

The attached arbitration decision is arbitral ratification of the Branch 3996 Policy Paper.

The Carrier in this case did everything in accordance with the policy and was fully vindicated by the Notice of Removal being denied and the complete make whole remedy being given.

When Carriers follow proper procedure vindictive, punitive discipline will not stand. The key element in this case is that the Carrier called and when told no assistance was available he finished the assignment.

REGULAR ARBITRATION PANEL

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In the Matter of the Arbitration \*  
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between: \* Grievant: S. Gomez  
\*  
United States Postal Service \* Post Office: Flushing, NY  
\*  
and \* USPS Case No: B06N-4B-D 10399759  
\*  
National Association of \* NALC Case No: 107720  
Letter Carriers, AFL, CIO \*  
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BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Albert Alvarez  
For the Union: Frank Mongiello

Place of Hearing: Postal Facility, Flushing, NY  
Date of Hearing: March 11, 2011  
Date of Award: April 12, 2011  
Relevant Contract Provision: Article 16  
Contract Year: 2006  
Type of Grievance: Discipline

Award Summary:

The Grievant was issued a Notice of Removal charging failure to properly perform the duties of his position. Management failed to establish just cause to support any disciplinary action in this matter. The grievance is granted and the Grievant shall be made whole in every respect.



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Lawrence Roberts, Panel Arbitrator

**SUBMISSION:**

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 11 March 2011 at the postal facility located in Flushing, NY, beginning at 10 AM. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a digital recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

**OPINION****BACKGROUND AND FACTS:**

The Grievant in this matter is employed as a Letter Carrier at a Flushing, NY Postal facility, the Woodside Station. He has been employed by the Postal Service for some six years.

On or about 9 September 2011, the Grievant received the following Notice of Removal letter, signed by a Supervisor, Customer Service. That document, in pertinent part, reads:

**"You are hereby notified that you will be removed from the Postal Service no sooner than thirty (30) days from the receipt of this notice. If a timely grievance is filed, in accordance with the Dispute Resolution Process (DRP), the removal will be deferred until a decision is made on the grievance, after a Step B decision has been rendered, or fourteen (14) days after the appeal is received at Step B, whichever comes first. If the final outcome of the DRP denies your grievance, you will be notified of the effective date of your removal.**

**CHARGE: FAILURE TO PROPERLY PERFORM THE DUTIES OF YOUR POSITION**

You were hired by the United States Postal Service on 09/17/2005. You are currently assigned to the Ridgewood Post Office. Your scheduled tour of duty is 07.50 to 16.00.

You and all other carriers at the Woodside Station have been instructed thru service talks and one on one instruction the importance of maintaining your approved schedule. You also have been instructed to notify management as soon as you become aware that you cannot maintain your work schedule. Submission of PS Form 3996 is required when you are of the opinion that you cannot maintain your assigned schedule. You are required to accurately estimate any request for assistance.

On Tuesday September 7, 2010 you were assigned to report for duty at 7:30 am. Your Float Assignment for that day was Carrier Route 077-007 at Woodside Post Office. You perform this assignment regularly as part of your bid.

On this day you submitted a PS FORM 3996 requesting One Hour Auxiliary assistance. I approved your request, which meant that you were to have completed your assignment and ended your tour by 17.00. On this day you moved back to the office at 18.59 and ended your tour at 18.85. You exceeded your scheduled end tour by one hour and fifty one minutes. You wildly underestimated your need for assistance and by doing so cost the Postal Service unnecessary overtime expenditures including .85 units of penalty overtime.

On September 8, 2010 I conducted a Pre Disciplinary Interview with you concerning this serious offense. NALC Union representative Teresa Perry was also present. I asked you if you had submitted PS form 3996 on Tuesday, September 7, 2010. You replied, "YES." I asked you if when you called did you at any point told me that you were coming back after 1800. You said "You weren't sure." You could not explain how you so poorly estimated your need for assistance.

