obtain the necessary replacement parts from the VMF stockroom area is well within the requirements of the [Lead Automotive Technician] position.

B. POSTAL WORKERS Union:

The Union alleges that Management is in violation of Article 7.2 when it denied the storekeeper, who is the Grievant, the opportunity to work the number of hours that she signed up for on overtime on the OTDL. She signed up for these overtime ours before the Lead Automotive Technicians, Joe Silver and John Cangemi were assigned to perform stock room duty on June 16, 17, 18, 22, 23, 24, and 25, 2015. This is an ongoing remedy and will continue until Management is ordered to cease and desist or the grievance is adjudicated. Utilizing the Lead Automotive Tech to pull parts and perform stockroom duties is a violation of Article 7.2, crossing occupational groups[1].

DISCUSSION AND OPINION OF THE ARBITRATOR

There were no threshold issues and testimony was presented by witnesses at the hearing after each witness was sworn. There was no objection as to the arbitrability of the issue or the Arbitrator. The hearing was held on August 2, 2016 and was closed the same day with no submission of any post-hearing briefs or cites. An audio recording was made of the hearing which was deleted upon the issuance of this opinion. The parties admitted a joint exhibit of 18 pages, among other exhibits.

At primary issue, in this case, is the Grievant's complaint that she has been denied the opportunity to work overtime because lead automotive tech's Joe Silver and John Cangemi performed said work. The work in dispute is the obtaining and issuance of parts from the stock and supplies held at the local VMF in Charlotte. It was demonstrated in the hearing that the Grievant's duties absolutely include that of keeping track of and logging in and out various parts and supplies for vehicles that are in the VMF for repairs. From time to time, the Grievant would not be at the VMF to do her job, for various reasons, including be non-scheduled and regular off days. When the Grievant was not present, for whatever reasons, including being sent home by Management, and there were repairs being performed and parts were needed, the Lead Automotive Technician would pull the parts and leave notice on the Grievant's desk that a part had been removed from the local stock, which the Grievant would later log into local files and computer databases. The Union proposes that this action by the Lead Automotive Technician is a crossing occupational group action.

Management's right to cross craft lines is substantially limited. There are exceptions to this but

1[From Page 7, Joint Exhibit]

the exceptions to this rule are unusual and reasonably unforeseeable. As set out in case H8S-5F-8027 by Richard I. Bloch, Esq. on April 7, 1982, which is drawn from Richard Mittenthal's August 23, 1982 award in case H8C-2F-C 7406 (and is also referenced in Shyam Das's award in Q00T-4Q-C 06082523) it must be shown either that there was insufficient work for the classification or that work was exceptionally heavy in one occupational group and light, in another. The National Agreement does not give Management discretion to schedule across craft lines merely to maximize efficient personnel usage.

Das goes on to say in his award in Q00T-4Q-C 06082523,

> "I see no viable basis, given the language in Article 7.2, to distinguish between crossing craft assignments and cross-occupational group assignments insofar as the proscription found by Block and Mittenthal is concerned. The provisions in Article 7.2.A basically treat work in different occupational groups on an equivalent basis and Article 7.2.C specifically addresses when cross-occupational group assignments are permitted based on relative workloads. The parties' JCIM as already noted, recognizes that a cross-occupational group assignment can constitute a violation of Article 7.2.B or 7.2.C. In other words, those provisions—in the context of the general proscription applicable to cross-craft and cross-occupational group work assignments—do not just permit certain cross-occupational group assignments, they prohibit others "

Under these circumstances, as Das put it, a cross-occupational assignment not *permitted* under Article 7.2.B or C *must be clearly authorized under some other provision of the National Agreement* in order not to constitute a violation of those provisions. In applying this logic, the Postal Service may not detail a maintenance craft employee to perform higher level work in a different occupational group to avoid paying overtime to an employee within that same occupational group.

Article 7.2.B and 7.2.C reads:

> B. In the event of insufficient work on any particular day or days in a full-time or part-time employee's own scheduled assignment, management may assign the employee to any available work in the same wage level for which the employee is qualified, consistent with the employee's knowledge and experience, in order to maintain the number of work hours of the employee's basic work schedule.
>
> C. During exceptionally heavy workload periods for one occupational group, employees in an occupational group experiencing a light workload period may be assigned to work in the same wage level, commensurate with their capabilities, to the heavy workload area for such

time as management determines necessary.

Here, in applying the words of page 17 of case Q00T-4Q-C 06082523 and Article 7.2.B and 7.2.C, the assignment must be to work "in the same wage level".

In considering all the facts and evidence admitted by both parties, the grievance is due to be sustained.

AWARD

The grievance is sustained.

CASE CITE INDEX

The following cases were submitted by the respectively noted party in support of their position and considered before the award was issued by the Arbitrator. They are listed in random order.

Submitted by Management:

Case	Award Date	Arbitrator
1. E00T-4E-C 03166624	January 15, 2007	Linda DiLeone Klein
2. A90V-1A-C 94056874	August 30, 2000	Thomas J. Fritsch
3. A00V-4A-C 05139930	May 9, 2006	Thomas J. Fritsch
4. B06V-4B-C 09359788	April 27, 2012	Timothy Buckalew

Submitted by the Union:

Case	Award Date	Arbitrator
1. Q00T-4Q-C 06082523	August 6, 2014	Shyam Das
2. H8S-5F-C 8027	April 7, 1982	Richard I. Bloch, Esq.
3. H8C-2F-C 7406	August 23, 1982	Richard Mittenthall

REGULAR ARBITRATION PANEL

In the Matter of Arbitration	)	Grievant: Keith Childers
	)	
Between	)	Post Office: Hickory VMF
	)	
UNITED STATES POSTAL SERVICE	)	USPS Case No. K15V-4K-D 17091628
	)	
and	)	APWU Case No. TS072016VMF
	)	
AMERICAN POSTAL WORKERS UNION, AFL-CIO	)	

BEFORE: Jane Desimone, Esq., Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Andrew T. Smith, Labor Relations Specialist
For the Union:	Bruce Amey, APWU Advocate
Place of Hearing:	Hickory, North Carolina
Date of Hearing:	May 25, 2017
Close of Record:	June 2, 2017
Relevant Contract Provisions:	Articles 16.1
Type of Grievance:	Discipline - Removal
Contract Year:	2015-2018

AWARD: The grievance is sustained in part. The Postal Service lacked just cause to issue the Grievant a Notice of Removal. The action taken was punitive in nature as it did not properly consider all relevant circumstances. The Grievant's removal is reduced to a 14-Day Suspension.

Date of Award: July 10, 2017

Jane Desimone, Esq.,
Arbitrator

ADMINISTRATION

By letter dated March 28, 2017, the undersigned was notified by the parties of her selection to hear and decide a matter then in dispute between them. Accordingly, a hearing was held in Hickory, North Carolina on May 25, 2017, at which the parties were provided with a full opportunity to present evidence, both written and oral, and to argue their respective positions. At the conclusion of the hearing, the parties presented closing arguments, after which the record was closed. This matter is now ready for final disposition in accordance with the parties' grievance arbitration procedure.

GRIEVANCE AND QUESTION TO BE RESOLVED

On or about July 25, 2016, the American Postal Workers Union, Winston Salem Local 523 (hereafter referred to as the "Union") filed a Step 2 Grievance Appeal Form with the United States Postal Service (hereafter referred to as the "Postal Service" or "Management") on behalf of the Grievant, Keith Childers. The grievance was filed in protest of a Notice of Removal issued to the Grievant on June 30, 2016, alleging that the Grievant was discharged without just cause for multiple reasons in violation of the parties' collective bargaining agreement[1]. The Union requested the following "Corrective Action" (Joint Ex. 3):

> The USPS to revert the letter (Notice of Removal) severed [sic] on 07/15/2016 to Mr. Keith Childers and return the employee back to pay duty status with full back pay and commensurate benefits. Make the Grievant whole in every way.

The issue to be determined is whether the Postal Service had just cause to issue the Grievant a Notice of Removal dated June 30, 2016. If not, what shall the remedy be?

PERTINENT PROVISIONS OF THE AGREEMENT

The following pertinent provision of the Agreement was cited by the parties in support of their respective positions (Joint Ex. 1):

ARTICLE 16

[1] COLLECTIVE BARGAINING AGREEMENT Between American Postal Workers Union, AFL-CIO and U.S. Postal Service, 2015-2018 (hereafter referred to as the "Agreement").

DISCIPLINARY 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.

FACTUAL BACKGROUND

The Grievant has been employed with the Postal Service for nineteen years. At the time of his discharge, he was employed at the Hickory, North Carolina Vehicle Maintenance Facility (VMF) as full-time regular Auto Technician. There was a total of four Auto Technicians assigned to the facility, with a Supervisor and Manager located in Charlotte, North Carolina. By notice dated June 30, 2016, the Grievant was informed of his removal effective thirty (30) days from receipt of the notice, charged as follows (Joint Ex. 3):

Charge 1: Improper Conduct Specifically Misuse of a Government Vehicle

You are currently assigned to your present position as a full-time regular employee at the Hickory VMF.

I received information regarding allegations of improper use of the government vehicle. On March 11, 2016, you were observed leaving the facility at approximately ten minutes to twelve. You were with Mr. Cochran and Mr. Bennett. The three of you arrived at El Paso restaurant and left at 1217. All of you then went to a store where lottery tickets were purchased. You returned to the VMF at 1238 and clock rings show you had lunch rings from 1300-1400. You did not have permission to take an early lunch.

On March 15, you were observed leaving with Mr. Childers at 12:00 and returned at approximately 12:30. Clock rings confirmed you clocked for lunch from 1250-1350.

You were notified you were being emergency placed pending further investigation. On this same date, your co-worker, Mr. Cochran admitted to me the three of you were guilty of misusing the government vehicle and swiping each other's badges at the time clocks.

Charge 2: Improper Conduct Specifically Misuse of Employee Time Cards

> You were observed on several occasions using Mr. Cochran's and Mr. Bennett's time card to swipe them in for begin tours and lunch hits. You first stated this was a mistake. You hit has badge by accident. When we discussed this further you elaborated and said the following: the badge was worn, standard operating procedure and reiterated it was a mistake.
>
> There were occasions when you extended your lunch and failed to submit a PS Form 3971 which is a request for or notification of an absence. You failed to notify me of your extended lunches, your reporting late or leaving early and you failed to submit a 3971. You stated Management did this same behavior. Management went and purchased lottery tickets. It was a standard practice.
>
> I reviewed all of your clock rings from December until March and there were numerous occasions where you left for lunch and clocked for lunch upon your return. Further to note, you are authorized thirty minutes for lunch; yet, on numerous occasions, you extended your lunch. You failed to notify Management at any time requesting to extend your lunch. I heard all of your responses and I checked to see if any such policy existed or whether or not the previous Managers allowed this practice to go on. I spoke with Managers Bennett, Senecal and Freemen and each stated you were never instructed this was the practice or the policy nor was this ever done in their presence.
>
> (Emphasis in original)

The Notice of Removal was issued by Supervisor Barry Gaither. Mr. Gaither testified that he first learned of a problem at the Hickory VMF in November of 2015, as reported by one of the four Auto Technicians at the facility, Jim Merique. He recalled that Mr. Merique reported that the other Auto Technicians were using a postal vehicle for personal business and were improperly swiping each in and out of work. Following multiple reports from Mr. Merique, Supervisor Gaither visited the Hickory VMF on March 9, 10, 11 and 15, 2016. These visits were to observe employee conduct and were not known to the employees. Manager Jo Anna Freeman accompanied Mr. Gaither on each of these clandestine visits to the VMF, during which they observed the employees, took photographs and checked clock rings.

Supervisor Gaither testified during each of the visits, he and Ms. Freeman saw the Grievant and two other VMF employees, Auto Technician Keith Childers[2] and Custodian Scott Everhart,

[2] Keith Childers was the grievant in a separate grievance heard at arbitration before the undersigned on May 25, 2017 (Case No. K15V-4K-D 17091628). The disposition of Mr. Childers' grievance is the subject of a separate Award.

leaving the building in a postal vehicle in order to go to breakfast or lunch. They were also observed buying and scratching off lottery tickets on multiple occasions. Mr. Gaither testified that a review of the Grievant's clock rings revealed that his clock in and clock out times for lunch did not match the time that he was observed leaving the facility. Following the investigation, all three employees were placed on Emergency Suspension on March 15, 2016. According to Mr. Gaither, at the time of his suspension, Auto Technician Shannon Cochran stated that he and the two other employees were guilty of improper use of time badges and improper use of government vehicles.

Multiple Pre-Disciplinary Interviews (PDIs) were conducted with the Grievant. Also in attendance were Shop Steward Tracy Spencer, Supervisor Barry Gaither and Supervisor Kenny Shaw. During the PDIs, the Grievant was questioned regarding his clocking activities and use of a postal vehicle on multiple occasions dating back to December 9, 2015. Throughout the interviews, the Grievant's response to these inquiries was that they were in accordance with standard operating procedures, past practice, common practice or that he did not know why he acted as he did. The Grievant further indicated that a prior Manager, Thomas Pierce, would typically take everyone to lunch in a postal vehicle when he visited the facility each Friday. He also asserted that it was an accepted practice for employees to swipe each other's badges for lunch breaks. The Grievant stated that this was a common activity since when he began at the VMF in 2007.

Supervisor Gaither testified that there is no written policy supporting the Grievant's assertion that taking a government vehicle for personal use and swiping another employee's time card are permitted activities. He emphasized that all employees are taught that they are not allowed to swipe each other badges and that using a government vehicle for personal use is prohibited. He maintained that after reviewing the Grievant's responses during the multiple PDIs and statements provided by several managers, he concluded that the Grievant engaged in the alleged misconduct. He also concluded that the Grievant's removal was appropriate because he knowingly broke Postal Service rules. In his opinion, the breaking of any rule provides sufficient basis for an employee's removal. He did not consider this to be a correctable offense. Mr. Gaither further believed that the Grievant did not show remorse for his actions and was not truthful during the multiple PDIs. Mr. Gaither acknowledged that Auto Technician Jim Merique also stated that he engaged in similar activities in the past. However, because Mr. Merique stopped doing so approximately two years prior, Mr. Gaither did not seek to discipline him. Manager Jo Anna Freeman was the concurring official and agreed that the Grievant's removal was appropriate.

The Grievant testified that he fully participated in the multiple PDIs that were conducted. He recalled that throughout the investigation process he repeatedly explained that both the use of a government vehicle and the time card practices were in accordance with the past practice at the facility. He denied at any time using the terms "Standard Operating Procedure" and "SOP", both of which he asserted were added by Supervisor Gaither. The Grievant testified that both practices were consistent with what was done in the past with the previous Manager, who would take everyone out to lunch in a postal vehicle and then stop to purchase lottery tickets. He testified that all employees engaged in the same practices, including Auto Technician Jim Merique until approximately three months before this investigation began.

