

REGULAR ARBITRATION PANEL

In the Matter of Arbitration between United States Postal Service and National Association of Letter Carriers, AFL-CIO	Grievant: Mathias Brantley Post Office: New Haven, CT USPS No: B16N4BD19122076 DRT No: 14-461614 Union No: 1982218FH
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Before: EILEEN A. CENCI

Appearances:

For United States Postal Service: Glenn Smith

For the National Association of Letter Carriers: Charles Carroll

Place of Hearing: New Haven, Connecticut

Date of Hearing: July 9, 2019

AWARD SUMMARY

Management did not violate Article 16 of the National Agreement when it issued the grievant a Notice of Removal for Unacceptable Conduct on November 15, 2018. The grievant was not acting in self-defense when he sprayed a customer with dog spray, and his conduct was so serious as to warrant removal even in the absence of prior discipline.

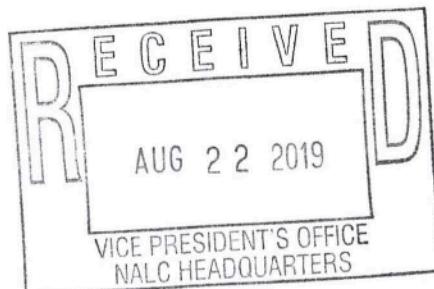
Date of Award: August 8, 2019

Regular Regional Arbitration Panel

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Richard J. DiCecca, NBA
NALC - New England Region



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OPINION**STATEMENT OF PROCEEDINGS:**

This matter was arbitrated pursuant to the grievance and arbitration provisions of a collective bargaining agreement (National Agreement) in effect between the United States Postal Service (Service) and the National Association of Letter Carriers (NALC or Union). A hearing was held before me on July 9, 2019 in New Haven, Connecticut. The parties appeared and were given a full and fair opportunity to be heard, to examine and cross-examine witnesses and to present argument. Each party called witnesses who testified under oath. Following the testimony, the parties gave oral closing arguments and the record was closed on the day of hearing.

ISSUE:

Did management violate Article 16 of the National Agreement when it issued the grievant a Notice of Removal for Unacceptable Conduct on November 15, 2018?

If so, what shall the remedy be?

FACTS:

The grievant was a Full-Time Regular carrier assigned to the Fair Haven Station of the New Haven Post Office. He was employed by the Postal Service beginning in 2008 and was issued a Notice of Removal (NOR) on November 15, 2018, based upon an incident that occurred on September 12, 2018.

New Haven Postmaster Tom Sullivan became aware of an incident when he was leaving a meeting on September 12, 2018 and overheard part of a conversation between his administrative assistant and a clerk, who was talking to a customer who had come to the office with a complaint about a carrier's conduct.

Postmaster Sullivan had the customer come to his office.¹ The individual was visibly covered with mace or pepper spray and was shaken. His arms were red and he was uncomfortable. The customer stated that he had been driving on East Street at a point where two lanes merged into one, and a Postal truck had forced him over the yellow line into oncoming traffic and would not allow him to merge into the lane. When the vehicles stopped at a signal, the complainant got out of his truck to take a picture of the postal truck. He then took a second picture of the carrier driving the truck, and at that point he said the carrier got out of his truck and sprayed him with mace. The customer showed Postmaster Sullivan the photographs he had taken, which were on his cell phone, and also forwarded the photographs to Postmaster Sullivan. Postmaster Sullivan then asked permission to take photographs of the customer and he agreed.²

Postmaster Sullivan told Mr. Gremp that the Post Office would conduct an investigation. Mr. Gremp asked if he should go to the police, and the Postmaster told him that it was up to him. Mr. Gremp did go to the police station the following day to file a complaint, and the police went to the Post Office and spoke to Postmaster Sullivan, who told them the grievant's name and showed them the photographs he had on his cell phone.³

Postmaster Sullivan was able to identify carrier Mathis Brantley from the photographs taken by the complainant, and contacted Mr. Brantley's supervisor, Ny Drungo, to ask whether the grievant had reported an incident. He had not made a report. Postmaster Sullivan then called Supervisor Drungo and Manager John O'Mara to the office and showed them the photographs. The three of them then went to the street to locate carrier Brantley. Before doing so, they also