Section 112.1 of the Carrier handbook M-41 states Efficient Service:

"Provide reliable and efficient service. Federal statutes provide penalties for Persons who knowingly or willfully obstruct or retard the mail..

Section 112.21 of the Carrier Handbook states: "Obey the instructions of your supervisor."

Section 131.42 of the Carrier Handbook states: "Inform management of this well in-advance of the scheduled leaving time and not later than immediately following the final receipt of the mail. Management will Instruct you what to do."

Section 131.43 of the Carrier Handbook states: "Complete applicable items on Form 3996 Carrier-Auxiliary Control, if overtime or auxiliary assistance is authorized in the office or on the street.

Section 666.1 of Employees and Labor Relations Manual states: "Employees are expected to discharge their assigned duties conscientiously and effectively.

Section 668.51 of the Employee and Labor Relations Manual states: "Employees must obey the instructions of their supervisors. If an employee has reason to question their propriety of a supervisor's order, the individual will nevertheless carry out the order."

Be advised that following elements of your past record have been considered in deciding this action:

12/19/2008 21 Day Time Served Suspension: Conduct Unbecoming a Postal Employee.

10/16/2007 Time Served Suspension. Failure to secure the mail entrusted to your care.

08/22/2007 21 Day No Time Served Suspension: Continuous Absence Without Official Leave/Failure to Follow Instructions.

06/14/2007 14 Day No Time Served Suspension: Failure to Be Regular In Attendance

05/31/2007 7 Day No Time Served Suspension: Failure to Be Regular in Attendance.

**04/11/2007 Letter of Warning. Failure to Follow Instructions/Falsifying Official Postal Records.**

**In the five years since you have been employed by the Postal service you have amassed the above outlined atrocious disciplinary record. Your actions, as stated above, violate Postal Rules and Regulations. All attempts to rehabilitate you have failed. Your conduct cannot and will not be tolerated. Therefore, your removal is warranted."**

The Letter goes on to cite the various options and rights available to the Grievant to protest the Removal action.

The Grievant, as well as the Union, refute the charges. The instant grievance was filed in protest. The Union asks the Grievant be made whole and returned to work. In rebuttal, the Agency argues the evidence supports their removal action and requests their removal action to be upheld.

Obviously, the Parties were unable to resolve this dispute during the prior steps of the Parties Grievance-Arbitration Procedure of Article 15. The Step B Team declared an impasse on 10 December 2010.

It was found the matter was properly processed through the prior steps of the grievance procedure. Therefore, the dispute is now before the undersigned for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. The record was closed following the presentation of oral closing arguments by the respective Advocates.

**JOINT EXHIBITS:**

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

**COMPANY'S POSITION:**

The Employer contends there is just cause to support the removal of the Grievant. Management asserts the Grievant is knowledgeable of his duties and responsibilities and has performed them on numerous occasions.

It is also mentioned by the Agency that the Grievant has accumulated a number of corrective actions relative to his performance over the last six years. It is the claim of the Employer the Grievant fails to adhere to policies, rules and regulations in performing his duties.

The Service asserts the incident for which the Grievant is charged with is just another example of how the Grievant, for whatever reason, continues to go against the grain.

And it is Management's view that after repeated corrective actions in an attempt to correct his behavior, the Grievant either fails to perform or refuses to perform in the manner expected of him.

According to the Employer, the evidence in this case will show the Grievant failed to perform his duties in providing a reasonable and accurate estimate of time needed to perform his duties on 7 September 2010. Management alleges the Grievant was unable to explain why he failed to return in a timely manner that particular day.

As long as the Grievant continues not to accept responsibility for his actions, the Service claims there is

nothing that can be done to assist the Grievant in becoming a productive Employee.

And for all of the above reasons, Management asks the removal action be upheld and the instant grievance denied.