CONTENTIONS OF THE PARTIES

Postal Service

The Postal Service contends that it had just cause to discharge the Grievant. With the documentary evidence and testimony presented, it asserts that the Grievant acted as charged – using a government vehicle for personal use and improperly using employee timecards. It maintains that the investigation revealed that the Grievant routinely used a postal vehicle to go to lunch and on occasion purchase lottery tickets. He also either swiped other employees' timecards or allowed other employees to swipe his time card. It is pointed out that these actions by the Grievant's were observed and documented during the investigation conducted from March 9, 2015 through March 15, 2015. The Postal Service maintains that the Grievant was well aware that these actions were prohibited. As it believes that it met its burden of proof through a preponderance of evidence, the Postal Service asks that the grievance be denied in its entirety.

Union

The Union contends that the Postal Service did not met the burden of proof to prevail in this matter. Because this involves a removal action, it argues that the appropriate standard of proof is beyond a reasonable doubt. It characterizes the majority of the evidence presented by the Postal Service as based upon assumptions and conclusions, with no hard evidence that the Grievant acted as charged. The Union also raises various procedural errors as bars to the Grievant's due process rights, including the fact that the concurring official was also the Step 2 Designee, the Postal Service's placement of the Grievant in a non-pay status since March 15, 2016, and the lack of an effective date on the Notice of Removal.

The Union views the Grievant's actions as correctable misconduct rather than conduct requiring his removal. It points out that Supervisor Gaither refused to consider any lesser discipline other than removal, which it asserts was in error. Contrary to the assertions of the Postal Service, the Union views the Grievant as cooperative throughout the investigation, admitting his actions when confronted. As a twenty-year employee, it is argued that the Grievant should be given an opportunity to continue his employment. Because it views the Grievant's removal as punitive in nature, the Union asks that it be rescinded, with the Grievant returned to work and made whole in all respects.

FINDINGS AND DISCUSSION

The issue in this matter is whether the Grievant, Keith Childers, was issued a Notice of Removal for just cause, in accordance with the Agreement. Article 16.1 provides the basic principle that no employee can be disciplined without just cause. This standard places a significant burden of proof on the Postal Service, requiring two prongs of convincing evidence. First, the Postal Service must establish that the Grievant engaged in the misconduct for which he was disciplined. After this evidentiary hurdle is cleared, it must then provide proof that the discipline was corrective rather than punitive in nature, a requirement that is specifically set forth in the contractual language of Article 16.1. Simply stated, this requires that the discipline be reasonable under the circumstances, in light of all relevant and mitigating factors.

The Grievant was discharged effective thirty days from the date he received the Notice of Removal, on approximately July 30, 2016. This removal was based on two charges of misconduct, namely, 1) improper use of a government vehicle and 2) misuse of employee time cards. In the Notice of Removal, the Postal Service alleged that the Grievant and two other employees repeatedly used a postal vehicle to go to lunch and pick up lottery tickets. It further alleged that the same employees including the Grievant routinely swiped each other's time cards, thereby indicating that the Grievant started work before he actually appeared at work and that he was at work when he as actually at lunch.

These allegations were based upon an investigation conducted by Supervisor Barry Gaither with the assistance of Manager Jo Anna Freeman over the course of several months, from December 9, 2015 through March 11, 2016. During this time period, Supervisor Gaither documented that the Grievant acted as charged, using a postal vehicle for personal errands and either swiping other employees' time cards or permitting them to swipe his time card.

Significantly, when placed on Emergency Suspension on March 15, 2016, the Grievant made the statement that he and the two other employees were guilty of the alleged misconduct. An investigation was then conducted, during which the allegations were fully supported by the evidence gathered. As the Grievant's admission was not refuted by any of the evidence or testimony presented and the documentary evidence supported the two charges, it is concluded that the Grievant acted as charged.

With the first prong of the evidentiary burden met by the evidence presented, the question then becomes whether the Grievant's discharge was reasonable under the circumstances. The record reveals that there are significant circumstances in this case that must be considered in determining the reasonableness of the disciplinary action taken. In particular, there is strong evidence of a history of the misconduct being permitted or condoned in the Hickory VMF. There are only four employees stationed at the VMF, three of which were charged the same misconduct. The fourth employee, Auto Technician Jim Merique, reported the conduct of the other three employees while acknowledging that he also engaged in the same misconduct in the past. The Grievant testified that a prior Manager routinely took employees out to lunch on Fridays in a postal vehicle and permitted employees to clock each other in and out. This testimony was not refuted and essentially remained unchallenged. While the Manager at the facility has since been replaced, both the current supervisor and manager – Supervisor Barry Gaither and Manager Jo Anna Freeman – are located in Charlotte and do not often visit the facility. All of these circumstances do not excuse the Grievant's conduct. However, because the same conduct was permitted by a prior Manager, was not stopped by the current management, and was engaged in by all employees of the VMF, there is an explanation for the Grievant's conduct.

Another significant factor to be considered is that the Grievant acknowledged his wrongdoing. Contrary to the assertions of the Postal Service, the Grievant acknowledged his actions throughout the ensuing investigation. While the Grievant attempted to explain his behavior by referring to "standard operating procedures", this term was not used a legal term, but rather, as an effort to explain what he considered to be the longstanding practice at the facility. The Grievant repeatedly communicated this explanation to Supervisor Barry Gaither throughout the investigation and multiple PDIs.

Despite these two significant factors being well established during the investigation, it is apparent that they were not meaningfully considered by the Postal Service in determining the level

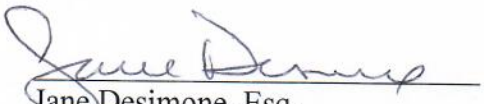
of discipline to impose. There is also no evidence that the Grievant's nineteen years of employment and lack of a disciplinary record were given any weight in the decision. To the contrary, Supervisor Gaither testified that in his view, because the Grievant knowingly broke a Postal Service rule his removal was the only appropriate remedy. This conclusion provides the necessary evidence that the discipline imposed was not reasonable but rather punitive in nature, as the just cause standard requires consideration of relevant circumstances and mitigating factors. In light of all of the circumstances presented, it is concluded that the Grievant's conduct was correctible and thereby appropriate for lesser discipline than removal.

Based upon all of the evidence presented, it is concluded that the Postal Service's actions in issuing the Grievant a Notice of Removal were without just cause, in violation of Article 16.1 of the Agreement[3]. While the Grievant knowingly did not follow proper procedures in using a postal vehicle for personal use and engaged in improper use of time cards, his conduct did not warrant the punitive remedy of removal. After careful consideration, it is concluded that the appropriate disciplinary response is a fourteen-day suspension. With this suspension being the final step on the progressive disciplinary procedure, the Grievant should be well aware that his conduct will not be tolerated and that he needs to fully abide by postal rules and regulations. At the same time, the Grievant is being provided an opportunity to continue his postal employment.

[3] In reaching this conclusion, the undersigned recognizes that the Union also raised various procedural errors in support of its position that the Grievant's due process rights were violated. These errors are not addressed in this Award due to the decision being based on the merits of the grievance.

AWARD

The grievance is sustained in part. The Notice of Removal dated June 30, 2016 is hereby reduced to a Fourteen-Day Suspension. The Grievant is to be returned to work and made whole for all lost wages and benefits sustained after taking into account this Fourteen-Day Suspension, less any interim earnings or benefits received. The undersigned shall retain jurisdiction should an issue arise in the implementation of this Award.



Jane Desimone, Esq.
Arbitrator
July 10, 2017

REGULAR ARBITRATION PANEL

In the Matter of Arbitration	)	Grievant: Shannon Cochran
	)	
Between	)	Post Office: Hickory VMF
	)	
UNITED STATES POSTAL SERVICE	)	USPS Case No. K15V-4K-D 16853880
	)	
and	)	APWU Case No. TS06HVMF2016
	)	
AMERICAN POSTAL WORKERS UNION, AFL-CIO	)	

BEFORE: Jane Desimone, Esq., Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Andrew T. Smith, Labor Relations Specialist
For the Union:	Bruce Amey, APWU Advocate
Place of Hearing:	Hickory, North Carolina
Date of Hearing:	May 25, 2017
Close of Record:	June 2, 2017
Relevant Contract Provisions:	Articles 16.1
Type of Grievance:	Discipline - Removal
Contract Year:	2015-2018

AWARD: The grievance is sustained in part. The Postal Service lacked just cause to issue the Grievant a Notice of Removal. The action taken was punitive in nature as it did not properly consider all relevant circumstances. The Grievant's removal is reduced to a 14-Day Suspension.

Date of Award: July 10, 2017

Jane Desimone

Jane Desimone, Esq.,
Arbitrator

ADMINISTRATION

By letter dated March 28, 2017, the undersigned was notified by the parties of her selection to hear and decide a matter then in dispute between them. Accordingly, a hearing was held in Hickory, North Carolina on May 25, 2017, at which the parties were provided with a full opportunity to present evidence, both written and oral, and to argue their respective positions. At the conclusion of the hearing, the parties presented closing arguments, after which the record was closed. This matter is now ready for final disposition in accordance with the parties' arbitration procedure.

GRIEVANCE AND QUESTION TO BE RESOLVED

On or about July 21, 2016, the American Postal Workers Union, Winston Salem Local 523 (hereafter referred to as the "Union") filed a Step 2 Grievance Appeal Form with the United States Postal Service (hereafter referred to as the "Postal Service" or "Management") on behalf of the Grievant, Shannon Cochran. The grievance was filed in protest of a Notice of Removal issued to the Grievant on June 27, 2016, alleging that the Grievant was discharged without just cause for multiple reasons, in violation of the parties' collective bargaining agreement[1]. The Union requested the following "Corrective Action" (Joint Ex. 3):

> The USPS to revert the letter (Notice of Removal) severed [sic] on 07/08/2016 to Mr. Shannon Cochran and return the employee back to pay duty status with full back pay and commensurate benefits.
> Make the Grievant whole in every way.

The issue to be determined is whether the Postal Service had just cause to issue the Grievant a Notice of Removal dated June 27, 2016. If not, what shall the remedy be?

PERTINENT PROVISIONS OF THE AGREEMENT

The following pertinent provision of the Agreement was cited by the parties in support of their respective positions (Joint Ex. 1):

[1] COLLECTIVE BARGAINING AGREEMENT Between American Postal Workers Union, AFL-CIO and U.S. Postal Service, _____, 2015 through _____, 2018 (hereafter referred to as the "Agreement").

ARTICLE 16
DISCIPLINARY 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 the 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.

FACTUAL BACKGROUND

The Grievant began his employment with the Postal Service on September 14, 1997. At the time of his discharge, he was employed at the Hickory, North Carolina Vehicle Maintenance Facility (VMF) as an Auto Technician. There was a total of four Auto Technicians assigned to the facility, with a Supervisor and Manager located in Charlotte, North Carolina. By notice dated June 27, 2016, the Grievant was informed of his removal effective thirty (30) days from receipt of the notice, charged as follows (Joint Ex. 3):

Charge 1: Improper Conduct Specifically Misuse of a Government Vehicle

You entered on duty on September 13, 1997 and you are currently assigned to your present position as a full-time regular employee at the Hickory VMF.

I received information regarding allegations of improper use of the government vehicle. On March 11, 2016, I, along with VMF Manager JoAnn Freeman arrived at the Hickory VMF. At 1150, you were entering the government vehicle, without permission, with employees Bennett and Childers. You were seen leaving you place of assignment where the three of you traveled to El Paso Mexican Restaurant on N. Center and 17th Avenue. All of you left the restaurant at 1217 and went to a store to purchase lottery tickets. You returned to the VMF at 1238. A review of your clock rings showed you clocked out for lunch from 1300 until 1400 and during that time frame you were observed playing scratch off lotto.

On March 15, 2016, we arrived at 6:30 AM and you were observed leaving in the government vehicle, without permission, at 7:04 AM. You went to a restaurant and got food and brought it back to the VMF. During this time, you were not on a scheduled repair route.

Charge 2: Improper Conduct Specifically Misuse of Employee Time Cards

From December until February (SEE ATTACHED), you were being clocked in by Mr. Childers. He was clocking your begin tour at 0700. You were reporting after 7:00 and on one occasion you reported between the hours of 0800-0850. During your PDI, you stated you were not aware he was clocking you in. There were also times you were clocking in Mr. Childers for lunch. When this was brought up, you stated this was the SOP, you couldn't remember and past practice.

There were occasions when you extended your lunch and failed to submit a PS Form 3971 which is a request for or notification of an absence. You failed to notify me of your extended lunches, your reporting late or leaving early and you failed to submit a 3971. Again your reply was you couldn't remember.

(Emphasis in original)

The Notice of Removal was issued by Supervisor Barry Gaither. Mr. Gaither testified that he first learned of a problem at the Hickory VMF in November of 2015, as reported by one of the four Auto Technicians at the facility, Jim Merrique. He recalled that Mr. Merrique reported that the other Auto Technicians were using a postal vehicle for personal business and were improperly swiping each in and out of work. Following multiple reports from Mr. Merrique, Supervisor Gaither visited the Hickory VMF on March 9, 10, 11 and 15, 2016. These visits were to observe employee conduct and were not known to the employees. Manager JoAnn Freeman accompanied Mr. Gaither on each of these clandestine visits to the VMF, during which they observed the employees, took photographs and checked their clock rings.

Supervisor Gaither testified during each of the visits, he and Ms. Freeman saw the Grievant and two other VMF employees, Auto Tech Keith Childers[2] and Custodian Scott Everhart, leaving the building in a postal vehicle in order to go to either breakfast or lunch. They were also observed buying and scratching off lottery tickets on multiple occasions. Mr. Gaither testified that a review of the Grievant's clock rings revealed that his clock in and out times for lunch did not match the time that he was observed leaving the facility. Following the investigation, all three employees were placed on Emergency Suspension on March 15, 2016. According to Mr. Gaither, at the time of his suspension, the Grievant stated that he and the two other employees were guilty of improper use of time badges and improper use of government vehicles.

[2] Keith Childers was the grievant in a separate grievance heard at arbitration before the undersigned on May 25, 2017 (Case No. K15V-4K-D 17091628).

Four pre-disciplinary interviews (PDIs) were conducted with the Grievant – on March 25, 2016, April 5, 2016, April 19, 2016, and June 10, 2016. Also in attendance were Shop Steward Tracy Spencer and Supervisor Barry Gaither and Supervisor Tracy Spencer. During the PDIs, the Grievant was questioned regarding his clocking activities and use of a postal vehicle on multiple occasions dating back to December 9, 2015. Throughout the interviews, the Grievant's response to these inquiries was that they were in accordance with standard operating procedures, past practice, common practice or that he did not know why he acted as he did. The Grievant further indicated that a prior Manager, Thomas Pierce, would typically take everyone to lunch in a postal vehicle when he visited the facility each Friday. He also asserted that it was an accepted practice for employees to swipe each other's badges for lunch breaks. The Grievant stated that this was a common activity since when he began at the facility in 2012.

