C-32318

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration)	Grievant: Michael Borkowski
)	
between)	Post Office: Southington, CT.
)	
The U.S. Postal Service)	Case Number: B11N-4B-D15329443
)	
and)	Union Number: 060315
)	
The National Association of)	DRT Number: 14-350819
Letter Carriers, AFL-CIO)	
)	

Before: Donald J. Barrett, Arbitrator

Appearances:

For the U.S. Postal Service: MaryLou C. Millett, Labor Relations Specialist

For the National Association of Letter Carriers: Charles Carroll, Regional Arbitration Advocate

Place of Hearing: Wallingford CT Postal Facility

Date of Hearing: February 2, 2016

Award: This grievance is denied

Date of Award: February 9, 2016

AWARD SUMMARY

The Service demonstrated with clear and convincing evidence that the grievant's actions on July 25, 2015 irreparably damaged the continuing employer-employee relationship. The parties' stipulations regarding the grievant's actions that day left much of the deliberation focused upon the Service's obligations to the just cause standards. I find persuasive evidence that they satisfied those obligations, and therefore am left with no alternative but to ratify that decision.

STATEMENT OF PROCEEDINGS:

This grievance was presented by the parties at hearing on February 2, 2016 at the Wallingford CT. General Mail Facility pursuant to the provisions of the 2011-2016 Collective Bargaining Agreement, also known as the Agreement, or Contract that exists between the US Postal Service, also known as the Service, or Management, and the National Association Of Letter Carriers, also known as the Union.

The parties' advocates at hearing were experienced, articulate, well prepared, and passionate in the presentation of their respective positions. Throughout the events of this day, counsel for the parties' acted professional, and represented their duties thoroughly.

Each fully exercised their right to present argument, evidence, and witnesses.

Counsel for each party presented both written and oral Opening and Closing Statements into the record.

The parties each called one witness, and asked that each be duly sworn an oath prior to presenting their offered testimony.

The Service called Mr. John Colaccino, Supervisor, Customer Services at the Southington CT office.

The Union called the grievant, Mr. Michael Borkowski, City Letter Carrier at the Southington office.

At the conclusion of this hearing, the Service provided the arbitrator with one (1) previously issued regional award. (MacManis – G06N-4G-D-09336010)

The Union, at that time provided the arbitrator with two (2) previously issued regional awards. (Schaefer-E01N-4E-D 04196956) & (Williams – C8N-4T-D 33242)

I have thoroughly digested each award provided, have given due consideration to each, and shall offer comment as found appropriate within the Opinion of this decision.

JOINT EXHIBITS SUBMITTED:

Joint 1 – The National Agreement, inclusive of the Joint Contract Administrative Manual (J-CAM)

Joint 2 – Moving Papers, Pages 1-61

UNION EXHIBIT SUBMITTED:

Union 1 – Discharge Summary, Wheeler Clinic (2 pages)

(The Service objected to this submission, however the arbitrator accepted it for whatever weight deemed appropriate as its acceptance did not broaden the scope of the grievance for the first time at hearing.)

STIPULATED FACTS NOT IN DISPUTE BY THE PARTIES:

The parties' agreed to the following:

The vehicle accident and date. (July 25, 2015)

That a customer first found the grievant slumped over the steering wheel of the vehicle.

That this customer did call 911 when unable to awaken the grievant.

That fire, police and an ambulance responded to the scene.

That a responding police officer did awaken the grievant.

That when awoken, the grievant's foot came off the brake, the vehicle travelled forward until it struck a pole.

That there was significant damage to the postal vehicle.

That an ambulance transported the grievant to the hospital.

That the police and EMT smelled alcohol on the grievant.

That the grievant was arrested and charged with driving under the influence.

That the police department issued a "press release" regarding this incident.

That it was determined the grievant's blood alcohol level was .15, which is two times the legal limit in the state of Connecticut.

That alcohol was found in the grievant's water bottle in his damaged postal vehicle after it was towed back to the post office by the supervisor, who then called the police department, who then came to the office and retrieved the bottle as evidence.

That the grievant was dishonest during his pre-disciplinary interview.

ISSUE AS FRAMED BY THE PARTIES:

The parties at hearing stated that the issue to be decided in this matter would be that as stated by the parties' Step B Team, as follows,

"Did Management violate Article 16 and 35.1 of the National Agreement and did it have just cause when it issued the Grievant a Notice of Removal dated 9/14/2015?"

BACKGROUND IN THIS MATTER:

On July 25, 2015, the grievant was discovered slumped over the steering wheel of his postal vehicle at 290 Curtiss Street in Southington CT by a pedestrian. After the pedestrian was unable to wake the grievant, this person called 911, and police, fire, and emergency medical technicians (EMT's) responded. A policeman then awoke the grievant, and the grievant's foot, which was on the brake during his period of non-consciousness with the engine running, came off and hit the gas pedal causing the vehicle to drive forward, striking a utility pole, and causing significant damage to the postal vehicle.