**UNION'S POSITION:**

The Union contends the Notice of Removal was issued without just cause. It is the argument of the Union that, even if all the charges are true, it doesn't rise to any level of discipline.

The Union insists Management has failed to prove just cause in this matter. According to the Union, the Grievant is a floater on the route he was assigned on the day in question. Additionally, the Union points out, the alleged incident occurred the day after a Holiday, a day consisting of very heavy mail volume.

It is also explained by the Union that the Grievant in this case is a non overtime desired list Employee. The Union also interjects that six other Letter Carriers in the office were late in arriving back from their respective routes that day.

The Union is of the opinion that the discipline in this matter is punitive instead of corrective and is not progressive in nature. The Union also asserts that returning late to the station is not an egregious offense deserving of any form of discipline, let alone removal.

It is the view of the Union that the Grievant in this matter did not act in a willful or deliberate manner on that day. Instead, according to the Union, the Grievant followed the instructions of his supervisor by completing the delivery of his assignment. In fact, the Union mentions the Grievant even called in from the street to advise his supervisor that he would be late.

The Union concludes that, at best, the allegations made by the Employer in this case are speculative and opinionated.

The Notice of Removal, according to the Union, does not meet the test for just cause and must be rescinded. The Union asks the grievance be sustained, the Grievant's record expunged and a make whole remedy be applied.

**THE ISSUE:**

Did Local management violate the National Agreement, specifically Articles 16 and 19 when they issued a Notice of Removal to Woodside Letter Carrier Mr. Samuel Gomez, dated September 9<sup>th</sup> 2010 for Failure to Properly Perform the Duties of Your Position and if so, what is the proper remedy?

**PERTINENT CONTRACT PROVISIONS:**

ARTICLE 16  
DISCIPLINE PROCEDURE

**DISCUSSION AND FINDINGS:**

This matter involves an issue of removal wherein the burden of proof falls on Management to establish just cause for their actions.

While Article 3, Management Rights, provides the Employer with the power to "suspend, demote, discharge, or take other disciplinary action...", the Employer is limited in any decisions as restricted by other Articles or Sections of the Agreement.

According to the Agreement, no Employee may be disciplined or discharged except for just cause. In my view the "just cause" provision is ambiguous; however, its concept is well established in the field of labor arbitration. The Employer cannot arbitrarily discipline or discharge any Employee. The

burden of proof is squarely on the Employer to show the discipline imposed was supported with sound reasoning.

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

The chief negotiators of Article 16 suggest progressive discipline. In many cases, that guideline prevails and progressive discipline works to serve both the Employer and Employee. As an example, absenteeism is oftentimes corrected with progressive discipline.

Then, there are those infractions, whereby progressive discipline, is simply improper. Theft would certainly be a good example of one of these instances. In this business, such an act would be intolerable and removal following the first occurrence would only be appropriate. I'm sure the chief negotiators would agree with this reasoning.

However, each matter of discipline rests solely on its own merits. What is found to be applicable in this case cannot be applied evenly to other similar issues. In fact, this case is totally unique when compared to other matters of discipline that I've decided throughout my arbitral career.

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

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

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

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

First of all, in this instance, I am of the considered opinion the alleged infraction is not a dischargeable offense. Secondly, the Employer failed to prove the Grievant was guilty as charged. Those are two separate opinions and when taken either singularly or collectively, for those reasons, the Grievant shall be reinstated and made whole. Furthermore, in comparing the dates of previous discipline cited in the Notice of Removal with the unambiguous language of Article 16.10, the aforementioned shall be expunged from the Grievant's file.

After careful review of all evidence and testimony, I was absolutely convinced the Grievant's work performance on Tuesday, September 7, 2010, was letter perfect to the tee and carried out as assigned. The Grievant had submitted the Form 3996 per regulation and even called his supervisor later in the afternoon to inform the same of anticipated tardiness.