Supervisor Gaither testified that there is no written policy supporting the Grievant's assertion that taking a government vehicle for personal use and swiping another employee's time card are permitted activities. He emphasized that all employees are taught that they are not allowed to swipe each other badges and that using a government vehicle for personal use is prohibited. He maintained that after reviewing the Grievant's responses during the multiple PDIs and statements provided by several managers, he concluded that the Grievant engaged in the alleged misconduct. He also concluded that the Grievant's removal was appropriate because he knowingly broke postal rules and in his opinion, the breaking of any rule provides sufficient basis for an employee's removal. He did not consider this to be a correctable offense. Mr. Gaither further believed that the Grievant did not show remorse for his actions and was not truthful during the multiple PDIs. Mr. Gaither noted that Auto Technician Jim Merrique also stated that he engaged in similar activities in the past. However, because Mr. Merrique stopped doing so two years prior, Mr. Gaither did not seek to discipline him. Manager JoAnn Freeman was the concurring official on the removal and agreed that the Grievant's removal was appropriate.

The Grievant testified that he fully participated in the multiple PDIs that were conducted. He recalled that throughout the investigation process he repeatedly explained that both the use of a government vehicle and the time card practices were in accordance with the past practice at the facility. He denied at any time using the terms "Standard Operating Procedure" and "SOP", both of which he asserted were added by Supervisor Gaither. The Grievant asserted that both practices were consistent with what was done in the past with the previous Manager, who would take

everyone out to lunch in a postal vehicle and then stop to purchase lottery tickets. He testified that all employees engaged in the same practices, including Auto Technician Jim Merrique until three months before this investigation began.

CONTENTIONS OF THE PARTIES

Postal Service

The Postal Service contends that it had just cause to discharge the Grievant. With the documentary evidence and testimony presented, it asserts that the Grievant acted as charged – using a government vehicle for personal use and improperly using employee timecards. It asserts that the investigation conducted revealed that the Grievant routinely used a postal vehicle to go to lunch and on occasion purchase lottery tickets. He also either swiped other employees' timecards or allowed other employees to swipe his timecard. It is pointed out that these actions by the Grievant's were observed and documented during the period March 9, 2015 through March 15, 2015. The Postal Service maintains that the Grievant was well aware that these actions were prohibited. As it believes that it met its burden of proof through a preponderance of evidence, the Postal Service asks that the grievance be denied in its entirety.

Union

The Union contends that the Postal Service did not met the burden of proof to prevail in this matter. Because this involves a removal action, it argues that the appropriate standard of proof is beyond a reasonable doubt. It is asserted that the majority of the evidence presented by the Postal Service is based upon assumptions and conclusions, with no hard evidence that the Grievant acted as charged. The Union also raises various procedural errors as bars to the Grievant's due process rights, including the concurring official being the Step 2 Designee, the Postal Service's placement of the Grievant in a non-pay status since March 15, 2016, and the lack of an effective date on the Notice of Removal.

The Union views the Grievant's actions as correctable misconduct rather than conduct requiring his removal. It points out that Supervisor Gaither refused to consider any lesser discipline other than removal, which it asserts was in error. Contrary to the assertions of the Postal Service, the Union views the Grievant as cooperative throughout the investigation, admitting his actions when confronted. As a twenty-year employee, it is argued that the Grievant should be given an opportunity to continue his employment. Because it views the removal as punitive in nature, the Union asks that it be rescinded, with the Grievant returned to work and made whole.

FINDINGS AND DISCUSSION

The issue in this matter is whether the Grievant, Shannon Cochran, was issued a Notice of Removal for just cause, in accordance with the Agreement. Article 16.1 provides the basic principle that no employee can be disciplined without just cause. This standard places a significant burden of proof on the Postal Service, requiring two prongs of evidence. First, the Postal Service must establish that the Grievant engaged in the misconduct for which he was disciplined. After this evidentiary hurdle is cleared, it must then provide proof that the discipline was corrective rather than punitive in nature, a requirement that is specifically set forth in the contractual language. This requires that the discipline be reasonable under the circumstances, in light of all relevant and mitigating factors.

The Grievant was discharged effective thirty days from the date he received the Notice of Removal, on approximately July 27, 2016. This removal was based on two charges of misconduct, namely, 1) improper use of a government vehicle and 2) misuse of employee time cards. The Postal Service alleged that the Grievant and two other employees repeatedly used a postal vehicle to go to lunch and pick up lottery tickets. It further alleged that the same employees including the Grievant routinely swiped each other's time cards, thereby indicating that the Grievant started work before he actually appeared at work and that he was at work when he as actually at lunch.

These allegations were based upon an investigation conducted by Supervisor Barry Gaither with the assistance of Manager JoAnn Freeman over the course of several months, from December 9, 2015 through March 11, 2016. During this time period, Supervisor Gaither documented that the Grievant acted as charged, using a postal vehicle for personal errands and either swiping other employees' timecards or permitting them to swipe his time card. Significantly, when placed on Emergency Suspension on March 15, 2016, the Grievant made the statement he and the two other employees were guilty of the alleged misconduct. An investigation was then conducted, during which the allegations were fully supported by the evidence gathered. As the Grievant's admission was not refuted by any of the evidence or testimony presented and the documentary evidence supported the two charges, it is concluded that the Grievant acted as charged.

With the first prong of the evidentiary burden met by the evidence presented, the question then becomes whether the Grievant's discharge was reasonable under the circumstances. The record reveals that there are significant circumstances in this case that must be considered in determining the reasonableness of the action taken. In particular, there is strong evidence of a

history of the misconducted being permitted or condoned in the Hickory VMF. There are only four employees stationed at the VMF, three of which were charged the same misconduct. The fourth employee, Auto Technician John Merrique, reported the conduct of the other three employees while acknowledging that he also engaged in the same misconduct for a prolonged period of time. The Grievant testified that a prior Manager routinely took employees out to lunch on Fridays in a postal vehicle and permitted employees to clock each other out. This testimony was not refuted. While the Manager at the facility has since been replaced, both the current supervisor and manager are located in Charlotte and do not often visit the facility. All of these circumstances do not excuse the Grievant's conduct. However, because the same conduct was permitted by a prior Manager and not stopped by the current management and it was engaged in by all employees of the VMF, there is an explanation for the Grievant's conduct.

Another significant factor to be considered is that the Grievant acknowledged his wrongdoing. Contrary to the assertions of the Postal Service, he admitted that he was guilty as charged from when he was confronted when placed on Emergency Suspension on March 16, 2016 and continued to acknowledge his actions throughout the ensuing investigation. While the Grievant attempted to explain his actions by referring to "standard operating procedures", this term was not used a legal term, but rather, in an effort to explain what was the longstanding practice at the facility. The Grievant repeatedly attempted to communicate this explanation to Supervisor Barry Gaither throughout the investigation.

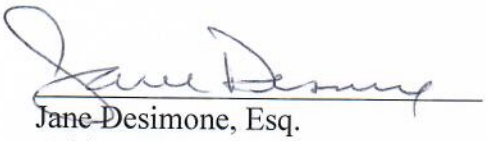
Despite these two significant factors being well established during the investigation, they were not considered by the Postal Service in determining the level of discipline to impose. There is also no evidence that the Grievant's twenty years of employment and lack of a disciplinary record were given any weight in the decision. To the contrary, Supervisor Gaither testified that in his view, because the Grievant knowingly broke a rule his removal was the only appropriate remedy. This conclusion provides the necessary evidence that the discipline was not reasonable, but rather punitive in nature. In light of the circumstances and mitigating factors, it is concluded that the Grievant's conduct was correctible and thereby appropriate for lesser discipline than removal.

The Postal Service's actions in issuing the Grievant a Notice of Removal were without just cause, in violation of Artile 16.1 of the Agreement[3]. While the Grievant knowingly did not follow proper procedures in using a postal vehicle for personal use and engaged in improper use of time cards, his conduct did not warrant the punitive remedy of removal. After careful consideration, it is concluded that the appropriate disciplinary response was a fourteen-day suspension. With this suspension being the final step on the progressive disciplinary procedure, the Grievant should be well aware that his conduct will not be tolerated and that he needs to fully abide by postal rules and regulations. At the same time, the Grievant is being provided an opportunity to continue his postal employment.

[3] In reaching this conclusion, the undersigned recognizes that the Union also raised various procedural errors in support of its position that the Grievant's due process rights were violated. These errors are not addressed in this Award due to the decision being based on the merits of the grievance.

AWARD

The grievance is sustained in part. The Notice of Removal dated June 27, 2016 is hereby reduced to a Fourteen-Day Suspension. The Grievant is to be returned to work and made whole for a lost wages and benefits sustained after taking into account this Fourteen-Day Suspension, less any interim earnings or benefits received. The undersigned shall retain jurisdiction should an issue arise in the implementation of this Award.



Jane Desimone, Esq.
Arbitrator
July 10, 2017

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	)	Grievant: Class
between	)	Post Office: Atlanta, GA
UNITED STATES POSTAL SERVICE	)	USPS Case No.: K10V-1K-D 13422685 K10V-1K-D 11462762 K10V-1K-C 12338136
and	)	APWU Case No.: 20122208 20111139 20121584
AMERICAN POSTAL WORKERS UNION AFL-CIO	)	

BEFORE: Frank E. Giordano, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Edna Bohannon, Presenting, L/R Specialist

For the Union: Bruce Amey, Presenting

Place of Hearing: Atlanta, GA

Date of Hearing: March 2, 2017

Date of Award: April 12, 2017

Submissions: March 12, 2017

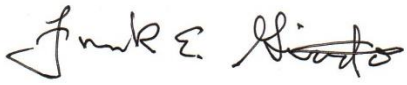
Relevant Contract Provision: Article 15.1

Contract Year: 2015 - 2018

Type of Grievance: Class

AWARD SUMMARY

That for the reasons set forth herein the grievances are arbitrable.



Frank E. Giordano

THRESHOLD ARGUMENT

Were the Attached grievances untimely filed in violation of Article 15.2?

ARBITRATION AWARDS

UNITED STATES POSTAL SERVICE

Arbitrator Debra Simmons Neveu	Case # G10V-1C-C 14376136/14376137
Arbitrator Zachary C. Morris	Case # C10V-1C-C 13414001

UNION

Arbitrator Benjamin Aaron	Case # H8T-5C C 11160
Arbitrator Dana Edward Eischen	Case # I94M-1I-C 98072898

POSITION OF THE PARTIES

UNITED STATES POSTAL SERVICE

The Employer says this grievance was received ECM September 23, 2016 at the Step 2 level notifying the Labor Staff it was appealed to Step 3. Also, the Service asserts that according to the file, the Union, without any supporting documentation, allegedly appealed the grievance to Step 2 Labor Specialist Jacquese Thompson on an unspecified date. Jacquese Thompson left the Postal Service in May of 2015. Management says there is no record of this grievance having ever been received at Step 2 on or about the date of the Step 1 denial dated December 11, 2012. Also, says the Service, Article 15.4.B of the National Agreement requires the Union to maintain the

contractually agreed upon time limits. Any failure of the part of the Union to do so constitutes a waiver of its rights to pursue the grievance.

The Service states that whether the grievance was untimely appealed to Step 2 or timely appealed to Step 2 and then not pursued for four (4) years when they decided to appeal the grievance to Step 3 on September 19, 2016 the Union has, in accordance with the National Agreement, waived its rights to the grievance process.

In addition, the Service argues that the Step 1 denial was December 11, 2012, a timely grievance appeal to Step 2 would have been filed on/or before December 21, 2012. The Union did not state that there was a Step 2 file until September 19, 2016 when the appealed the grievance to Step 3; four (4) years later. The Union did not present any evidence in the file other than their opinion to support this claim.

Furthermore, says the Employer, the alleged incident was November 13, 2012, the Union did not file an appeal Step 2 or to Step 3 until September 19, 2016; this is clearly untimely. In fact, says the Employer since all of the language contained in both the National Agreement and the JCIM regarding this issue is clearly defined and the parties do not have the right to resolve issues in a manner that contradicts the JCIM. The JCIM prohibits the filing of untimely grievances. The Service says this grievance was untimely appealed, the Union, according to Article 15.4.B of the National Agreement has waived its rights and grievance is not arbitral.

The Employer asks that its motion to deny and dismiss the grievance as untimely be upheld.

UNION

The Union references the following Contract Language:

> **Section 2. Grievance Procedure Steps**
>
> **Step 1:**
>
> (a) Any employee who feel aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. The Union also may initiate a grievance at Step 1 within fourteen (14) days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance.

The Union states that this grievance was filed with Supervisor James Mote in the Transportation Networks Department on December 8, 2012. Mr. Mote initialed the Step 2 Grievance Form on December 11, 2012 as required by Article 15.2.Step 1. Also, says the Union, the grievance was appealed to Step 2 to Labor Relations Atlanta District. Additionally the grievance was discussed several times with Ms. Jacquese Thompson at Step 2, as were several grievances that had been appealed during the same time frame.

The Union asserts that prior to these grievances being appealed to Step 3 a notice was mailed certified to the Labor Specialist assigned to discuss these grievances. The notice indicated that if there was no response, the grievances would be appealed to the next step of the grievance procedure. As indicated it was mailed Certified No: 7013 090 0001 0907 3496, it was never returned to its origin of destination as "undeliverable".

Furthermore, says the Union, each grievance listed on the Scheduling Letter was appealed to Step 2 certified with the number as indicated at the top of each Step 2 Grievance Appeal Form. There is also a certified number on each of the Step 3 Grievance Appeal Forms.

What is more, the Union states that Article 15.4.B of the Collective Bargaining Agreement prohibits Management from arguing the issue of timeliness unless it is raised at Step 2, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived. In these cases that would have been at Step 3. The Union cites the following Contract Language:

> *A. The failure of the employee or the Union in Step 1, or the Union thereafter to meet the prescribed time limits of the Steps of this procedure, including arbitration, shall be considered as a waiver of the grievance. However, if the Employer fails to raise the issue of timeliness at Step 2, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived.*

At the same time, the Union argues that essentially, the Union or an employee can file a grievance whenever it desires to do so. It does not matter how long ago an incident occurred. The Union says that the only recourse that Management has is to meet and discuss the complaint. It can then deny it based on the fourteen (14) day limitation as stated in Article 15, Step (1) and Step (2). If it should fail to do so, then that grievance can be properly appealed to the next step of the grievance procedure. In addition, the Union cites the following:

> *B. Failure by the Employer to schedule a meeting or render a decision in any of the Step of this procedure within the time herein provided (including mutually agreed to extension periods) shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure.*

Notwithstanding, says the Union, each grievance was appealed to Step 3 within the time limits of the Certified Notice that was mailed to the Atlanta District Labor Relations Office. In accordance with the language of Article 15.Step 4.B, the Employer's Step 3 Level Area Representative could have raised timeliness at the Step 3 meeting. Whereas the language specifically states:

> "*Each party's Step 3 representative shall be responsible for making certain that all relevant facts and contentions have been developed and considered. The Union representative shall have authority to settle or withdraw the grievance in whole or in part. The Employer's representative likewise shall have authority to grant the grievance in whole or in part.*"

Alternatively, the Union argues that this meeting did not take place; instead the Employer's Step 3 Level representative issued a decision without a Step 3 meeting. The issue of timeliness was not mentioned. Also, there was no mention of the grievance being untimely appealed to Step 2 or, who should have been discussing the grievance at Step 2 for Management.