Postal officials were notified and the supervisor and postmaster of Southington immediately went to the scene.

The grievant was transported to the local hospital and the postal vehicle was towed back to the post office, where during the removal of the remaining mail the grievant's cooler, and its contents were found strewn about. When the supervisor was placing the grievant's water bottles back into the cooler, one bottle only appeared to have been consumed of all but approximately one inch, and that bottle gave off an odor thought to be alcohol.

The supervisor then notified police who arrived and took possession of this bottle as evidence. The police then sought a search warrant for the grievant's medical records which showed an elevated blood alcohol content almost twice the legal limit. After this finding, the grievant was issued an arrest warrant for "Driving Under the Influence of an Intoxicating Liqueur and of Drug."

A pre-disciplinary interview was held with the grievant, his Union steward and the supervisor on September 3, 2015. The grievant offered that he was tired from a lack of sleep and the heat, denied being impaired, and only after being questioned about the police report offered that he took only "a sip."

The grievant was issued a Notice of Removal (NOR) dated September 14, 2015, charged with "Unacceptable Conduct."

The Union grieved this NOR, with the result being an appeal to arbitration.

CONTRACT PROVISIONS CITED:

"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 35 – Employee Assistance Program"

Section 1. Programs

"The Employer and the Union express strong support for programs of self-help. The Employer shall provide and maintain a program which shall encompass the education, identification, referral, guidance and follow-up of those employees afflicted by the disease of alcoholism and/or drug abuse. When an employee is referred to the EAP by the Employer, the EAP staff will have a reasonable period of time to evaluate the employee's progress in the program. This program of labor-management cooperation shall support the continuation of the EAP for alcohol, drug abuse, and other family and/or personal problems at the current level."

POSITION OF THE PARTIES IN THE MATTER BEFORE ME:

"The US Postal Service"

The Service takes the strong position that there is just cause for the removal of the grievant, and that this action should be upheld by the arbitrator.

The Service states that the there is no dispute now between the parties, and the grievant that on July 25, 2015, the grievant did report for duty in an alcoholic inebriated condition, that he brought alcohol onto postal property, consumed alcohol during his duties on the street, that he was discovered by the public slumped over the steering wheel of the postal vehicle, with the engine running.

Further, that the grievant, when awoken by the police did cause the vehicle to drive forward after his foot moved from the break to the gas, and violently strike a utility pole, causing significant damage to the vehicle. Further, that after the vehicle was towed back to the office, the supervisor found a bottle of clear liquid belonging to the grievant that was turned over to the police, and it was later acknowledged to contain alcohol. Further, that the grievant was then arrested for driving under the influence of alcohol, and that all of his actions happened while on duty, in uniform, and in public.

The Service argues that only after these actions did the grievant offer that he was an alcoholic, and worthy of consideration to retain his employment. The Service maintains that throughout the grievance process, the grievant has failed to complete any program related to his admission, and failed to immediately enroll in any such program.

The Service offers that in the past, they have offered the grievant EAP services after noticing performance inconsistencies, but the grievant has consistently refused to accept such offers, or to acknowledge any reason for its need.

The Service offers that the grievant was afforded the full opportunity to acknowledge responsibility for his actions of July 25th during his pre-disciplinary interview (PDI) yet willingly chose to be dishonest.

The Service states further that it has considered the grievant's years of service, his performance record, and those other factors inclusive of the principles of just cause but find after doing so that there is a total loss of trust in his ability to continue as an employee, and that the employer-employee relationship is now irreparable.

The Service maintains that it has the right, and obligation to provide a safe working environment for all its employees, and its customers, and that the grievant's actions on July 25th seriously jeopardized that effort, and could have resulted in more serious harm.

The Service maintains further that there are no mitigating circumstances that outweigh the grievant's actions, the Service fulfilled its contractual obligations, and maintains its right to take such action, and have it validated.

"The National Association of Letter Carriers"

The Union maintains, with vigor and passion that the Service lacks just cause to remove the grievant from his employment, and therefore this grievance should be sustained in favor of the grievant with a lessor form of redress.

The Union stipulates that the grievant acted on July 25th as it is stated, and offers no dispute as to the events, circumstances, or its aftermath.

However, the Union strongly maintains that there remain valid mitigating circumstances which the Service has failed to properly consider that warrant a lessor penalty levied against the grievant.

The Union argues that the grievant is a 31 year employee with a record free of discipline, who is only 4 years from retirement that warranted a greater consideration of leniency from the Service, and now warrants such from the arbitrator.