Any rationale mind could not have expected more from any Letter Carrier. In fact, the Grievant should be commended for his actions. He delivered the mail and completed the assignment. And through that entire process, credible evidence shows the Supervisor told the Grievant that assistance was not available.

Even after much consideration of this matter, I was unable to identify any miscues of the Grievant on that day. In fact, in my considered opinion, the Grievant should have been rewarded, instead of removed, for his actions on that Tuesday.

The Employer implied the Grievant was unable to provide explanation for being late on that day. However, it wasn't up to the Grievant to provide any rationale. The record shows the Grievant called his Supervisor at 3:17 pm on the day in question. The substantive evidence proves to me the Grievant made the call to a supervisor for the purpose of providing his supervisor with an update.

And by doing so, the Grievant is charged with "wildly underestimating" the need for assistance. In my view, this is, instead, the responsibility of the supervisor. For, it is not up to the Grievant to manage. He was told to complete the route and that is exactly what happened.

The testimony shows the supervisor had already informed the Grievant that assistance was not available, so, in my considered opinion, anything occurring past that point was moot. For by stating that assistance was not available, the Supervisor informed the Carrier that it became his direct responsibility for the delivery of the assigned route that day.

The fact of the matter is, the Employer was unable to show any negligence on the part of the Grievant. The Grievant had completed the proper paperwork and had even called his Supervisor, late into the tour that day.

Even though the Employer claimed the Grievant had failed to submit another form, Management failed to show the submission of a second form was required by an contractual section, or Article 19 Policy or Manual.

It is rather obvious to the undersigned that given the outcome of this matter, with respect to Article 16.10, the Grievant's record should not only be expunged of this matter, and, with respect to the dates of previous discipline indicated in this Notice of Removal, should now be clean of any and all previous discipline.

In addition, one of the core elements in establishing just cause consists of a showing that discipline has been administered in a fair and equitable manner. In this particular case, the Union contended that other Letter Carriers did not complete their assignments on that same day prior to 6 pm. And the Union pointed out that none of the other Carriers were disciplined.

The occurrence in this case was the day after a Holiday. Understandably, the mail volume was high on that day. And assistance was not available to the Grievant. The Agency argues the Grievant was one and one-half hours over his estimate, without explanation.

The mail volume was clearly high that day. The Grievant, as required, had properly submitted a Form 3996 citing "excessive mail, heavy volume," and "1 hour tentative." I need to point out that I could find no requirement on that Form 3996 requiring any Carrier to "accurately estimate" any request for assistance, as charged in the Notice of Removal cited above.

And as I have pointed out in many of my previous decisions, the Employer is always tasked with proving all of the allegations made in the Notice of Removal document. And in this case, there is absolutely no Postal regulation, to my knowledge, requiring any letter carrier to accurately estimate any request for assistance.

Secondly, the Grievant notified his Supervisor at 3:17 pm on that day. Page 16 of Joint Exhibit 2 depicts the time from cell phone records and there is no reason for me to believe the

Grievant did not contact his supervisor to provide a status report.

Lastly, and maybe the most significant, is the fact the Grievant had completed the route. This only adds to the credibility of the Grievant and detracts from management allegations in this case. The Grievant completed the route, albeit late. And what that does tell the undersigned is the Grievant, obviously, made every effort to complete the route.

The Service implies, via their case in chief, that the Grievant was simply killing time for some reason. But in my considered opinion, such an argument doesn't make sense. For, if the Grievant had been "sandbagging," as alleged by Management, then the route would have never been completed that day.

Instead, the Grievant was late, however, successful delivery was accomplished that day. The Employer case in chief failed miserably in proving any violation of Postal policy or regulation committed by the Grievant. Instead, in my considered opinion, the Grievant should have been commended for his efforts on that particular day.

The grievance is sustained and the Grievant shall be made whole in every respect.

AWARD

The grievance is sustained.

Dated: April 12, 2011  
Fayette County PA