Regarding this, the Union cites the National Award by Arbitrator Dana Edward Eischen, and Case # 194M-11-C 98072898 whereas he states:

> *"…a Step 2 decision issued after the grievance has been "deemed to move" properly to Step 3 by dint of Article 15.3.C, lacks contractual validity…"*

On the other hand, the Union references a Step 4 Signoff Re:Q00C-4Q-C 06026519 between the Postal Service and American Postal Workers Union also agreed that parties are precluded from issuing a Step 2 decision or Additions and Corrections outside the prescribed time limits of Article 15.2.Step 2(f) and (g) of the Collective Bargaining Agreement.

In another way, the Union states that if, at any time, the Union should appeal a grievance and bypasses any step of the grievance procedure in the grievance will be considered procedurally defective. It should be considered the same way should Management refuse to meet or issue a

decision at any step of the grievance procedure. The Step 3 meeting was scheduled for the dates of December 1-2, 2016. The Step 3 denials were issued to the Union dated November 30, 2016.

On the whole, the Union argues that there was a Step 2 meeting. Even more, the Union states that Management refused to meet on the scheduled dates of December 1-2, 2016.

The Union respectfully requests that the grievance be sustained and rendered arbitrable.

DISCUSSION AND FINDINGS

There are three (3) separate grievances on the docket for March 2, 2017. The employer's Advocate asks that the grievances be dismissed as untimely.

Case # K10V-1K-D 13422685 denied by Supervisor James Mote on February 11, 2012.

Case # K10V-1K-C 114262762 denied by Supervisor Roxanne Butler on May 11, 2011.

Case # K10V-1K-C 12330136 denied by Supervisor Kenyatta Reynolds on September 11, 2012.

What is more, the record evidence contains Step 2 appeal forms for the cases cited supra. In addition, the Union, under the submission of Union Exhibit (1) September 2, 2016 notified Ms. Jacquese Thompson. Re: Cases to be settled at Step 2. Also, under that same cover, the Union says:

> *"I have made several attempts to contact you, either on your mobile number provided, or through Nikki Hand, Labor Relations Specialist."*

The Employer, on the other hand states that the Step 2 grievances were allegedly appealed to Step 2. Notwithstanding, the Employer did not comment or rebut Union Exhibit #1 which was sent by certified mail with a United States Mail Certified tracking number. More importantly, the Service argues that whether there was an untimely appeal or a timely appeal at Step 2 the Union did not purusue the grievance for four (4) years. Hence, the Employer says by appealing to Step 3 on

September 19, 2016 the Union waved its rights to the grievance process. Nonetheless, according to the record evidence, there was no claim that the grievances were untimely filed at Step 2.

In like manner, the Union argued that time limits in the Atlanta District were exceedingly lax. The Union continued by saying that it was not uncommon for grievances to not be discussed or resolved for long periods of time. The way I see it, there were no agreements in the record to grant extensions or award delayals of prosecuting grievances. Likewise, Arbitrator Benjamin Aaron in Case # H8T-5C-1160 made this observation:

> *"In the event that understandings as to the subsequent application of pre-arbitration settlements are reached in the future the parties are advised to reduce them to writing."*

Indeed, the Parties operating under a lax enforcement of time constraints without a written agreement according to Arbitrator Aaron is ill advised. That being said, this case does not turn on that issue. The record evidence in these proceedings contains e-mail activity between NBA Bruce Amey and Labor Relations Specialist Vijay V. Vick. On November 17, 2016 at 2:35pm Mr. V. J. Vick sent the following email:

> *"We must meet ASAP cannot let the cases go over fifty-six (56) days old. Please call." (J-2) (P-11)*

In (J-2) page 9 "top" it states:

> *"If that is the case then I request we hold the cases in abeyance until we meet on December 1-2, 2016."*

At the bottom of that same email (J-2)(P-9) November 17, 2016 3:03pm twenty-eight (28) minutes after Mr. Vick's email, Mr. Amey agrees to meet on Step 3, December 1-2, 2016. In (J-2) (P-10) November 17, 2016 3:01pm twenty-six (26) minutes after Mr. Vick agreed to meet he changed his mind and asked Mr. Amey for earlier dates release the cases were fifty-six (56) days old. He knew that when he sent the previous email.

On November 18, 2016 9:04am (J-2) (P-8) Mr. Vick sends an email to Mr. Amey:

"Please sign and return or let me know if you do not wish to sign."

(J-2) (P-7) November 21, 2016 at 9:53 Mr. Vick sends:

"I am again requesting you either please sign attached abeyance agreement or please meet; a no response from you is not acceptable. As an NBA engaged in the grievance process you do not have the option not to respond."

(J-2) (P-6) November 23, 2016 2:11pm Mr. Amey responds:

"As hard as it might be, I am going to be polite as I can with you. I informed you of the dates that I was available to meet with your already. You don't know what my status is at the moment and it is none of your business. But, if I failed to respond to you, there has to be a reason why. With that said, Happy Thanksgiving."

Article 15.2.b states that the Grievant shall be represented at the employers Step 3 level by the Union's Regional Representative. Also, each Parties representative shall be responsible for discussing relevant facts and contentions. Making certain all relevant facts have been developed and considered.

For my part, regardless of any infirmities in these cases the Step 3 Representative has an obligation to meet with Employee's Representative. The words on the page of the contract are clear. In the email (J-2) (P-9) Mr. Vick offers to hold the grievances in abeyance until they meet on December 1-2, 2016. The Step 3 designee may be under pressure due to time constraints. I get that. However, the Contract does not give the Step 3 representative the right to out of hand unilaterally strip its Employee and the Representative of their right to due process. This statement follows:

"Your action as noted above: of not to meet or engage in a meaningful dialogue to resolve issues that you have to meet has consequences: The consequence of your action is that you have by your actions waived your grievance."

The record is manifestly clear. Mr. Amey did agree to meet. Mr. Vick cancelled the date. More than that sine qua non to the grievance process is a mutual and equal cooperative partnership.

In that regard, neither party has a right to dictate when meetings are held. It should be accomplished by mutual cooperation. As has been noted; the Employer rendered a decision without meeting with the Union, as required by the CBA. More than that, the Employer unilaterally declared the Union's grievance as waived.

That for the reasons set forth herein, I find the grievances to be arbitrable.

Stephen H. Cook
Arbitrator
3737 Cambridge Drive
Hurricane, WV 25526-8921
304 389-2797

February 14, 2017

Kennith L. Beasley, Coordinator
Southern Regional Coordinators' Office
11811 North Freeway, Suite 385
Houston, Texas 77060

Bruce Amey
National Business Agent
MVS Division, Southeast Area
Southern Region
6951 Pistol Range Road
Suite 106
Tampa, FL 33635

Labor Relations Service Center
ATTN: Awards/Invoices
United States Postal Service
P. O. Box 23788
Washington, DC 20026-3788

USPS Capital/Metro Area
Manager, Labor Relations
418 Gilmore Dairy Road
Greensboro, NC 27498

Richard M. Norcross
Area Labor Relations Specialist
PO Box 929994
Columbia, SC 29292

Re: USPS Grievance No.: K15V-4K-D 1677562 & K15V-4K-D 17020104

APWU Grievance No.: 080416RD01 & 101816JH1 T. Baird

Dear Sir and/or Madam:

Enclosed please find an Opinion and Award relevant to the above captioned matter. In accordance with my terms and conditions of employment, electronic word and PDF copies have been forwarded to the parties. Invoice and receipts are enclosed for the designated entities so they may process payment.

Thank you.

Very truly yours,

Stephen H. Cook

REGULAR ARBITRATION

In the Matter of the Arbitration

Between

United States Postal Service

and

American Postal Workers Union

Grievant: T. Baird

Post Office: Charlotte VMF

Case No.: K15V-4K-D 16777562
K15V-4K-D 17020104

Union No. 080416RD01
101816JH1

BEFORE: ARBITRATOR STEPHEN H. COOK

APPEARANCES:

For the U.S. Postal Service: Richard M. Norcross, Area Labor Relations Specialist

For the American Postal Workers Union: Bruce Amey, APWU National Business Agent

Place of Hearing: 2901 Scott Futrell Drive, Charlotte, NC 28228

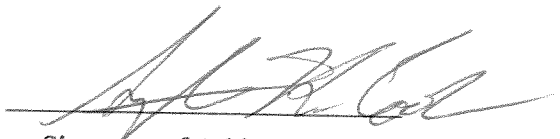
Date of Hearing: January 27, 2017

Date of Award: February 14, 2017

Relevant Contract Provision: Articles 16.1, 16.5, 16.7, 16.8, and Article 19- Employee and Labor Relations Manual (ELM) Code of Ethical Conduct 665.16

Contract Year: 2015

Type of Grievance: Discipline



Signature of Arbitrator

Award Summary: For all of the reasons mentioned above I believe grievant was denied her due process and I do not believe it is necessary to address the merits of this case. Arbitrator Eischen determined in his National decision for review and concurrence issues that, **"Proven violations of Article 16.6 as set forth in Issues 1 (b), 1 (c) or 1 (e) are fatal. Such substantive violation invalidate the disciplinary action and require a remedy of reinstatement with 'make-whole' damages."** In my considered opinion Management clearly violated Issue c) which states: **"Is violated if there is a joint decision by the initiating and reviewing officials to impose a suspension or discharge."** Accordingly, based on the specific fact circumstances of this case, the Emergency Placement and Notice of Removal that was unilaterally reduced to a Long Term Suspension were not for just cause. Both grievances are sustained in accordance with the Union's requested remedy at Step 2 of the grievance/arbitration procedure.

STATEMENT OF THE CASE

This is an arbitration proceeding pursuant to the provisions of Article 15 of the National Agreement between United States Postal Service (hereinafter "Service") and American Postal Workers Union, AFL-CIO (hereinafter "APWU"). At the hearing, exhibits were offered and made part of the record, witnesses provided testimony, and oral argument was heard. The Union submitted five arbitration decisions for my consideration that were received on February 6, 2017. The Service chose not to submit any arbitration decisions and the record was closed on February 6, 2017.

ISSUE

The Parties' stipulated issue for the referenced grievance is: "Was the Emergency Placement and subsequent Notice of Removal for just cause? If not, what shall the remedy be?"

POSITION OF THE SERVICE

The Service makes the following contentions in support of its position the grievance should be denied:

Both instances of discipline were for just cause. Grievant was adamant that the incident never happened. She will not even consider a possibility that she touched her Manager.

Contrary to Grievant's version of the events, one Management witness, Ms. Freeman, who was the recipient of Grievant's physical attack, testified Grievant bumped her hard and scratched her finger nail. Another Management witness, a Postal Vendor, saw Grievant bump into Ms. Freeman and he believed Grievant's actions to be an act of "intimidation". Accordingly, based on a preponderance of the evidence of record, the Service believes Grievant purposely bumped Ms. Freeman and was attempting to intimidate her.

There is a zero tolerance for violence in the workplace and that is exactly what Grievant is guilty of in this instance.

POSITION OF THE UNION

The APWU makes the following contentions in support of its position the grievance should be sustained:

Regarding the Emergency Placement, there was no act of threat. Manager Freeman continued her conversation with the Vendor after Grievant allegedly bumped her. The circumstances involved do not rise to the level of Emergency Placement. If Grievant did bump Freeman, as Freeman says she did, as soon as the alleged incident occurred Freeman should have promptly acted. Supervisor Gaither, Manager Freeman and Grievant all walked outside to discuss the matter immediately after the alleged incident.

Regarding the Notice of Removal, Grievant's Supervisor did not conduct a thorough investigation as required under the provisions of just cause and Article 16 of the Agreement. He only talked to Grievant during the pre-disciplinary interview (PDI) on August 8, 2016. He did not talk to Manager Freeman or the Vendor.

The Supervisor testified that he did not make the decision alone to remove Grievant. He said, "It was a team effort". One of the Managers on that "team" was Shawn Bennett, the concurring official for the subject discipline. Accordingly, a violation of Article 16.8 occurred and the removal is procedurally defective.

The Vendor who testified telephonically at the hearing was trying to secure work for himself and his testimony was to serve the Manager's version of what happened. Clerk Hill testified that the Vendor told her he did not see anything. The Vendor's testimony cannot be credible.

The Notice of Removal was not issued in a timely fashion. Even though the Notice of Removal was reduced to a long term suspension, it was the exact same incident and it remained untimely as well.

Grievant was never put in a pay status during her notice period and there was no effective date of the removal. Nothing happened after the fact of the removal to warrant reducing it to a suspension.

Management bears the burden of proving their case and that did not happen here. Neither instance of discipline was for just cause.

On August 16, 2016, the APWU filed a grievance at Step 1 of the grievance procedure alleging that the Service had violated Article 16 of the National Agreement when by notice of July 25, 2016, Grievant was notified that she was placed on Emergency Placement, effective July 19, 2016, for hitting Manager Joanna Freeman in the arm with her forearm and hand. The APWU's corrective action for this grievance is: "Ms. Baird's Emergency Placement letter shall be rescinded; Baird shall be made whole by being paid for any lost wages while in a non-pay status. On October 13, 2016, the APWU filed a grievance at Step 1 of the grievance procedure alleging that the Service had violated Articles 16 and 19 of the National Agreement when by notice of August 29, 2016, Grievant was notified that she would be removed from the Postal Service no sooner than 30 days from her receipt of the notice for "Conduct Unbecoming a Postal Employee". The APWU's corrective action requested for this grievance is: "To rescind Notice of Removal and Ms. Baird be made whole; to be paid for all lost wages including overtime and all other entitlement and all copies be removed from all folder and files." The parties were not able to resolve these matters during the required steps of the grievance procedure and the APWU appealed the grievances to arbitration. The parties stipulated prior to the start of the hearing that there were no issues of arbitrability.

RELEVANT CONTRACT LANGUAGE

ARTICLE 16

DISCIPLINE PROCEDURE

Article 16.1 Statement of Principle

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.

Article 16.5 Suspensions of 14 or More Days or Discharge

In the case of suspensions of more than fourteen (14) days, or 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 (non-pay) status until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance arbitration procedure.

Section 16.7 Emergency Placement

An employee may be immediately placed on an off duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication (use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U. S. Postal Service property, loss of mail or funds, or where the employee may be injurious to self or others. The employee shall remain on the rolls (non pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance.

Article 16.8 Review of Discipline

A 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 a signed and dated writing, by the installation head or designee…

ARTICLE 19
HANDBOOKS AND MANUAL

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.

Employee and Labor Relations Manual, (ELM)
665 Postal Service Standards of Conduct

665.11 – Employees are expected to discharge their assigned duties conscientiously and effectively

665.13 Discharge of Duties - Employees are expected to discharge their assigned duties conscientiously and effectively.

665.16 Behavior and Personal Habits- Employees are expected to conduct themselves during and outside of working hours in a manner which reflects favorable 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 personnel 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. Employees are expected to maintain harmonious working relationships and not to do anything that would contribute to an unpleasant working environment.