1 The Union objected to the use of the term "customer" to describe the individual involved in the incident and suggested the use of the term "assailant" instead. The Union points out that the grievant was not interacting with the individual in a professional capacity prior to the incident. The Service explained that the term is used to refer to any member of the public and is essentially a neutral term. I accept the Union's point that the term "customer" could imply, to one unfamiliar with postal terminology, the mistreatment of an individual who was seeking or obtaining service from the carrier at the time of the incident, though that is not its meaning as used here. I have used the terms "customer" and "complainant" in this decision.

2 The photographs were included in the file and showed that the individual was covered with an orange substance and his arms and neck were visibly red.

3 According to the police report, Postmaster Sullivan told them the grievant was likely facing termination. Postmaster Sullivan testified that he simply explained the process, and possible outcomes following an investigation, to the police officer.

contacted a Union steward and told her they would give her the location when they located the grievant.

When the three Postal supervisors located the grievant, Ms. Drungo and Mr. O'Mara got out of their car. The grievant's first words when he saw them were, "I want a steward." They waited for the steward to arrive and then showed the grievant the pictures they had obtained. Ms. Drungo placed the grievant off duty on an emergency basis.⁴ He was not interviewed about the incident before being placed off duty.

The OIG conducted an investigation in which postal inspectors interviewed the complainant, W. Carter Gremp, the grievant, and several witnesses who had been passengers in Mr. Gremp's car at the time of the incident. Mr. Gremp was interviewed by telephone and told postal inspectors that at 10:45 to 11:00 a.m. he had been driving a gray Toyota pickup on East Street near Bender Plumbing Supply. Although the road is two lanes at that point the street is narrow in sections. At one point he was in the left lane, side by side with the postal truck, and the truck intentionally drove into his lane and pushed him into oncoming traffic. He said he used his horn extensively, but that the carrier looked straight ahead and ignored him. He had to pull into oncoming traffic to avoid the postal truck. When the traffic came to a stop in front of Bender Plumbing, the grievant got out to take pictures of the truck with his iPhone camera. His purpose in doing so was to identify the vehicle in order to file a complaint about reckless driving. As he approached the truck, photographing its number and the driver, the driver got out and sprayed Mr. Gremp with pepper spray, in the face and all over his torso. Mr. Gremp said he experienced extreme discomfort, including shortness of breath, and burning sensations in his mouth, nose lungs and on his skin. His clothes were saturated and within hours he developed a rash.

Mr. Gremp had been on his way to a job site and had two passengers who work for him in his pickup truck at the time of the incident. He drove to the job site but then went to the Post Office to show someone the pictures he had taken. He also reported the matter the following day to the police.

Oual Hamidine is an employee of Carter Gremp and was working for him on September 12, 2018. He was in the front passenger seat of the truck when the incident occurred, and when

⁴ A grievance over the emergency off-duty placement was subsequently resolved by the B Team, which found no contractual violation.

interviewed by postal inspectors, he said that the postal truck would not let Mr. Gremp pass. He said that Mr. Gremp beeped his horn, and that the carrier sprayed Mr. Gremp in the eyes when he took pictures. He stated that he and the other passenger stayed in the truck during the entire incident. He denied that anyone swore at the carrier, gave him the finger or threatened him.

Alex Palacios was the other employee who was in Mr. Gremp's truck at the time of the incident and he was also interviewed by the inspectors. Because of his limited command of the English language, a Spanish interpreter assisted with translation. Mr. Palacios was riding in the back seat of Mr. Gremp's truck, and noticed the postal truck right next to him. He stated that the postal truck started pulling into them and that Mr. Gremp beeped his horn. He said that he and the other passenger stayed in the truck when Mr. Gremp got out to take pictures. He saw the grievant spray Mr. Gremp.