The Union argues further that the grievant, at the time of his actions on July 25th was an untreated alcoholic whose thought process, and understanding of the consequences of his actions was deeply flawed because of his disease.

The Union states that the Service knew the grievant had a problem with alcohol, and offered EAP on more than one occasion, and that the grievant's failure to partake of these offers was due only to his self-denial of this disease. And that in spite of this knowledge by the Service, they failed repeatedly to act more responsibly.

The Union argues that Management had the ability to send the grievant for a fitness for duty exam when they suspected his alcohol usage was affecting his job performance but again failed the grievant. Further, the Service failed to inform the grievant in advance of the possible consequences for bringing alcohol onto postal property, or the consumption of alcohol while on duty. The Union argues that this obligated warning by the grievant's supervisors and/or postmaster may have been for the grievant the realization he desperately needed to seek help.

The Union states that the grievant is an alcoholic – that alcoholism is a chronic, progressive, and multi variant disease which is characterized by denial, dependence, tolerance, and a preoccupation with, and lack of control of the consumption of alcohol. The Union further cites that such conduct as the grievant exhibited on July 25th due to his alcoholism lacks the degree of intentionality or reckless indifference essential to finding willful misconduct, and therefore the Service should rightfully have taken less drastic steps in addressing the grievant's action than removal. That Article 35.1 mandates such an appropriate approach to this disease.

The Union further offers that there are mitigating factors that need to be considered in reaching a decision – that the grievant committed such actions under the influence of alcohol, that the grievant has been diagnosed, and is being treated for alcoholism, remains sober, has a good past work record, and has been employed for 31 years by the Postal Service, and all taken together warrant due consideration of a lessor penalty.

The Union requests that a finding of no just cause be stated, and that this grievance be sustained in favor of the grievant.

OPINION & DECISION OF THE ARBITRATOR:

The burden of establishing the facts, and thus the proof required to possibly sustain the position taken by a moving party is so greatly enhanced when the parties' stipulate that the allegations leveled against the grievant are true. It is infrequent when parties' in dispute stipulate to the number of facts as the parties' before me in this matter.

No doubt given the nature of these facts, and the indisputable involvement of so many other individuals on July 25, 2015, a denial would be fraught with much risk.

What is not in dispute, and accepted by the parties as fact is that on July 25, 2015 the grievant had been drinking alcohol when he reported for duty, that he carried a Poland Springs water bottle with vodka in it instead of water and maintained this alcohol in his cooler inside his postal vehicle while driving on public roadways delivering mail.

That he consumed this alcohol while on duty, on the street, and that he pulled over on Curtis Street, slumped over the steering wheel of the vehicle, and assumingly became unconscious. That a man walking to work noticed the grievant in this position, and attempted to awaken him, with no success, then called the 911 emergency number for assistance.

That police, fire, and EMT's arrived on scene, and a policeman, Officer Donald MacKenzie did attempt to wake the grievant who was cold and clammy to his touch. Unable to awaken the grievant by calling out to him, he had to shake him, and as the grievant did awake, his foot, which had been resting upon the brake did slip off. Because the engine was running during this time, when the grievant's foot came off the brake pedal, it then went onto the gas causing the vehicle to move forward, almost striking the police officer before it hit a utility pole causing significant damage to the vehicle. [1]

There is no dispute that the police officer states he smelled alcohol on the grievant, and that he was later told by the EMT's Myers and Quilter that they too could smell alcohol on the grievant when transporting him to the hospital.

That the vehicle suffered significant damage and was towed back to the post office where, while cleaning out the vehicle of undelivered mail, the grievant's water bottles were found, and that one bottle contained about an inch of clear liquid that smelled of alcohol, and was then provided to the police.[2]

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[1] See J-2, Page 60-61

[2] See J-2, Page 54 & 55

That the police then obtained a search warrant for the grievant's medical records from the hospital where he was transported, and said records showed the grievant had a blood alcohol level twice the legal limit for the state of Connecticut, and as a result the grievant was issued a notice of arrest for driving under the influence of alcohol.[3]

And finally that a pre-disciplinary interview (PDI) was held between the supervisor, the grievant, and his Union steward on September 3, 2015 where the grievant was dishonest regarding the events of July 25th.

The Service argues that these facts justify the removal of the grievant from further postal employment, while the Union argues just as strenuously that there are mitigating circumstances that led to the grievant's actions on July 25th, and during his PDI on September 3rd, namely that he was an untreated alcoholic then, and is now being treated, and is a recovering alcoholic worthy of help instead of termination, due in no small measure to his many years of service, and good work record. [4]

The Service maintains that it has satisfied their just cause obligations, while the Union maintains that the Service has not, and has failed to follow the dictates of Article 35.1, Employee Assistance Program.