665.24 Violent and/or Threatening Behavior – The Postal Service is committed to the principle that all employees have a basic right to a safe and humane working environment. In order to ensure this right, it is the unequivocal policy of the Postal Service that there must be no tolerance of violence or threats of violence by anyone at any level of the Postal Service. Similarly, there must be no tolerance of harassment, intimidation, threats, or bullying by anyone at any level. Violation of this policy may result in disciplinary action, including removal from the Postal Service.

ZERO TOLERANCE POLICY STATEMENT

On February 3, 2016, the following statement was issued by District Manager Sandy S. Wyrick and Senior Plant Manager Justin Glass:

"A Postal employee has the right to perform his or her assigned duties in an atmosphere free of threats, assaults, or any other acts of workplace violence. The Postal Service has zero tolerance for such actions. We are committed to ensuring that a safe working environment is provided for all employees.

Threats or assaults made directly or indirectly toward any employee or postal customer, even in jest, will not be tolerated. These actions have the potential to create apprehension for employees or customers to whom such behavior is directed.

The Postal Service's zero tolerance policy places all employees on notice that threats, assaults, or other acts of violence committed against other postal employees or customers may result in disciplinary action, up to and including removal from the Postal Service. Any employee who has been subjected to a threat or assault is instructed to immediately report the incident to a manager or supervisor and to the Inspection Service. Employees are also encouraged to report any unusual situation that has the potential to cause workplace violence. Reports to the Inspection Service, at the request of the employee who reports the incident, may be handled anonymously.

Below are definitions to help you understand and clarify when a threat, assault, or other act of workplace violence has occurred:

- **THREAT** (broadly defined) – a statement or act that carries the intention to inflict harm or injury on any person, or on his or her property. Threats also include words or actions intended to intimidate another person or to interfere with the performance of his or her official duties.

- **ASSAULT** (broadly defined) – Any willful attempt to inflict injury upon a person, or any intentional display of force that would give the victim reason to fear or expect immediate bodily harm.

Violence is not limited to facilities or physical injuries. We recognize that any intentional words, acts, or actions meant to provoke another can escalate and result in injury if they are not immediately and appropriately addressed by Postal management."

TESTIMONY

Joanna Freeman, Manager, Vehicle Maintenance Facility (VMF), testified on behalf of the Service. Freeman testified that problems started with Grievant when Grievant was denied an annual leave request that had previously been approved. Freeman said that she tried to explain to Grievant what happened but Grievant left their meeting yelling and cursing. According to Freeman, sometime after her meeting with Grievant about the annual leave issue the Local Police and Postal Inspectors came and told her that Grievant had called them. Freeman explained that on June 19, 2016 she was doing an inventory in the aisle of the Vehicle Motor Facility (VMF) when Grievant walked by and "bumped" her. According to Freeman, Grievant "Bumped" her hard enough to scratch her fingernail. Freeman said that when the incident occurred she said, "Excuse me!" to Grievant. Freeman said that Grievant denied touching her and said, "What are you going to do about it?" Freeman testified that after the incident Supervisor Gaither and she were discussing the incident outside with Grievant when Cheryl Hill, a Storekeeper, Automotive Parts employee, approached them. Freeman said that she told Hill to get back to work but Grievant told Hill she could stay. Freeman testified that after their discussion Gaither called Labor Relations and they advised to place Grievant on Emergency Placement which was about 15 minutes after the incident. According to Freeman, she had a hard time getting along with Grievant and she felt that if the incident had been an accident Grievant would have apologized. Freeman said that Grievant never admitted bumping into her and that Grievant could have taken another avenue around her and avoided the incident. According to Freeman, prior to the incident, no matter what she asked Grievant to do Grievant would argue. Freeman explained that she reduced the Notice of Removal to a Long Term Suspension because the letter was mailed out late. Specifically, the removal notice was dated August 29, 2016 and Grievant received it on October 6, 2016. Freeman said, "If Grievant had apologized we would not be here." Freeman testified that the only conversation she could remember having with Service Step 3 Representative Celia Clinton was when Clinton called and told her she was settling the Emergency Placement from an earlier matter that occurred prior to this instance. According to Freeman, Grievant's hostility initially began when her schedule was changed in March of 2016. Freeman testified that she is a "hands on" Manager and that she brought Grievant and Supervisor Gaither up to her office to discuss the prime choice annual leave situation. Freeman said she wanted to ensure Grievant got her annual leave. Freeman testified that during their conversation about the annual leave Grievant kept "cutting off" Supervisor Gaither and that Freeman asked Grievant why she was being so nasty. Freeman said that she asked Grievant why she was changing her annual leave request and Grievant told her it was none of her business.

During cross examination Freeman testified that the annual leave incident with Grievant concerned "prime choice" annual leave. Freeman said that after their meeting on the annual leave situation Grievant walked out cursing and she was placed on Emergency Placement. Freeman said that Grievant was to be paid for that Emergency Placement Suspension because they did not get the letter out in time. Freeman testified that she was not sure why Grievant has not been paid for the Emergency Placement resulting from the annual leave incident. Freeman testified that she did not speak with Management's Step 3 Representative, Celia Clinton, who handles grievance payouts. Freeman testified that it was her decision to reduce Grievant's Notice of Removal to a Long Term Suspension and that Grievant received no pay since the incident. Freeman said that she did not know Grievant was entitled to pay for the 30 day notice period of the removal.

Barry Gaither, Supervisor, VMF and Grievant's immediate Supervisor, testified on behalf of the Service. Gaither testified that he and Union Steward Joe Hall implemented the annual leave calendar for the VMF. Gaither testified that he talked to Grievant about her annual leave. Gaither said that Steward Hall and he determined that Grievant submitted too many annual leave choices for the prime time annual leave period. As a result, Grievant's excessive requests had to be deemed incidental. Gaither explained that Freeman and he tried to talk to Grievant about her annual leave. Gaither said that Freeman asked Grievant why she was being so nasty. Gaither said that Grievant and Freeman argued and Grievant used profanity. According to Gaither, he had other issues with Grievant in the workplace. He said that Grievant has used profanity in the past and when he asked Grievant to do "some things" she would have outbursts at times. Gaither testified that he had a discussion with Grievant about her actions but it did no good. Gaither said that he did not see the incident between Grievant and Freeman but Grievant came to him and said, "Freeman says I hit her. Would you be my witness?" According to Gaither, right after the incident, Freeman, Grievant and he walked outside. Gaither said that Freeman told him that Grievant bumped into her and Grievant denied it. Gaither testified that he put Grievant on Emergency Placement and that the Service had a zero tolerance for workplace violence. Gaither testified that he conducted the pre-disciplinary interview (PDI) with Grievant and that Vehicle Maintenance Facility (VMF) Supervisor Kenny Snow and APWU Steward Joe Hall were present. Gaither testified that Grievant never acknowledged contact with Freeman.

During cross examination Gaither testified that after the PDI he never called Grievant back in to tell her what discipline was being issued and he never discussed loyalty or code of conduct language cited in the subject discipline with Grievant. Gaither testified that he issued the discipline based on zero tolerance for workplace violence. Gaither testified that he did not discuss the incident with Freeman or Vendor Matassa and he did not interview them. He said that he relied on their written statements. Gaither testified that it was his decision to issue the Notice of Removal and that he had a discussion with Shawn Bennett, Territory Manager, Kenny Shaw, Supervisor, VMF and Chris Beck, Supervisor, VMF about the situation. Gaither said that the Managers worked as a team in deciding the level of discipline and that it was not his decision alone. Gaither acknowledged that Grievant has not received any pay since July 19, 2016, the day she was placed on Emergency Placement.

Stephen Matassa, a salesman for First USA who does contract work for the Service, was called to testify by the Service. Matassa testified that he had a meeting scheduled with Freeman on July 19, 2016 and when he walked in the door of the VMF office he saw Grievant walking down the aisle on the opposite side coming toward Freeman. Matassa said that there was not a lot of room in the aisle and Grievant went between the cabinets and Freeman. Matassa testified that he saw Grievant "bump" into Freeman and Freeman said, "Excuse me!" Matassa said that he saw Freeman go over to Grievant and say, "You just ran into me." Matassa testified that he heard Grievant deny running into Freeman. Matassa testified that Cheryl Hill talked to him afterward and asked him for a written statement as to what happened. Matassa said that he told Hill that he gave a statement to Freeman and Gaither.

During cross examination Matassa testified that he was 5 to 10 feet away from the incident and that he was not present when Gaither, Freeman and Grievant went outside. According to Matassa, Freeman asked him if he saw what happened and he told her yes. Matassa said that he did not have any work with the Service at that time. Matassa testified that there was no doubt there was contact between Freeman and Grievant and that the only doubt he had was whether the bump was on purpose or incidental. Matassa testified that he perceived the incident as someone trying to show dominance and the fact that Grievant denied it baffled him.

Cheryl Hill, Storekeeper Automotive Parts, testified on behalf of the Union. Hill explained that there are two types of inventories that occur in the VMF. One is "Quarterly" which is mandatory and the other is a "Complete" inventory which is not. According to Hill, the stock room personnel, and sometimes mechanics, are present when conducting an inventory but there is never any Management personnel. Hill testified that Grievant denied bumping Freeman and Freeman, Gaither and Grievant went outside after the incident. Hill said that she went outside and Freeman told her to get back in the stock room. Hill testified that she asked Matassa if he saw anything and he said Grievant did not bump Freeman hard. Hill testified that she asked Matassa for a statement and he said he would provide one to her. Hill said she never received a statement from Matassa.

During cross examination Hill testified that she was not a Union Steward but she wanted to try to help find out what really happened. Hill believed that Matassa's statement is inconsistent with what he told her. Hill said that Matassa told her that he gave his statement to Supervisor Gaither. Hill testified that she was friends with Grievant and they socialize together. Hill admitted that she wanted to "stick up" for Grievant. Hill testified that she did not see Grievant walk by Freeman but she saw them standing together.

Terrilyn Baird, Grievant, testified on behalf of the Union. Grievant testified that Freeman and she were scheduled to attend an EEO hearing the day after the alleged incident and that is why Freeman accused her of bumping her. Grievant testified that she told her Supervisor Barry Gaither, that Freeman said, "Watch what I do to her now and I'm going to tell you what I'm going to do to her." Grievant testified that Freeman told her that she was going to make sure that Grievant did not get any paid vacation. Grievant asked, why would Freeman continue her conversation with Matassa when she said that Grievant bumped her? If the incident was so violent, why didn't Freeman report it immediately? Grievant said that during the investigation Freeman was not consistent in her version of what occurred. Specifically, Freeman said that Grievant "pushed" her then she said, "bumped" her. Grievant testified that Freeman had too many versions of the events to be credible. Grievant said that if someone pierces their finger in a metal clipboard it would cause more of an affect than Freeman claimed she had from the incident.

During cross examination Grievant testified that she did not come close to touching Freeman. Grievant testified that she believes Freeman was mad at her over the vacation issue and because Grievant filed an EEO and grievance on the annual leave requests.

FINDINGS AND CONCLUSIONS

On July 25, 2016, Grievant was notified that she was placed on Emergency Placement effective July 19, 2016, for allegedly bumping into her Manager, Joanna Freeman.[1] Subsequently, Grievant was issued a Notice of Removal for, "Conduct Unbecoming a Postal Employee." The Notice of Removal was dated August 29, 2016, and Grievant received the notice on October 6, 2016. On January 25, 2017, the Notice of Removal was unilaterally reduced to a Long Term Suspension by Ms. Freeman.

As in most cases of this nature, there are two distinctly different versions of what really took place. Ms. Freeman said Grievant "bumped" her hard enough to make a scratch on her fingernail from a clipboard. In her written statement Freeman said Grievant "plowed" in to her. A Vendor, Steve Matassas, who was the only person other than Grievant and Freeman who saw what happened testified and provided a statement regarding the incident. Matassa testified that Grievant "bumped" into Freeman and he was not sure if it was incidental or on purpose. He did believe it may have been an attempt to intimidate Freeman. Grievant maintained throughout the grievance procedure and at the arbitration hearing that she never touched Freeman.

The Service claims that Grievant was, "hard to get along with" and her attitude initially stemmed from a schedule change that Grievant allegedly did not agree. Additionally, an incident occurred pertaining to Grievant's vacation. The incident resulted in Grievant having to relinquish her prime choice vacation selections that had already been approved by Management and Union.

It is no secret that due to numerous instances of workplace violence, throughout not only the Postal Service but in practically every place of work, Management has established policies to address this problem. The Postal Service has implemented a "zero tolerance" for acts of workplace violence and the local District in this instance has such a policy in effect. Even though there is a "zero tolerance" for workplace violence the parties' National Agreement, Article 16, requires each and every instance of discipline be for just cause.

Regarding the Emergency Placement, I agree with the Union that it was not issued for just cause. Specifically, after the incident occurred, Freeman continued her conversation with Matassa after Grievant "bumped" her. Subsequently, Freeman, Gaither and Grievant went outside to discuss the situation. Freeman testified at the arbitration hearing that, "If Grievant had apologized we wouldn't be here." It appears to me that if Freeman really felt threatened by Grievant's actions or felt Grievant may have been

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[1] The Emergency Placement letter states Grievant was placed in an off-duty (without pay) status effective June 19, 2016 but the Service Representative explained this was a typographical error and the incident occurred on July 19, 2016. The date at the top of the letter was July 25, 2016 and since the date of incident referenced all through the grievance papers was July 19, 2016, I accept Management's position.

injurious to herself or others she would have acted immediately as stated in Article 16.7 of the Agreement. If an apology would have cured the situation for Freeman I would think what Grievant did would not have been as serious to warrant Emergency Placement. Even if the Emergency Placement was proper there was no end to it. The Notice of Removal never provided an effective date of removal which would have terminated the Emergency Placement. In my considered opinion, the circumstances at bar did not rise to the level of an Emergency Placement and, even if it did, it was procedurally defective.[2]

The Union presented several due process arguments in their challenge to the removal action. Specifically, they contend that Grievant's immediate Supervisor, who conducted the PDI, failed to conduct a thorough investigation. It was undisputed that Supervisor Gaither did not interview anyone involved other than Grievant. He did not question Freeman or Matassa who were eye witnesses to the event and provided written statements. He did not interview Storekeeper Automotive Parts, Cheryl Hill. The Supervisor was directly involved right after the incident occurred and was well aware of what happened. He allowed Grievant to give Management her "side of the story" during the PDI. I'm not sure there was a need for further investigation.