When interviewed by inspectors, the grievant described the road narrowing so that two lanes essentially merge into one at the point where the incident occurred. He said that a pickup truck suddenly came out of nowhere, blaring its horn, while the driver and passenger were yelling at him and giving him the finger. The truck was next to him in the oncoming traffic lane, over the yellow line. Another car was directly in front of the postal truck. The truck tried to get back across the yellow line by getting in front of the car ahead of him, but that car didn't let him in. As traffic slowed, the driver of the pickup truck also slowed, matching his speed, while the occupants yelled and gave him the finger. He saw that there were three people in the truck and became frightened. He had nowhere to go with the truck on his left, and a passenger in the truck was yelling at him, "we're going to fuck you up!"

Mr. Brantley told inspectors that he saw the driver get out of the truck, yell something at the car in front of him, and advance toward his postal vehicle with an object in his hand. He saw the front seat passenger get out of the truck also and advance toward him, coming even closer than the driver. The grievant told inspectors that he feared for his life and grabbed his dog repellent spray. He then opened the door of his truck, used the door as cover, and sprayed them with his dog repellent spray. He said that when he sprayed, the passenger turned and ran back to the truck first. Then the driver in front of the grievant's truck started beeping his horn. The grievant kept the dog repellent spray in his hand because he was unsure whether the passenger would return with something. The driver then turned and ran back to the truck. When the truck pulled away, the

grievant said he sat in his truck, thankful and scared. He let two cars go past him to make sure the other truck had left. He then drove to his route and began to deliver it. His supervisors then came out to the street and placed him off duty on an emergency basis.

The postal inspectors obtained a video from Bender Plumbing Supply that recorded the incident and included it with their Investigative Memorandum (IM), which was completed on October 9, 2018 and provided to postal management. Supervisor Ny Drungo received the IM and reviewed it, along with the video. She concluded that the video was consistent with Mr. Gremp's statement to postal inspectors.

The police also conducted an investigation, and interviewed Mr. Gremp as part of it. His statement was consistent with the one he gave the postal inspectors. He said he was driving side by side with a postal truck, whose operator was driving very aggressively, refusing to let him pass and swerving toward his vehicle. Mr. Gremp said that he got out of his truck to take photographs so that he could report the reckless driving, and the postal employee pepper sprayed him in the face. Mr. Gremp told the police that he was not injured, but had had a significant rash on his face and neck for most of the day.

The police attempted to contact Mr. Brantley by calling his cell phone and going to his address, where he spoke to the grievant's mother, who confirmed that he lived there but was not home at the time.

Supervisor Drungo scheduled a PDI for September 19, 2018. The grievant did not appear because the Union took the position that he did not have to do so, since Union steward Ilona Pavona had not yet received requested information, including the video obtained by the OIG.

The PDI was rescheduled and held on October 17, 2018. When asked to tell in his own words what had happened, the grievant said that at the point where two lanes on East Street become one, a pickup truck pulled up next to him out of nowhere. The driver was holding his horn and giving him the finger. The driver and a passenger were both yelling at him. The truck tried to pull in front of the postal vehicle but there was no room because there was a car in front. The driver slowed down and was yelling, beeping his horn and giving him the finger, all the while being over the yellow line. The grievant said the pickup truck boxed the car in front of him and the passenger got out first, yelling, "We're going to fuck you up." Then the driver also got out and advanced toward him with something in his hand. The grievant said that was in fear for his life, put the truck

in park, grabbed his dog spray and got out. He said that he sprayed the two of them.

When asked at the PDI if he recalled the first thing he said to Supervisor Drungo when she came out to the street on September 12, 2018, the grievant said that he did not. When asked why he didn't immediately inform his supervisor about the incident, the grievant replied that at the time he couldn't believe it had just happened and was in shock that it happened. The grievant was asked why, if he was in fear and was concerned that the occupants of the truck would get at him, he opened his locked door. He replied that he didn't want to give them a chance to break the glass and drag him out of the truck. His explanation for why, if he was in fear, he didn't immediately report the incident, and why he delivered his route if in fear, was that he was in shock. The grievant was also told, at the PDI, that the video showed only one person approaching the truck. The grievant responded that he didn't view the video. When told that the video showed him immediately driving away after spraying the individual, rather than waiting for two cars to go by, the grievant stated that he hadn't seen the video. When asked why he would spray a person with dog repellent, the grievant said that there were three of them and one of him, and that he panicked and sprayed them.

