

C# 18938

REGULAR ARBITRATION PANEL

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In the Matter of the Arbitration

GRIEVANT: Michael Tsang

between

POST OFFICE: Hayward, CA  
Castro Valley Station

UNITED STATES POSTAL SERVICE

CASE NO: F94N-4F-D98066054

NALC CASE NO: HCV112897D

and

NATIONAL ASSOCIATION OF LETTER  
CARRIERS, AFL-CIO

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BEFORE: Donald E. Olson, Jr.

APPEARANCES:

For the U.S. Postal Service: Ms. Glenda F. Dunmore

For the NALC: Mr. Edmond L. White

Place of Hearing: Hayward, CA

Date of Hearing: November 19, 1998

AWARD: The Notice of Removal issued to the Grievant on November 18, 1997, will be rescinded. Just cause existed for a thirty (30) working day suspension. The Grievant shall be immediately reinstated to his former position with full back pay plus interest less the period of suspension and with full benefits and seniority.

Date of Award: November 25, 1998

  
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Donald E. Olson, Jr., Arbitrator

## **OPINION OF THE ARBITRATOR**

### **PROCEDURAL MATTERS**

This proceeding was conducted in accordance with the provisions set forth in Article 15 of the parties' 1994-1998 National Agreement. A hearing was held before the undersigned on November 19, 1998, in Hayward, California at the postal facility located at 24438 Santa Clara Street. The hearing commenced at 9:00 a.m. and concluded at 11:50 a.m., at which time the hearing record was closed. The case number assigned this matter was **F94N-4F-D98066054**. The hearing proceeded in an orderly manner. There was a full opportunity for the parties to make opening statements, submit evidence, to examine and cross-examine witnesses, and to orally argue the matter. All witnesses testified under oath as administered by the Arbitrator. The Arbitrator tape-recorded the proceeding as an extension of his personal notes, and not as an official record of the hearing. The advocates fully and fairly represented their respective parties. There were no challenges to the substantive or procedural arbitrability of the dispute. The parties submitted the matter on the basis of evidence presented at the hearing and oral closing arguments. The parties stipulated to the issue(s) to be determined. Mr. Glenda F. Dunmore, Labor Relations Specialist, represented the United States Postal Service, hereinafter referred to as "the Employer". Mr. Edmond L. White, OWCP Specialist for Golden Gate Branch 214, represented the National Association of Letter Carriers, AFL-CIO, hereinafter referred to as "the Union", and Mr. Michael Tsang, hereinafter referred to as "the Grievant". The parties introduced two (2) Joint Exhibits, which were received and made a part of the record. The Employer introduced fourteen (14) Exhibits, all of which were received and made a part of the record. The Union introduced one (1) Exhibit, which was received and made a part of the record. The Arbitrator promised to render an opinion and award within thirty (30) calendar days after the hearing was closed. This opinion and award will serve as this Arbitrator's final and binding decision regarding this dispute.

### **ISSUE(S)**

The stipulated issue(s) to be determined are:

“Did management have just cause to issue the Grievant the November 18, 1997, Notice of Removal, and if not, what is the appropriate remedy?”

**RELEVANT PROVISIONS OF THE 1994-1998 NATIONAL AGREEMENT**

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**ARTICLE 3  
MANAGEMENT RIGHTS**

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

- A. To direct employees of the Employer in the performance of official duties;
- B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

\* \* \* \*

**ARTICLE 14  
SAFETY AND HEALTH**

**Section 1. Responsibilities**

It is the responsibility of management to provide safe working conditions in all present and future installations and to develop a safe working force. The Union will cooperate with and assist management to live up to this responsibility. . . .

\* \* \* \*

**ARTICLE 16  
DISCIPLINE 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.

\* \* \* \*

## **ARTICLE 19 HANDBOOKS AND MANUALS**

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, 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.

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### **RELEVANT PROVISIONS OF THE M-39 HANDBOOK**

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#### **115 Discipline**

##### **115.1 Basic Principle**

In the administration of discipline, a basic principle must be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause. The delivery manager must make every effort to correct a situation before resorting to disciplinary measures.

##### **115.3 Obligation to Employees**

When problems arise, managers must recognize that they have an obligation to their employees and to the Postal Service to look to themselves, as well as to the employee, to:

- a. Find out who, what, when, where, and why.
- b. Make absolutely sure you have all the facts.
- c. The manager has the responsibility to resolve as many problems as possible before they become grievances.