During cross examination Supervisor Gaither initially testified that he did not make the decision alone to remove Grievant but later on he said it was a "team" effort and one of the members of that team, Shawn Bennett, was the concurring official. This is a clear violation of Article 16.8 as interpreted by National Arbitrator Dana Edward Eischen in case number E95R-4E-D 01027978. On page 25 of Arbitrator Eischen's, National, and precedent setting award he opines that Article 16.6 of the NRLCA and USPS Agreement (which is Article 16.8 of the subject parties Agreement): **"c) Is violated if there is a joint decision by the initiating and reviewing officials to impose a suspension or discharge."**

The subject discipline did not contain an effective date of removal and Grievant was never put in a pay status as required by Article 16.5. It was undisputed that the incident occurred on July 19, 2016, the discipline was dated August 29, 2016, and Grievant received the notice on October 6, 2016. To my knowledge, there is no set time period to establish whether or not an instance of discipline is untimely. I believe to make such determination one must look at the facts of the case. Was there an ongoing

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[2] The Union submitted a National, precedent setting arbitration award by Arbitrator Richard Mittenthal, case number H4N-3U-C 58637 and H4N-3A-C 59518, to emphasize their argument that Grievant was not immediately placed on Emergency Placement. Even though Arbitrator Mittenthal addresses his definition of "immediately" the Arbitrator's opinion is based on the issue of advance written notice for Emergency Placement and not whether Management took immediate action. In my opinion this award is not analogous to the case at bar.

investigation? Was there evidence that took an unusual amount of time to obtain? Were witnesses unavailable? In this instance I must ask, why did it to take approximately 79 days from the date of incident to issue the subject discipline? The only witness interviewed was Grievant and that took place on August 3, 2016. In my opinion, the Service did not provide any legitimate reason(s) for the extensive time it took to issue the discipline and there was no rebuttal to the Union's claim that the discipline was untimely. The fact that the removal was reduced to a suspension did not affect the issue of timeliness. It merely reduced the level of punishment. Accordingly, I believe the discipline was not issued in a timely fashion and violated just cause. [3]

For all of the reasons mentioned above I believe grievant was denied her due process and I do not believe it is necessary to address the merits of this case. Arbitrator Eischen determined in his National decision for review and concurrence issues that, **"Proven violations of Article 16.6 as set forth in Issues 1 (b), 1 (c) or 1 (e) are fatal. Such substantive violation invalidate the disciplinary action and require a remedy of reinstatement with 'make-whole' damages."** In my considered opinion Management clearly violated Issue c) which states: **"Is violated if there is a joint decision by the initiating and reviewing officials to impose a suspension or discharge."** Accordingly, based on the specific fact circumstances of this case, the Emergency Placement and Notice of Removal that was unilaterally reduced to a Long Term Suspension were not for just cause. Both grievances are sustained in accordance with the Union's requested remedy at Step 2 of the grievance/arbitration procedure.

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[3] The Union submitted an arbitration award by Arbitrator Irving N. Tranen, case number H98V-1H-C 00164471. Arbitrator Tranen's opinion dealt with the issue of an employee working and being paid throughout not only the notice period of the removal but the employee was never taken off the rolls after being issued a Notice of Removal and continued to be compensated. In my opinion this award is not analogous to the case at bar because Grievant in this case was off work without pay.
Additionally, the Union cited case number I98C-4I-D 99136609 by Arbitrator John C. Fletcher which I believe is not analogous to the case at bar and case number E00C-4E-C 06132811 by Arbitrator Carl C. Bosland. Arbitrator Bosland's award was not considered by the Arbitrator as it appears to be an expedited award and in accordance with Article 15.5Cf of the National Agreement cannot be cited.

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL WORKERS UNION

Grievant: Kuhn

Post Office: Atlanta, Georgia

USPS Case No.: K10V-1K-D 11462782

BEFORE: Linda S. Byars, Arbitrator

APPEARANCES:

For the U. S. Postal Service: Edna Bohannon, Labor Relations Specialist

For the Union: Bruce Amey, National Business Agent MVS Division

Place of Hearing: Atlanta, Georgia

Date of Hearing: January 25, 2017

Date of Award: February 2, 2017

Contract Year: 2010-2015

Type of Grievance: Removal

Award Summary

Glass-Frances signed the Settlement Agreement as Kuhn's representative and not as a representative of the Union, and she did not have standing or authority to withdraw the Grievance. Therefore, her signature on the Settlement Agreement and the grievance waiver in the text of the Settlement Agreement does not preclude a hearing of the Grievance on the merits.

_____

Arbitrator

DATE: February 2, 2017

BACKGROUND

By memorandum dated July 21, 2011, Transportation Networks Supervisor Kent Harper issued a Notice of Removal to Kermit Kuhn, charging him with failure to be regular in attendance including AWOL. [Management Exhibit No. 1, pp. 3-5.] Mr. Kuhn filed a Grievance and an EEO complaint and, by Settlement Agreement dated November 27, 2011, entered into an agreement with Transportation Networks Manager James Karasoulis. [Management Exhibit No. 1, pp. 1-2.]

There is no dispute that the Union appealed the Grievance to Step 2 of the grievance procedure. There is no dispute that, as a result of the Settlement Agreement, Mr. Kuhn returned to work on November 19, 2011, that the removal was reduced to a 30-Day suspension, and that Mr. Kuhn was made whole for all but 30 days of the suspension period. There is no dispute that Mr. Kuhn remained on the rolls and in pay status during the 30-day notice period required in Article 16.5 of the National Agreement. There is no dispute that Mr. Kuhn remained on the rolls until he returned to work on November 19, 2011. There is also no dispute that Mr. Kuhn retired on December 31, 2011.

The Grievance came before the Arbitrator at hearing on January 25, 2017. The parties asked the Arbitrator to decide only the arbitrability issue. The Arbitrator frames the issue as follows.

STATEMENT OF ISSUE

Does the grievance waiver in the text of the Settlement Agreement preclude a hearing of the Grievance on the merits?

OPINION

As the Postal Service contends, the parties to the November 27, 2011 Settlement Agreement included the statement, "By signing this settlement, the appellant withdraws any and all pending complaints including EEO, appeals, grievances, or other actions relative to the subject of this mediation." [Management Exhibit No. 1, p. 2.] The Settlement Agreement is signed by Mr. Kuhn, as appellant, and by C. Glass-Frances, as appellant's representative. [Management Exhibit No. 1, p. 2.]

There is no dispute that Mr. Kuhn was a Motor Vehicle Craft employee and that Glass-Frances was not a Motor Vehicle Craft Steward. The Union contends that Glass-Frances did not have standing to represent a Motor Vehicle Craft employee for the Union.

The Union relies on the JCIM language in Article 2, which states as follows:

> EEO settlements to which the union is not a party will not take precedence over the language contained in the collective bargaining agreement (CBA). Nor can an EEO settlement modify the terms or requirements of the CBA. A settlement of an EEO claim does not automatically render moot a grievance filed on the same issue. Rather, for a grievance beyond Step 1, the union must be signatory to any EEO settlement which resolves the grievance, and the EEO settlement should specifically include the grievance waiver in the text of the settlement. [Joint Exhibit No. 1.]

The Union maintains that, because Glass-Frances did not have standing to represent Kuhn, the Union was not a party to the EEO Settlement.

Given the undisputed facts, Glass-Frances signed the Settlement Agreement as Kuhn's representative and not as a representative of the Union, and she did not have standing to withdraw the Grievance. Therefore, her signature on the Settlement Agreement and the

grievance waiver in the text of the Settlement Agreement does not preclude a hearing of the Grievance on the merits.

As the Postal Service noted, Mr. Kuhn was not present at the arbitration hearing. However, his absence is not relevant to a decision on the arbitrability issue.

AWARD

The grievance waiver in the text of the Settlement Agreement does not preclude a hearing of the Grievance on the merits.

_____ DATE: February 2, 2017

Arbitrator

Regular Arbitration Panel

IN THE MATTER OF THE ARBITRATION	)	
	)	**GRIEVANT:** Bradley McDonald
BETWEEN	)	Class Action
	)	
UNITED STATES POSTAL SERVICE	)	**POST OFFICE:** Atlanta P&DC
	)	
AND	)	**CASE NO.:** K10V-1K-C 12425621
	)	
AMERICAN POSTAL WORKERS UNION, AFL-CIO	)	**UNION NO.:** 20112325
	)	

APWU RECEIVED MAY 01 2017 TAMPA NBA OFFICE

BEFORE: CHRISTOPHER E. MILES, ARBITRATOR

APPEARANCES:

For the U.S. Postal Service:	Elvin A. Rembert, (A) Labor Relations Specialist
For the Union:	Bruce Amey, National Business Agent
Place of Hearing:	Atlanta, Georgia
Date of Hearing:	April 4, 2017
Date of Award:	April 24, 2017
Relevant Contract Provisions:	Articles 15 and 19
Contract Year:	2010 - 2015
Type of Grievance:	Contract

AWARD SUMMARY

The grievance filed on behalf of Mr. Bradley McDonald is sustained. Based upon the testimony and evidence presented in this case, it is found that Mr. McDonald was erroneously paid when certain pay periods were excluded from his back pay award by the Accounting Service Center. The case is remanded to the parties to properly calculate the compensation due to Mr. McDonald for his losses in accordance with the pre-arbitration settlement dated December 3, 2010 in Case No. H06V-1H-D 09358605. No pay periods shall be excluded for failure of Mr. McDonald to "seek" (obtain) outside employment. The amount of unemployment compensation received by Mr. McDonald during the time in question shall be deducted, as well as any other applicable deductions. The Grievant shall be paid interest on the amount due in accordance with the provisions of the parties' Joint Contract Interpretation Manual (JCIM) concerning Article 16 "Interest on Back Pay." The undersigned will retain jurisdiction of this case for a period of 90 days in order to resolve any questions or issues which may arise concerning the implementation of this AWARD.

Christopher E. Miles

Christopher E. Miles, Esquire
Labor Arbitrator

I. BACKGROUND

The grievance considered herein was filed by the Atlanta Metro Area Local of the American Postal Workers Union (hereinafter referred to as the "Union") on behalf of Mr. Bradley McDonald. The Grievant is a Tractor Trailer Operator employed by the United States Postal Service (hereinafter referred to as the "Postal Service") in Atlanta, Georgia. The Step 1 grievance was filed on November 9, 2011 and appealed to Step 2 on November 14, 2011. The Step 2 Grievance Appeal Form sets forth the following "Detailed Statement of Fact/Contentions":

> APWU and Bradley McDonald are aggrieved over the the Management has violated the collective bargaining agreement. Specifically Management has failed to abide by a pre-arbitration agreement reached in Case # H06V-1H-D 09358605 (2009-1699). (sic)
>
> The Union contends that the pre-arb agreement specifically stated that the Grievant to be made whole for all losses. According to pay calculations statement from a check received by the Grievant dated 9/22/11. The Grievant was not made whole for the period for which he was denied employment by the Postal Service.

As the corrective action, it was requested that "Management cease and desist. Request that the Grievant is to be made whole as agreed to in the pre-arb settlement dated 12/3/10."

Thereafter, by Step 3 Grievance Appeal Form, dated September 24, 2016, the case was appealed for the following reasons:

> APWU and the Motor Vehicle Craft are appealing Case Number 2011-2325 to the next step to be considered for resolution. The case is being appealed without a Step 2 Decision due to the fact that Management's Step 2 Designee has refused to meet. The grievance was to be discussed with Jacquese Thompson at Step 2. She has since moved on to the Atlanta Veteran's Administration. Prior to her leaving she and I agreed that we would meet on these cases once she was adjusted in her new position. No specific date or time was indicated. I recently informed her by Certified Mail that these cases were still awaiting to be discussed at Step 2. I have yet to receive any type of response. Therefore this case is being appealed to the next step in the grievance arbitration procedure without a Step 2 answer. The Union is invoking it's rights to object to any argument that Management makes in this case beyond the Step 2 process/meeting. All arguments will be considered new arguments and/or new evidence and violates the new argument rule.

The record reveals that no Step 3 meeting was conducted and the Union then appealed the grievance to arbitration in accordance with the provisions of the parties' collective bargaining

agreement.[1] The undersigned was appointed to hear and decide the issue and a hearing in this matter was held on April 4, 2017 in Atlanta, Georgia. At that time, the parties were afforded full opportunity to present testimony and evidence, to cross-examine the witnesses, who were sworn, and to make arguments for their respective positions. At the conclusion of the hearing, the record in this case was closed.

II. RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE 5
GRIEVANCE - ARBITRATION PROCEDURE

ARTICLE 19
HANDBOOKS AND MANUALS

III. CONTENTIONS OF THE PARTIES

A. Union

The Union contends that the Postal Service failed to properly make the Grievant whole for all losses in accordance with a pre-arbitration settlement dated December 3, 2010. By check dated September 21, 2011, Mr. McDonald received the gross amount of $5,135.94 and a net amount of $3,042.75 for his back pay despite the fact that he was denied work by the Postal Service for one and one-half years from August 16, 2009 until January 15, 2011 and his annual salary was $50,560. It asserts that it is evident the Postal Service disallowed a significant portion of the back pay period even though the Form 8039 prepared by Labor Relations Specialist Cynthia Davis identified no pay periods to be disallowed and the Postal Service failed to provide to the Grievant a "Notice of Mitigation of Damages" as set for in Management Instruction EL-430. Therefore, the Union requests that the grievance be sustained and that Mr. McDonald be made whole for all losses.

With regard to the timeliness argument raised by the Postal Service concerning the appeal of this grievance to Step 3, the Union argues that the parties had a longstanding agreement to waive the time requirements after grievances were appealed to Step 2. It maintains that the Labor Relations Specialist to whom this case was appealed, left the Postal Service and before she left and thereafter, the Union was unsuccessful in trying to get this case scheduled to be heard at Step 2. Therefore, the grievance was appealed to Step 3 and again, no Step 3 meeting was conducted within the required time limits. As a result, the Union timely

[1] Collective Bargaining Agreement Between United States Postal Service and American Postal Workers Union, AFL-CIO, effective November 21, 2010 - November 20, 2015 (hereinafter referred to as the "Agreement").

appealed this grievance to arbitration and the Postal Service cannot now claim timeliness since no Step 2 or Step 3 was held in this matter. The Postal Service has provided no contentions in the grievance file at either step and the case is now properly at arbitration. Consequently, it is the Union's position that the timeliness argument raised by the Postal Service should be dismissed.

B. Postal Service

The Postal Service contends that this grievance is not arbitrable as it was untimely appealed to Step 3. The record reveals that the case was appealed to Step 2 on or about September 14, 2011 and then not appealed to Step 3 until five years later on September 24, 2016. Therefore, the Postal Service submits that this case was appealed woefully late and it requests that it be dismissed as untimely.

With respect to the merits of this case, the Postal Service maintains that Mr. McDonald was properly made whole for his losses in accordance with the pre-arbitration settlement dated December 3, 2010. It points out that on the Form 8038 completed by the Grievant he indicated that he did not seek outside employment during the back pay period. Therefore, since he did not provide any detailed information concerning the efforts he made to obtain other employment, he was properly compensated only for the first 45 days of the back pay period in accordance with the instructions on the Form 8038 and the Management Instruction EL-430. For these reasons, the Postal Service requests that this grievance be denied in its entirety.