Following her investigation, Supervisor Drungo recommended removal. Manager John O'Mara reviewed and concurred in the decision on October 22, 2018. Supervisor Drungo issued the Notice of Removal for Unacceptable Conduct on November 15, 2018. As Unacceptable Conduct, the NOR cited deliberately spraying dog repellent in an individual's face and failing to report the incident to local management. Thee NOR further charged that the grievant's answers during the PDI conflicted with what was recorded in the surveillance video. It did not cite any prior elements of discipline.

The Union filed a grievance over the removal. At the Informal A meeting with Supervisor Drungo, she introduced a statement by Wanda Maldonado about an incident she'd had with the grievant in 2016, in which he had become very angry, sworn at her and thrown things around when she went to his section to retrieve a hand truck and accidentally knocked his vest on the ground. That incident resulted in a 7-day suspension, which had expired prior to the date the NOR was issued.⁵ The grievance was denied at the Informal and Formal A levels. The Union filed

⁵ The Union objected to any evidence involving the incident with Wanda Maldonado or the expired 7-day suspension.

Additions and Corrections. After the B Team reached impasse, the matter was appealed to arbitration.

The grievant testified at arbitration that he saw the passenger get out of the pickup truck first, and that the passenger and the driver were both coming toward him. He testified that he sprayed toward the passenger first, and then toward the driver. When told that the video didn't show the passenger getting out of the truck, the grievant responded that he hadn't seen the video when he wrote the statements.

The surveillance video of the incident was played at arbitration.

CONTRACT:

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 and alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations.

EMPLOYEE LABOR RELATIONS MANUAL (ELM)

Section 665.13 Discharge of Duties

Employees are expected to discharge their assigned duties conscientiously and effectively.

Section 665.16 Behavior and Personal Habits

Employees are expected to conduct themselves during and outside of working hours in a manner that reflects favorably 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 employees be honest, reliable, trustworthy, courteous, and of good character and reputation. 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 the statute. Employees are expected to maintain harmonious working relationships and not to do anything that would contribute to an unpleasant working environment.

Section 667.16. Controversies with the Public

Employees must not engage in controversies with customers, railway employees, airline employees, or other members of the public while on duty or on federal property.

POSITIONS OF THE PARTIES:**UNITED STATES POSTAL SERVICE (USPS OR SERVICE)**

The Service maintains that it has established just cause for the removal. The evidence clearly shows that the grievant sprayed a customer with dog spray while on duty, driving a postal vehicle and in uniform. He then failed to report the incident.

Surveillance video obtained of the incident shows that the grievant was not threatened. The driver of the pickup truck never advanced close enough to the postal vehicle to be a threat to the driver. He was sprayed simply because he photographed the postal vehicle for the purpose of filing a complaint about reckless driving. The grievant gave his statement about the incident before seeing the surveillance video, and his version of events was inconsistent with the evidence in the video.

The police, OIG, and postal investigations all resulted in the conclusion that the customer's version of events was supported by photographs and surveillance video, while the grievant's version was contradicted by that evidence. There is no evidence that either passenger exited the pickup truck as the grievant claimed.

The statement by Wanda Maldonado and the expired 7-day suspension were introduced not as evidence of past discipline, but as relevant information concerning the grievant's character and pattern of conduct. The severity of the grievant's conduct warrants removal even in the absence of a prior disciplinary record.

The Service asks that the grievance be denied.

NATIONAL ASSOCIATION OF LETTER CARRIERS (NALC OR UNION)

The Union argues that management lacked just cause for the removal of the grievant. Letter carriers are responsible for their own safety. All carriers are required to carry pepper spray at all times. The grievant in this case used the pepper spray to defend himself against three aggressive potential assailants. His actions met the requirements of self-defense in that the grievant was an

innocent party facing an imminent threat. His response was proportional to the threat. While an individual has a duty to avoid an incident by retreating, the grievant was stopped in traffic and had nowhere to go. His actions were reasonable under the circumstances. The pickup truck had three people in it who had been shouting verbal threats and giving him the finger. When they left their vehicle and approached his truck, with the driver holding something in his hand, the grievant had reason to fear for his safety.