- d. If the employee's stand has merit, admit it and correct the situation. You are the manager; you must make decisions; don't pass this responsibility on to someone else.

\* \* \* \*

## **BACKGROUND**

The Grievant was employed as a Letter Carrier working out of the Castro Valley Station when this dispute arose. The Grievant was originally hired on September 3, 1994. On the morning of October 15, 1997, at approximately 11:00 a.m. the Grievant was assigned to deliver relays. In addition, he was instructed to load his relay for Route 4642, deliver that mail, and then return to the station for additional mail to deliver on other relays. The Grievant approached a jeep vehicle to load his mail. At approximately the same time, Arsenio Dela Cruz another letter carrier noticed that the Grievant was loading mail into the jeep which had been assigned Dela Cruz. Dela Cruz then asked the Grievant to remove the mail from Dela Cruz's assigned jeep. Thereafter, the Grievant removed his mail from Dela Cruz's jeep, and loaded same into another jeep. However, soon thereafter according to Dela Cruz the Grievant shot a rubber band in his direction which allegedly hit Dela Cruz near his eye. Once again, according to Dela Cruz the Grievant then got into a jeep and started the engine. As Dela Cruz approached the Grievant's jeep, the Grievant put his vehicle in gear and accelerated. On the other hand, the Grievant claimed he started the engine and was ready to leave, when suddenly a rubber band came through the jeeps window and struck his hand, which then hit his face. He then looked out the window to see where the rubber band had come from. As he did so, the Grievant's jeep hit a privately owned vehicle. This incident was reported to management. Both the Grievant and Dela Cruz were interviewed and made written statements regarding the incident. Thereafter, the Employer issued the Grievant a Notice of Removal dated November 18, 1997, which indicated he would be removed from employment 30 days after receipt of that notice. The reason given for the Grievant's removal was "Unacceptable Conduct/Committing Unsafe Acts". A grievance was

filed. The Employer denied the grievance at each step of the grievance procedure. The dispute was appealed to arbitration on October 19, 1998.

### **POSITION OF THE PARTIES**

#### **POSITION OF THE UNION**

The Union contends the Employer did not have just cause to issue the Grievant a Notice of Removal dated November 18, 1997. Moreover, the Union argues the Grievant's conduct was not intentional. In addition, the Union claims there were mitigating circumstances, which did not warrant the Employer to dispense such harsh discipline in the form of discharge. Furthermore, the Union asserts the Employer meted out discipline which was not corrective in nature, but rather punitive. Also, the Union alleges that management failed to follow principles of progressive discipline when they issued the Grievant a Notice of Removal. Further, the Union avows a less severe form of discipline short of removal may have been more appropriate in this case, since the Grievant did not commit a willful act. In conclusion, the Union requests that the grievance be sustained, the Grievant be reinstated, and made whole for all lost wages and benefits.

#### **POSITION OF THE EMPLOYER**

First, the Employer contends it had just cause to issue the Grievant a Notice of Removal dated November 18, 1997, for Unacceptable Conduct/Committing Unsafe Act. Second, the Employer argues it did not violate any provisions of the National Agreement when it issued the Notice of Removal to the Grievant. However, the Employer maintains it was well within its managerial prerogative to issue the Notice of Removal to the Grievant. Moreover, the Employer claims this incident was not minor vehicle accident, or a petty offense. Additionally, the Employer alleges the Grievant's actions were intentional. Further, the Employer avows the Grievant initiated and indulged in horseplay with the Mr. Dela Cruz, involving the shooting of rubber bands, which in itself is a serious violation of the Employer's safety policy. Likewise, the Employer avers the Grievant's conduct was inexcusable and could have resulted in far more serious consequences in terms of property damage and possible physical injury. Also, the Employer asserts there were no mitigating facts which existed to absolve the Grievant of his

responsibility to behave professionally and to comply with the safety policy. Furthermore, the Employer insists the Grievant had already received progressive discipline for committing unsafe acts. In summary, the Employer requests the grievance be denied in its entirety.

## **DISCUSSION**

The Arbitrator has reviewed all exhibits, pertinent testimony, the parties closing arguments, as well as cited arbitration awards.

For the most part, in order for a removal to be sustained the Employer must demonstrate that it had just cause to take such action. Moreover, the Employer is obligated to apply discipline that is corrective in nature, rather than punitive. Article 16.1 of the parties' National Agreement mandates these two conditions.