IV. DISCUSSION AND FINDINGS

This grievance concerns the issue of whether the Grievant, Mr. Bradley McDonald, was properly compensated pursuant to a pre-arbitration settlement for Case No. H06V-1H-D 09358605 which was signed on December 3, 2010. At the outset of this hearing, the Postal Service claimed that the grievance was untimely appealed to Step 3. The record reveals that the grievance was filed at Step 1 on November 9, 2011 and appealed to Step 2 on November 14, 2011. However, the grievance was not appealed to Step 3 until September 24, 2016. The case sat at Step 2 for nearly five years and it was clearly untimely appealed to Step 3. Yet, there was no Step 3 meeting with regard to the grievance, albeit there was an agreement between Mr. Amey, National Business Agent, and the Postal Service representative to discuss this case, among others. Thereafter, when no Step 3 meeting was held, the grievance was timely appealed to arbitration and as the result of there being no Postal Service contentions in the joint grievance file to indicate that the timeliness of the appeal to Step 3 was raised, it is

found that the timeliness argument was waived by the Postal Service pursuant to Article 15, Section 4.B. of the Agreement, which provides that "... if the employer fails to raise the issue of timeliness at Step 2, or at the step at which the employee or Union failed to meet the prescribed time limits, whichever is later, such objection to the processing of the grievance is waived." This grievance is therefore found to be arbitrable.

With regard to the merits of the grievance, the pre-arbitration settlement in question provides that "it is mutually agreed upon by Management and the Union that this Grievant will be made whole for all losses." The back pay period was from August 16, 2009 to January 15, 2011. The Grievant's annual salary was $50,560. On September 21, 2011, the Grievant was issued a check with a gross amount of $5,135.94 and the net amount of $3,042.75. The instant grievance was then filed. The issue is whether Mr. McDonald was properly made whole for all losses in accordance with the pre-arbitration settlement dated December 3, 2010.

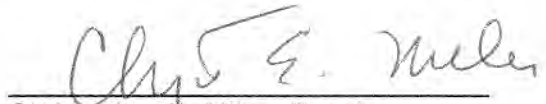
A review of the calculations provided by the Accounting Center in Egan Minnesota reveals that the Grievant was only paid for 45 days because all of the time he was off work except the first 45 days was excluded because Mr. McDonald did not "seek outside employment". In this regard, it is pointed out that on the Form 8038 signed by Mr. McDonald, he indicated "no" in response to the question "did you seek outside employment during the back pay period?" However, the note right below the question clearly states that "outside employment is employment you obtained during the back pay period." Mr. McDonald said he did not "obtain" any outside employment, so he responded "no." Moreover, the record reveals that Mr. McDonald did receive unemployment compensation during the time he was off work from the State of Georgia in the amount of $11,000. In this respect, he credibly testified that in order to receive the unemployment compensation, he was required to conduct a weekly job search and apply for available positions. He stated that when he reviewed and signed the Form 8039, completed by Labor Relations Specialist Cynthia Davis, he asked her about it and he also provided her with the documentation from the unemployment compensation office to evidence his weekly job searches. The Grievant's testimony was not refuted and perhaps that is why Ms. Davis did not indicate on the Form 8039 any periods to be disallowed. Therefore, it is found that Mr. McDonald was erroneously paid when the following pay periods were excluded by the Accounting Service Center; pay periods 22 to 26 in 2009, pay periods 1 to 26 in 2010, and pay periods 1 to 3 in 2011.

Consequently, after review and consideration of the testimony and evidence presented in this case, the grievance filed on behalf of Mr. McDonald is sustained. For the remedy, this case is remanded to the parties to properly calculate the compensation due to Mr. McDonald for

his losses in accordance with the pre-arbitration settlement dated December 3, 2010 in Case No. H06V-1H-D 09358605. In this regard, the parties are directed that no pay periods shall be excluded for failure of Mr. McDonald to "seek" (obtain) outside employment. The amount of unemployment compensation received by Mr. McDonald during the time in question shall be deducted, as well as any other applicable deductions. However, the Grievant shall be paid interest on the amount due in accordance with the provisions of the parties' Joint Contract Interpretation Manual (JCIM) concerning Article 16 "Interest on Back Pay." In addition, the undersigned will retain jurisdiction of this case for a period of 90 days in order to resolve any questions or issues which may arise concerning the implementation of this AWARD.

AWARD

The grievance filed on behalf of Mr. Bradley McDonald is sustained. Based upon the testimony and evidence presented in this case, it is found that Mr. McDonald was erroneously paid when certain pay periods were excluded from his back pay award by the Accounting Service Center. The case is remanded to the parties to properly calculate the compensation due to Mr. McDonald for his losses in accordance with the pre-arbitration settlement dated December 3, 2010 in Case No. H06V-1H-D 09358605. No pay periods shall be excluded for failure of Mr. McDonald to "seek" (obtain) outside employment. The amount of unemployment compensation received by Mr. McDonald during the time in question shall be deducted, as well as any other applicable deductions. The Grievant shall be paid interest on the amount due in accordance with the provisions of the parties' Joint Contract Interpretation Manual (JCIM) concerning Article 16 "Interest on Back Pay." The undersigned will retain jurisdiction of this case for a period of 90 days in order to resolve any questions or issues which may arise concerning the implementation of this AWARD.



Christopher E. Miles, Esquire
Labor Arbitrator

April 24, 2017

Regular Arbitration Panel

In the Matter of the Arbitration
between
UNITED STATES POSTAL SERVICE
and
AMERICAN POSTAL WORKERS
UNION, AFL-CIO

Grievant: Class Action
Post Office: Charleston, SC
USPS Case No: K10V-1K-C 13393949
APWU Case No: 56614JM3

BEFORE: Zachary C. Morris, Arbitrator

APPEARANCES:

For the Service: Mya Simpson, Labor Relations Specialist

For the APWU: Bruce Amey, National Business Agent

Place of Hearing: 7075 Cross County Rd., North Charleston, SC 29418

Date of Hearing: Friday, April 21, 2017

Date of Award: Wednesday, June 21, 2017

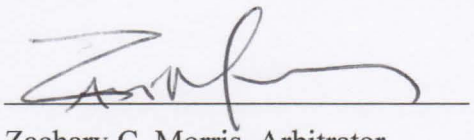
Relevant Contract Provisions: Article 19, Article 32

Contract Year: 2010-2015

Type of Grievance: Contract

Award Summary:

The grievance is sustained. The Postal Service violated Article 19 of the National Agreement by extending the term of Highway Contract Route 294MO.



Zachary C. Morris, Arbitrator

I. PROCEDURAL BACKGROUND

This grievance was filed January 30, 2014, alleging that the Postal Service violated various articles of the National Agreement when it extended Highway Contract Route 294MO. The grievance was denied at each step of the grievance-arbitration procedure and is properly before the arbitrator for a full and binding decision.

Management's Step 2 decision letter was untimely issued and, in accordance with a Step 4 settlement signed by the APWU Director of Industrial Relations, Mike Morris, and USPS Manager of Contract Administration, Patrick Devine, on January 11, 2013, was not admitted into the record.

At the hearing, both the Postal Service and the Union were ably represented and were given a full and fair opportunity to present evidence, examine and cross examine witnesses, and make arguments. In reaching the conclusions and making the Award set forth herein, the Arbitrator has given full consideration to all evidence of record.

The Union elected to close orally, but the Service requested that it be granted the opportunity to submit a post-hearing brief and arbitral citations. The brief was to be postmarked by May 12, 2017. The brief was properly postmarked and received by the Arbitrator on that day, at which point the record was closed. The Arbitrator later requested and was granted an extension from the parties in submitting this Award.

II. ISSUE

The Service frames the issue:

Did the Postal Service violate Article 32.1? This article was allegedly violated when Management renewed a Highway Contract Route (HCR) without union input, no cost comparison, and no due consideration.

The Union frames the issue:

1) Did the Postal Service violate the Collective Bargaining Agreement, specifically Article 19, when it added an additional year to the 2009-2013 HCR 294MO term?

2) Did the Postal Service violate the Postal Operation Manual, incorporated into the Collective Bargaining Agreement through Article 19, when it failed to include the 2013-2014 term of HCR 294MO in the renewal 2014-2018 term?

After consideration, the Arbitrator frames the issue:

Did the Service violate Article 19 or Article 32 of the National Agreement when it extended the term of HCR 294MO? If so, what shall be the remedy?

III. STATEMENT OF THE CASE

The Postal Service entered into a contract with Amara Kamara for Highway Contract Route (HCR) 294MO. The original term for the contract was from May 30, 2009 through June 30, 2013. A document entered into the Joint File shows that this original contract was extended at a later date. The Union claims this was done without notification to them and without the due consideration required by Article 32. The document in question has an effective date of November 1, 2013, and shows HCR 294MO's contract term as May 30, 2009 through June 30, 2014. The contract was later renewed for a four-year term, running from July 1, 2014 through June 30, 2018.

It is the period between June 30, 2013 and June 30, 2014 that is the subject of this grievance.

IV. POSITION OF THE UNION

In making its argument, the Union is relying on both Article 32 and two documents incorporated into the National Agreement through Article 19. These documents are the Postal Operations Manual (POM) and the Purchasing Manual.

The Union argues that the two manuals referenced above lay out three separate types of highway contracts – regular, temporary, and emergency. Emergency contracts may be entered into for the duration of an emergency. There was no such emergency in this case. Temporary contracts are short-term contracts not to exceed two years. There are no circumstances (such as

an uncertain duration, frequency, or mail volume) that would justify entering into a temporary contract.

This leaves only the regular contracts, which are fixed-term contracts that cannot exceed four years except in certain circumstances. Regular contracts, the Purchasing Manual states, should be used whenever possible. Section 532.2 of the POM reads: "Generally, regular highway transportation contracts are competitively awarded. Contracts are normally awarded for a term of 4 years and are renewable by mutual agreement."

The Union's main argument, as it relates to Article 19, is that at the end of the 2009-2013 contract, the Service had the option of either terminating the contract or renewing it as a four-year regular contract, which would have run from 2013 to 2017. Instead, they just unilaterally added a year to the original contract. This is a violation.

The Union's Article 32 argument rests on a lack of due consideration of the five factors laid out in Article 32.1.A and a failure to give notice to the Union in accordance with Article 32.1.C.

The Union is requesting that the grievance be sustained, and that the local Motor Vehicle Craft be made whole by receiving the cost of utilizing HCR 294MO from June 30, 2013 through June 30, 2014.

V. POSITION OF THE SERVICE

Management vehemently argues that the issue, as presented at Step 2 by the Union, concerns only due consideration and notice under Article 32.1. Essentially, the Service was blindsided at the hearing by the Union's arguments concerning the POM and the Purchasing Manual. While they had made vague references to Article 19, they never mentioned anything specific about which handbooks and manuals may have been violated. Yet even though the Union was allowed to change the issue on the day of the hearing, the grievance is still without merit.

The Union provided no evidence prior to the hearing to support their case. As the Union well knows, contracts are renewed at the National level and the Union provided no proof that notification was not provided at that level. The Union does not get notified at the local level.

Additionally, there is no evidence that any bargaining unit employees' wages, hours, or conditions of employment suffered for the duration of the HCR. There was no significant impact to the bargaining unit.

Furthermore, Management was well within its rights to renew the contract. None of the work performed under this contract was "new work" that had been subcontracted. Nothing changed. It was simply an existing contract that was modified and later renewed.

Finally, there is no remedy even if a violation were found to have taken place. This was work that had been contracted out already and was never work belonging to the Motor Vehicle Craft. For these reasons, the Service requests that the Arbitrator uphold the Service's position and deny the grievance.

VI. OPINION

The Service argues that it is at an unfair disadvantage because it was precluded from entering into evidence the Step 2 decision letter. I would agree that this places them at a disadvantage, but there is little to be done about that. Step 4 settlements carry the weight of contract language, and the Step 4 entered by the Union clearly states: "The parties agree that the National Agreement does preclude either party from issuing a Step 2 decision or Additions and Corrections, as applicable, outside of the prescribed time limits of Article 15.2.Step2 (f) and (g), in the absence of a mutually agreed upon limit extension."

There was no argument made by the Service that the decision letter was timely. If the Service was precluded from issuing the Step 2 decision, then I am certainly precluded from later allowing it to be entered into the record. As an Arbitrator, I am bound to act as if that Step 2 decision never existed. That is why it was not allowed into the record.

Jerome Murray, the Union steward for this case, testified that at the Step 2 meeting, it was actually Transportation Manager Catheleen Washington who brought in the POM and Purchasing Manual. This is certainly hearsay evidence and, as such, carries much less weight than it would had Ms. Washington been there to testify to what she said and did. But Ms. Washington was not there. Indeed, no witnesses testified for the Service.

Part of the role of an arbitrator is to act as a fact-finder. It is this reason that the testimony was allowed into the record. Had the Service provided any witnesses, I would have a

more complete picture of what took place. As it is, I am left with the testimony of Mr. Murray as to what happened at the Step 1 meeting.

> "On the admission of hearsay into arbitration proceedings the consensus can be described as a collective shrug, a throwing-up of the hands, and a proclamation that it is inevitable. Many responses of both sides indicated that hearsay 'has to come in,' and that the arbitrator 'can't keep it out.' Admission of hearsay is justified to keep arbitration from becoming too cumbersome through procedural wrangling, or by the requirement that every witness who might be brought in be required to appear. It is agreed that the arbitrator must have wide latitude, and that he should let a witness with a grievance 'get it out.' Though the parties should feel that they have had their say in an informal manner, once admitted hearsay should be carefully weighed for its probative value." Eaton, *Labor Arbitration in the San Francisco Bay Area*, 48 LA 1381, 1385 (1967).

Mr. Murray's testimony regarding Ms. Washington's conduct at the Step 1 meeting is admitted into the record for what it is worth. While it does nothing to help the Union in proving a violation, it does further the Union's argument that Management was well aware of the Union's Article 19 concerns.

This leads us to Management's claim that it was blindsided at the hearing and that this grievance has only ever been about Article 32.1. Putting aside Mr. Murray's testimony, it is still plain to me that this case was about more than just due consideration and notice under Article 32.1. The Step 2 appeal clearly states the Union is alleging violations of Articles 5, 17, 31, 32, 19, 39, and 15. The Statement of Facts are incredibly detailed, and while I will admit that nowhere will you find the words "Purchasing Manual" or "Postal Operations Manual", it seems clear that the Union was concerned about the contract being extended from 2013 to 2014. As such, the Postal Service cannot rightly claim to have been blindsided at arbitration:

> "In reviewing the original HCR Schedule that Catheleen Washington provided to the Union, I notated the following: On November 1, 2013, Management extended HCR #294MO, Charleston P&DF, SC – Brunson, SC. Contract term: Modified

from May 30, 2009 thru June 30, 2013 to new effective date November 1, 2013 thru June 30, 2014 (exhibit 3B). But the Contract effective date (June 1, 2013) on the Statement of Work and Specifications (exhibit 3A) is different from the effective date on the original HCR Schedule that Ms. Washington provided to me marked exhibit 3B. Also, in reviewing the Contract Activity Log (Form 5443) the effective date shows an effective date of July 1, 2014 thru June 30, 2018 (exhibit 4). Exhibit 4 shows that HCR #294MO has been prematurely renewed months in advance by the USPS and the Union feels this is the main reason the USPS has failed to produce HCR #294MO requested contract and relevant documents."