The Postmaster informed the police that the grievant was likely to be terminated when they first came to the office, indicating that management had pre-determined the outcome of this case prior to any investigation. No one in management had even heard the grievant's version of events at that point.

Information concerning the 2016 incident with Wanda Maldonado, and the expired 7-day suspension should be excluded. The NOR did not cite any elements of prior discipline, and no reference to expired discipline, or to an incident that led to that discipline, is appropriate.

The Union asks that the grievance be sustained and that the grievant be reinstated and made whole for all losses he sustained as a result of the wrongful removal.

DISCUSSION:

The Service has established just cause for the removal of the grievant in this case. There is no question but that the grievant sprayed the driver of a pickup truck with dog spray following an incident on a road where both had been driving. Photographs taken by the individual who was sprayed clearly show the grievant in the act of using the dog spray. Photographs of the complainant, taken at the post office, show him covered in an orange substance, with his skin appearing red and irritated. The grievant also admits having used the spray, though he claims that he did so in self-defense.

The claim that the grievant faced such an imminent threat that he was justified in using dog spray in self-defense does not withstand scrutiny. The surveillance video shows that Mr. Gremp never got very close to the postal vehicle. When sprayed he was in front of the vehicle, away from the driver's side. He was in the act of photographing the vehicle and driver, as proven by the photographs he obtained, and thus must have stopped or paused to take each photograph. He therefore could not have been advancing toward the driver in a rapid or threatening manner.

Since the grievant was not facing an imminent threat of harm, his actions were not taken in self-defense. The incident could have been avoided, had the grievant remained in his vehicle. In Case #D13045553, Arbitrator Claude Dawson Ames upheld the removal of an employee who engaged in a physical confrontation with a postal customer. In a soundly-reasoned decision, Arbitrator Ames found that although postal employees have a right of self-defense, they also have a duty to avoid or step away from physical confrontations where possible. This reasoning is sound.

The grievant's account of the September 12, 2018 incident is also contradicted by other evidence in the record. The surveillance video does not support the grievant's claim that a passenger got out of the pickup truck and came toward him. Mr. Gremp and both passengers told postal inspectors during their interviews that both passengers remained in the truck, and the surveillance video seems to support their account. The grievant said during his interview that he sprayed two individuals, the driver and the front seat passenger in the truck, who was even closer to the postal vehicle than the driver. The video does not show another person close to the postal vehicle or a second person being sprayed. Moreover, if one of the passengers had been sprayed, it seems highly unlikely that they would not have complained to postal management or mentioned that fact during their interview with postal inspectors. The grievant's account of the reason for his actions is therefore not credible.

The grievant also failed to report the incident immediately after it occurred. Both the incident and the grievant's failure to promptly report it violated established Postal Service rules.

There were no procedural violations that deprived the grievant of just cause. The investigation was thorough and fair. The grievant was given the opportunity to explain his side of the story at a PDI, despite the fact that he failed to appear at the first PDI that was scheduled. The OIG also conducted a complete investigation. I do not find that Postmaster Sullivan exhibited bias against the grievant in his conversation with police, in which he stated that removal was a possible outcome following a postal investigation of the incident.

There are no mitigating factors that would warrant reduction of the penalty imposed by the Postal Service in this case. Spraying a person with dog repellent spray while on the job, in uniform, and driving a postal vehicle is an extremely serious violation, when, as here, the action was not taken in self-defense. As Arbitrator Thomas Levak stated in Case #W7N5DD60, "...the physical assault and battery of a Service patron by a letter carrier while on the job is a 'major' offense that

will normally justify the carrier's removal for a first offense without regard to the carrier's length of service and prior record." The penalty of removal for a first offense was justified under the facts and circumstances of this case.⁶

6 The arbitrator has considered the grievant an employee with no prior disciplinary record. The NOR did not cite prior discipline and although there was reference in the file to conduct that resulted in a 7-day suspension that has since expired, I have not considered that information.