In applying the test of "just cause" this Arbitrator is required to determine two factors. First, has the commission of the misconduct, offense or dereliction of duty, upon which the discipline administered was grounded, been adequately administered. Second, if proven or admitted, the reasonableness of the disciplinary penalty imposed in the light of the nature and gravity thereof.

In this case the Union on the Grievant's behalf has admitted that the facts alleged to have happened on October 15, 1997, which led to the Grievant's removal did in fact take place. However, on the other hand, the Union argues vociferously that the amount of discipline imposed on the Grievant was excessive. In support of that contention the Union claimed management failed to follow principles of progressive discipline regarding this dispute.

Clearly, in this Arbitrator's opinion when a collective bargaining agreement has a "just cause" standard for either discipline or discharge, that provision incorporates some form of progressive discipline. Obviously, that is what the National parties had in mind when they negotiated the terms outlined in Article 16.1., since they agreed that the basic principle shall be that discipline should be "corrective" in nature. The concept of progressive discipline is a term used interchangeably with corrective discipline.

This Arbitrator agrees with Arbitrator Whitley McCoy's definition of progressive discipline, when he rendered his decision in *Huntington Chair Corp.*, 24 LA 490, 491 (1955). In that case, Arbitrator McCoy defined progressive discipline as follows:

“[T]he Company imposes a mild penalty for a first offense, a somewhat more severe penalty for a second, etc., before abandoning efforts at correction and resorting to discharge. The theory is that this is in the interest of both management and employees. . . . I might hold a discharge without any prior discipline whatever reasonably necessary in the case of some offenses; in the case of other offenses it might be held that discharge did not become reasonably necessary for a long time and after many fruitless efforts at correction.”

Later, McCoy set forth for purposes of penalty two classes of offenses in language which is often quoted on progressive discipline.

“(1) those extremely serious offenses such as stealing, striking a foreman, persistent refusal to obey a legitimate order, etc., which usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline;

“(2) those less serious infractions of plant rules or of proper conduct such as tardiness, absence without permission, careless workmanship, insolence, etc., which call not for discharge for the first offense (and usually not even for the second or third offense) but for milder penalty aimed at correction.”

Indeed, in this Arbitrator's opinion underlying all systems of progressive discipline is the notion that a disciplinary and discharge program must above all be fair and just both on a substantive and on a procedural or due process level. As I see it, the object of any penalty imposed on an employee for misconduct should be to make employees recognize their responsibilities so that they might become better workers in the future, which of course, can also be a benefit to an employer in the form of a stable and responsible work force.

Additionally, the “punishment” should fit the offense. As stated above, once the misconduct has been proven, the penalty imposed must be fairly warranted and reasonably calculated to eliminate or correct the offensive conduct.

Certainly, under Article 16.1 of the National Agreement the Employer has just cause to either discipline or discharge employees for failure to observe safety rules and regulations. Beyond



question, the record clearly established that the Grievant has received two other suspensions for Unsatisfactory Work - Unsafe Acts, prior to being removed. The first five-working day suspension was issued on August 11, 1995. In that incident the Grievant's postal vehicle struck the rear end of a legally parked vehicle, and he failed to report the accident in a timely manner. The second five-working day suspension was issued to the Grievant on January 8, 1997. The facts surrounding that incident involved the Grievant being observed driving his postal vehicle with the door wide open. In both suspension letters the Grievant was forewarned that a recurrence of this type infraction , or a similar infraction would result in further disciplinary action, up to and including his removal.

By all means, Section 112.4 of the M-41 Handbook states, in part:

“Conduct your work in a safe manner so as not to endanger yourself or others. . .”

Moreover, this Arbitrator notes that Handbook EL-814 (Postal Employee's Guide to Safety) under Section 1, titled, “General Safety Rules” mandates that observing safe working practices and postal safety rules is a primary responsibility of all postal employees. Furthermore, under Section 1 of that same document general safety rules include that an employee may not engage in horseplay or practical jokes on postal premises.

In reality, this Arbitrator must conclude the actions surrounding the incident of October 15, 1997, which occurred on postal premises in the parking lot, constituted “horseplay”. Without doubt, the Grievant and Mr. Dela Cruz were engaged in prohibited activity while loading mail into their respective postal vehicles on that date. Equally important, the instigator of the “rubber band” shooting incident was the Grievant. This activity alone was totally inappropriate, and standing alone would constitute an unsafe. Clearly, the Grievant was not paying attention to his duties prior to entering his jeep on October 15, 1997, or after he started the engine and then hit a private vehicle.