Moving on from whether or not the Union's arguments concerning the POM and Purchasing Manual should be allowed, it is time to determine whether or not the Service actually violated these manuals. A further look into the Purchasing Manual sheds some light on what the Service can and cannot do with regard to extending contracts (as they did here, from 2009-2013 to 2009-2014). Section 4.4.7 of the Purchasing Manual is titled "Extension and Short-Term Renewal of Contracts". The three subsections read:

4.4.7.a – When appropriate, contracting officers may issue modifications extending the term of a contract, as distinct from the renewal of a contract.
4.4.7.b – The contract term may be extended in increments of up to 1 year, provided the extension does not result in a total term of more than 2, 4, or 6 years, whichever is the allowable maximum contract term. The extension must be made with the consent of the supplier by a supplemental agreement, and the need for the extension must be documented in the contract file.
4.4.7.c – Pending full renewal in accordance with 4.4.6, an expiring contract that is eligible for renewal may be renewed for short terms up to 1 year by mutual agreement of the parties. When the full renewal is approved, the short-term renewal may be converted into a full-term renewal to cover the full remaining term of the contract.

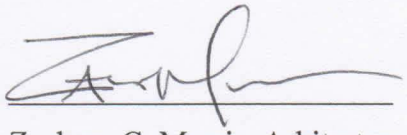
These sections, taken together, indicate that a violation has occurred in this instance. While the Service may modify the term of a contract (without officially renewing the contract), it may only do so in increments of one year and only if the extension does not result in a term of more than 2, 4, or 6 years, whichever is appropriate. Here, we are dealing with a regular contract without special conditions or special equipment that would justify the allowance of a 6-year term. As such, any extension made cannot result in a total term of more than four years. The extension in this case provided for a 5-year term – from 2009 to 2014.

Furthermore, it does not seem that Section 4.4.7.c applies in this case. The evidence in the file does not indicate that this extension was made "pending full renewal". Indeed, the language states that an "expiring contract" eligible for renewal may be renewed for short terms. It strikes me that this subsection of the Purchasing Manual is included so that HCRs can continue to run in the short term while the details of a full four-year renewal are hammered out. But exhibit 3B shows that the effective date of the modified contract was November 1, 2013 – some four months after the original four-year term expired. This was not an expiring contract. This was an expired contract that the Service attempted to tack a year onto. This action was contrary to the language in the POM and Purchasing Manual governing the administration of contracts. As such, it is a violation of Article 19. And to the extent the work in question could have been performed by the Motor Vehicle Craft, a remedy is due.

However, I am disinclined to grant the remedy requested by the Union – that the Craft be paid the cost of implementing highway contractors from June 30, 2013 to June 30, 2014. The purpose of a remedy is to put the parties in the same position they would have been had no violation ever occurred – to preserve the status quo ante. As such, the Service is directed to pay the Motor Vehicle Craft the cost of using bargaining unit employees to run HCR 294MO from 14 days prior to the filing of this grievance through June 30, 2014. This is to include any overtime that would have been necessary to ensure delivery of the mail on this route. I will retain jurisdiction in the event that a dispute concerning remedy arises.

VII. AWARD

For the reasons stated above, the grievance is sustained. The Service is directed to make the bargaining unit whole for work that was denied them from 14 days prior to the filing of this grievance through June 30, 2014.



Zachary C. Morris, Arbitrator

June 21, 2017

Regular Arbitration Panel

In the Matter of the Arbitration
between
UNITED STATES POSTAL SERVICE
and
AMERICAN POSTAL WORKERS
UNION, AFL-CIO

Grievant: Class Action
Post Office: Columbia, SC
USPS Case No: K06V-1K-C 10014832
APWU Case No: 09NW19

BEFORE: Zachary C. Morris, Arbitrator

APPEARANCES:

For the Service: Anthony Coward, Labor Relations Manager

For the APWU: Bruce Amey, National Business Agent

Place of Hearing: 2001 Dixiana Rd., West Columbia, SC 29169

Date of Hearing: Thursday, February 9, 2017

Date of Award: Saturday, March 11, 2017

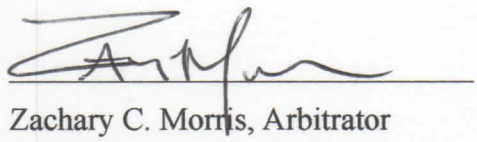
Relevant Contract Provisions: Article 15

Contract Year: 2006-2010

Type of Grievance: Contract

Award Summary:

The grievance is arbitrable. The Arbitrator will retain jurisdiction so that a grievance on the merits can be heard.



Zachary C. Morris, Arbitrator

I. PROCEDURAL BACKGROUND

This grievance was initiated when Management at the Columbia P&DC awarded a best-qualified job bid on October 29, 2009. This Award addresses Management's claim that the grievance was never properly filed at Step 1. At the request of the Service and with the consent of the Union, the hearing was bifurcated. Arguments and testimony were heard concerning solely the arbitrability of the grievance.

Two other cases were scheduled to be heard on the day of the hearing, but the Arbitrator was informed that they are being held in abeyance, pending a list of highway contract routes to be converted by the Service in response to a National Award in Case No. Q06C-4Q-C 11182451 from Arbitrator Shyam Das.

At the hearing, both the Postal Service and the Union were ably represented and were given a full and fair opportunity to present evidence, examine and cross examine witnesses, and make arguments. In reaching the conclusions and making the Award set forth herein, the Arbitrator has given full consideration to all evidence of record.

II. ISSUE

Is the grievance arbitrable?

III. STATEMENT OF THE CASE

On October 29, 2009, Management issued a job award for a best qualified lead automation technician position. The Union felt the Service had violated the National Agreement in doing so, and sought to grieve the case.

Alternate Steward for the Motor Vehicle Craft, Nate Walker, sought a Step 1 meeting with Supervisor Timothy Bush on Monday, November 9th – the eleventh day after becoming aware of the facts surrounding the grievance. The reason the grievance was initiated by Mr. Walker is due to the fact that Mr. Wages' scheduled days off are Sundays and Mondays. As such, he was not working on the day in question.

A chain of emails between Walker and Bush are central to determining whether the grievance was properly initiated by the Union:

8:32 AM – from Steward Walker to Supervisor Bush:

I need to do a step-1 with you this morning. If you are short on time we can do this step-1 over the phone. It would only take about 5-10 min. Let me know if you will be able to meet with me this morning.

8:40 AM – from Supervisor Bush to Steward Walker:

Please understand that Mondays are my busiest days! I can meet with the union anytime and any day except Mondays as Mondays are so busy and we are short staffed!

9:08 AM – from Steward Walker to Supervisor Bush:

So that I understand this clearly, you are telling me that based on your workload on Mondays you can't meet with the Union to do a step-1 grievance? If this is correct, are you giving me an extension to do this step-1 on another day? If so, what date? And what time?

9:59 AM – from Supervisor Bush to Steward Walker:

Based on my workload and being short staffed on Mondays, I cannot meet with union representation for a step 1 grievance at this time. I am more than willing to meet with union representation in accordance with Article 15 and that management will graciously extend the 14th day grievance filing requirement to a 15th day, if failure to meet on the day requested creates a timeliness issue for the union. I will be available at 1500 hrs on 10 November 2009 to meet with union representation for the step 1 grievance.

12:05 PM – from Steward Walker to Supervisor Bush:

Since you have refused once again to meet with me, Nate Walker, alternate Steward for the VMF, today, November 9, 2009, because of your workload and

being short staffed on Mondays are not in accordance with Article 15 of the Collective Bargaining Agreement, I am graciously requesting that you, Timothy Bush, give me, Nate Walker, an extension for 10 days until November 18, 2009 @ 3PM to conduct this step-1 grievance with you.

2:03 PM – from Supervisor Bush to Steward Walker:

As I stated in my earlier emails, Mondays are always bad days to try to schedule a Step 1. Especially, since I am not doing two supervisors' jobs and have only half the normal daily complement on Mondays. My earlier email proposal still stands. I am more than willing to meet with union representation in accordance with Article 15 at 1500 hrs on 10 November 2009. Furthermore, VMF management will extend the 14 day grievance filing requirement to a 15th day, if failure to meet today creates a timeliness issue for the union.

From these emails, it seems that both sides want to control when the Step 1 meeting will be held and neither party is willing to budge. I'll note that there also seems to be some confusion regarding when the grievance arose. The bid award is dated October 29, 2009, and all of the moving papers within the Joint File claim as such. Yet it seems Mr. Bush was acting under the impression that Monday, November 9, was the 14th day and that he was graciously granting a one-day extension to Tuesday, November 10. Indeed, even at the hearing, both he and Management's advocate spoke as if Walker didn't attempt to contact Bush until the fourteenth day.

According to my arithmetic, however, if the Union became aware of the job award on the day it was issued (October 29), then November 9 would only be Day 11 of the fourteen day window Article 15.2.Step 1(a) gives the Union to initiate a grievance. The fourteenth day would actually have been Thursday, November 12, 2009.

So the Union sought to meet on the eleventh day, but Management refused. Management then sought to meet on the twelfth day, but the Union refused. Thereafter, there is no communication between the parties. The fourteen days come and go without a Step 1 meeting ever actually being held and the Union appeals the grievance to Step 2 on Friday, November 13 (Day 15), in accordance with Article 15.4.C.

IV. POSITION OF THE SERVICE

The Service makes two main arguments, the first being that the Union violated Article 17 by allowing the alternate Steward to initiate the grievance when the primary Steward was available. Management takes the view that alternate Stewards are only to be used when the primary Steward is truly unavailable. This means that the primary Steward would have to be out on leave, for example. The fact that Mr. Wages had a day off does not mean he was unavailable. He was present throughout this period, so he should have been the one to present the grievance.

Secondly, Management argues that the grievance was never properly initiated under Article 15.2.Step 1(a). It is Management's responsibility to schedule Step 1 meetings, not the Union's. Supervisor Bush scheduled a meeting for Tuesday, November 10, at 3:00 PM, and the Union failed to show. Because there was no Step 1 meeting, the grievance was never really initiated at all. According to Article 15.4.B, failure to meet the prescribed time limits of Article 15 "shall be considered a waiver of the grievance".

For these reasons, the Service requests that the grievance be dismissed as not arbitrable.

V. POSITION OF THE UNION

The Union initially points out that Supervisor Bush received the request to hold a Step 1 meeting and made the decision that he couldn't within eight minutes. This, they argue, is clearly not making a good faith effort to meet with the Union. Management can't just flatly refuse to meet on Mondays. Meeting with the Union is part of a Supervisor's job as much as anything else they do. Supervisor Bush has no right to dictate to the Union what days he will or won't meet and with whom he will or won't meet.

Additionally, the Union also points out that nowhere in Article 15.2.Step 1 does it say that Management is the one who schedules the meeting. The Union initiates the grievance and then there is obviously a discussion or meeting that takes place, but nowhere does the Collective Bargaining Agreement explicitly state that Management schedules the meetings. There must be a consensus between the parties.

Finally, it is clear that Management knew of the grievance, even a Step 1 meeting was never held and that is the true purpose of Article 15.2.Step 1 – to give Management timely notice

that a grievance exists. Article 15.4.C reads: "Failure by the Employer to schedule a meeting or render a decision in any of the Steps of this procedure within the time herein provided shall be deemed to move the grievance to the next Step of the grievance-arbitration procedure." Obviously, this implies that a Step 1 meeting isn't even necessary for a grievance to be arbitrable. The Union did its part by notifying Management of the grievance.

For these reasons, the Union requests that the grievance be found arbitrable so that a hearing on the merits can be scheduled and heard.

VI. OPINION

Management claims that alternate Stewards do not have the authority to initiate a grievance on the primary Steward's day off. Rather, alternates are to be utilized only when the primary is truly unavailable. However, the Service offers no language backing up their argument and I cannot find any in Article 17 of the National Agreement. I am in agreement with Arbitrator Michael Zobrak, who dealt with this very same issue in this very same post office back in 2010:

> The Postal Service objects to the alternate steward filing grievances at the VMF instead of the designated steward. According to local management the Walker waits to file grievances on Wages' non-scheduled days. Regardless of motive, Walker is an alternate steward and can file grievances in Wages' absence. There is no evidence of a contractual violation was long as Walker is not filing grievances when Wages' is on duty. *[sic]* Case No. K06V-4K-C 09307941, Arbitrator Michael E. Zobrak, at 4. (2010)

Likewise, I am not convinced that the Union failed to initiate the grievance in accordance with Article 15. I find the reasoning of Arbitrator Katherine Thomson persuasive:

> The Agency argues that the Arbitrator has no jurisdiction because there was never a Step 1 meeting. In the recent cases cited by the Agency, the Arbitrators found that the Union did not make the employee's supervisors or

> managers aware of the grievance until the appeal to Step 2. The cases are correct because the Union did not properly initiate the grievances. However, in this case, the Union did not bypass Step 1. Williamson sent a letter, notifying the supervisor of the grievance and requesting documents. He heard no response for five days, and was running past the 14-day time limit for discussion. Relying on Article 15.4.c, the Union advanced the grievance by filing an appeal to Step 2…
> The agency essentially argues there must be a meeting at Step 1 to proceed further, that mere notification of the grievance could never be sufficient. The Agency's argument would give no meaning to section 4.c of the grievance procedure…
> As the Union here did notify the issuing supervisor of the grievance and request information, the grievance exists. Case No. F98V-1F-D 02022621, Arbitrator Katherine J. Thomson, at 15-16. (2002)

Admittedly, there is a major distinction between the case above and this one. In that case, the Supervisor never responded. Here, Supervisor Bush did respond to the Union's request and even attempted to schedule a meeting.

The Union attempted to meet with Supervisor Bush, even offering to hold the meeting telephonically. Walker told Bush that it would only take between five and ten minutes. Bush's response was essentially, "No, I don't do Mondays."

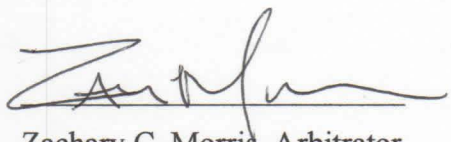
Mr. Bush gave credible testimony that he is stretched thin on Mondays because many employees are off that day and I am sure that he truly was busy. But, as the Union argues, maintaining good labor relations and meeting with the Union is just as much a part of his job as overseeing road tests, repairs, and parts ordering.

Allowing a Supervisor to refuse to hold Step 1 meetings on Mondays just because they are usually busy on that day creates a slippery slope. It's not hard to foresee a Supervisor declaring his or herself too busy to meet with the Union on Mondays, Tuesdays and Thursdays. Add in his or her two scheduled days off and the Union is left with only two days on which they can present grievances. That means that within the 14 days granted by Article 15.2.Step 1(a), the Union would actually only have four days in which they can initiate their grievance.

The Union made Management aware of the grievance on Day 11 after becoming aware of it. They requested a meeting that day. Management refused. Management requested a meeting on Day 12. The Union refused. No other attempts were made to schedule a meeting on Days 13 or 14. When they 14 days expired, the Union rightly appealed the grievance to Step 2. There is no violation of Article 15.

VII. AWARD

For the reasons stated above, the grievance is arbitrable. The Arbitrator retains jurisdiction so that a hearing on the merits can take place.



Zachary C. Morris, Arbitrator

March 11, 2017