Clearly, the Union has argued during the processing of this grievance that the Grievant's misconduct was not intentional, but that his actions were that of carelessness and gross negligence. This Arbitrator agrees with the Union that the Grievant on October 15, 1997,

conducted himself in a careless manner, however, does not believe his actions constituted gross negligence. On the contrary, this Arbitrator agrees with the Employer that the Grievant's actions on October 15, 1997, surrounding the entire incident which led to his removal were intentional. There is no doubt his actions alone caused the situation. Moreover, the evidence supports a conclusion that the Grievant drove quickly away without first checking for clearance or observing his surroundings. The Grievant's actions could have resulted in far more serious consequences in terms of property damage or possible physical injury to himself or others. Fortunately, that did not happen.

And yet, this Arbitrator is of the opinion the Employer's contention that the Grievant had already received progressive discipline for committing unsafe acts prior to being removed, lacks merit. Yes, there is no doubt the Grievant was disciplined on two occasions for unsafe acts. However, the first incident of discipline surrounding an unsafe act amounted to a five-working day suspension. Likewise, the second incident regarding an unsafe act led to the Grievant once again being issued a five-working day suspension. This Arbitrator concludes the second five-working day suspension does not comport with the theory of progressive discipline. Undoubtedly, in the opinion of this Arbitrator the Employer is obligated under the "just cause" standard to impose discipline of increasing degree, prior to discharging an employee, unless the infraction/misconduct is egregious.

Clearly, the Employer agrees with that philosophy. A cursory review of Handbook EL-921, "Supervisor's Guide to Handling Grievances", under the Section B titled Disciplinary Procedures illustrates the point. In pertinent part, it states:

**"The main purpose of any disciplinary action is to correct undesirable behavior on the part of an employee. All actions must be for *just cause and, in the majority of cases, the action taken must be progressive and corrective.*"**  
(Emphasis supplied)

And then too, this Arbitrator notes in the Joint Contract Administration Manual under the Section titled "Corrective Rather than Punitive", it states:

"The requirement that discipline be "corrective" rather than "punitive" is an

essential element of the “just cause” principle. In short, it means that for most offenses management must issue discipline in a “progressive” fashion, issuing lesser discipline (e.g., a letter of warning) for a first offense and a pattern of increasingly severe discipline for succeeding offenses (e.g., short suspension, long suspension, discharge). The basis of this principle of “corrective” or “progressive” discipline is that it is issued for the purpose of correcting or improving employee’s behavior and not as punishment or retribution.”

Indeed, it is an essential element of “just cause” that the penalty in a discipline case be fair and reasonable and fitting to the circumstances of the case. Certainly, the Grievant deserved to be disciplined, but certainly not the extreme penalty of removal. The evidence clearly illustrated that the Grievant’s jeep did not sustain any damage. Additionally, the Grievant rather than the Employer paid for the damages sustained to the private vehicle he hit, which was parked illegally. Basically, this incident was a minor event, that is, a “fender bender”.

Obviously, the Employer in this case did not properly apply corrective progressive discipline to the Grievant for the incident on October 15, 1997. For that reason, in part, this Arbitrator concludes the removal action must be overturned.

More importantly, the other reason for reaching that conclusion, is because of the influence exerted by Labor Relations staff on Supervisor Santos decision to issue the Grievant a Notice of Removal. Supervisor Santos admitted under cross-examination that when she contacted Labor Relations, she asked if she should issue a 14 working day suspension. According to Santos, Labor Relations advised her “to go for removal”. In the opinion of this Arbitrator that type of recommendation from Labor Relations is totally inappropriate. Clearly, the function of appropriately disciplining employees lies with the immediate supervisor and the reviewing authority, that is, Installation Head or his/her designee, rather than Labor Relations staff.


Certainly, this Arbitrator does not condone the Grievant’s actions. His conduct on October 15, 1997, deserves severe discipline.

Thus, based upon the record and for the reasons set forth above, this Arbitrator concludes management did not have just cause to Issue the Grievant the November 18, 1997, Notice of Removal.

**AWARD**

The Notice of Removal issued to the Grievant on November 18, 1997, will be rescinded. Just cause existed for a thirty (30) **working day** suspension. The Grievant shall be immediately reinstated to his former position with full back pay plus interest less the period of suspension and with full benefits and seniority.

Dated this 25th day of November 1998.  
Tacoma, Washington

  
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Donald E. Olson, Jr., Arbitrator