Given these many undisputed facts offered above, the parties ask only of the arbitrator to determine not the guilt, or innocence of the grievant's actions related to the events of July 25, 2015, but did the Service have just cause to issue a Notice of Removal (NOR) to the grievant for those same such actions, and/or did Management violate the terms of the parties' Agreement in so doing.

In deliberating the arguments and evidence before me, I recall what the great American writer Ralph Waldo Emerson once said, "One man's justice is another's injustice....one man's wisdom another's folly."[5]

Surely in matters such as before me, the outcome will cause one to feel vindicated, the other to feel aggrieved. That is particularly true when there is no modification to the judgement, which is the case here. The facts of these charges are true, without dispute, and totally inexcusable for the harm caused, and only by chance more serious harm that could have been caused to people and property. While one may argue that the grievant should not be held accountable for damage not incurred, it would nonetheless be irresponsible to not consider what his actions may have caused. Such responsibility is most assuredly his , and warrants regard.

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[3] See J-2, Page 61

[4] See Service & Union Opening & Closing Statements of Record

[5] R.W. Emerson, 1803-1882

The Union argues that the Service violated Article 16 of the Agreement, Discipline. I respectfully disagree.

Article 16 states that no employee may be discharged except for just cause. This article specifically cites as an example "intoxication", "failure to perform work as requested", and "failure to observe safety rules and regulations." Each of which the grievant, admittedly engaged in on July 25th.

Pursuant to the established, and practiced tenants of "just cause", the employer is required to perform a nominal seven tasks, i.e. 1. Notice: Did the employer give the employee forewarning of the possible consequences for their actions?

Arbitrator Koven offered the following, "Only certain egregious conduct, such as....intoxication while at work.... Is so evidently a violation of commonly accepted notions of work conduct that it will be presumed that the employee is on notice that such conduct is unacceptable and that can be penalized for violating such rules."[6]

I find that to be applicable in this matter. The grievant, having worked in this environment for three decades is rightfully assumed to have known that bringing alcohol to work, having it in his postal vehicle, and consuming while on duty, becoming inebriated, and driving his postal vehicle could reasonably lead to serious discipline.

2. Reasonable Rule: Was Management's rule reasonably related to the orderly, efficient, and safe operation of its business?

There can be no doubt that this prohibition of being intoxicated at work, and driving a postal vehicle in that condition is deemed unsafe for the employee, and others, and is a reasonable rule.

3. Investigation: Did the employer, before administering the discipline to the employee make an effort to discover if the employee did, in fact violate the rule(s)?

There is no dispute that they did so. On September 3, 2015 they conducted the PDI. They asked him pointed questions regarding the events of July 25th yet denied being inebriated, offering only false statements, in spite of evidence provided to him to the contrary.[7]

4. Fair Investigation: Was this investigation conducted fairly and objectively?

There is no dispute offered that it was not done in this required manner.

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[6] See Bay Area Rapid Transit Dist., 80-2 ARB @8612, 5734, (1980)

[7] See J-2, Pages 38-39

5. Proof: During the investigation was substantial evidence or proof that the employee was guilty as charged obtained?

The proof of his actions as been stipulated to by the parties at hearing.

6. Equal Treatment: Has the employer applied its rules and penalties even-handedly, and without discrimination to all employees?

There is no evidence that the grievant was singled out for disproportionate or discriminating treatment. The supervisor testified that he has issued similar discipline in the past, and that by itself the grievances actions stand alone.

7. Penalty: Was the degree of discipline administered by the employer reasonably related to the seriousness of the employee's proven offense, and the record of the employee in the service with the employer?[8]

This is the Union's primary argument, and it is an argument worthy of the Union's role in the labor-management relationship – that the penalty is excessive, that "the penalty doesn't fit the crime" as it is often referred to, and that it lacks consideration of mitigating conditions, i.e., the employee's alcoholism and his years of service.

The Union argues that on July 25th, the grievant was acting only under the influence of his consumption of alcohol, and is now diagnosed as an alcoholic, and therefore may be considered a "troubled" employee worthy of consideration of this mitigating factor.

A "troubled" employee is an employee who is addicted to drugs or alcohol, and may be viewed as warranting a modification of the just cause standard.[9]

However, an employee who drinks to excess is not necessarily a "troubled employee." "The fact that the employee is addicted must be established since the critical underpinning of any special treatment for the troubled employee is that the employee was not responsible for misconduct. In the absence of an addiction, the employee acts voluntarily, and is, thus responsible for use of alcohol...and for the related misconduct."[10]

In all discharge cases, the Service bears the burden of proving that the employee is guilty of the misconduct that they charged him with. The grievant's guilt in this matter has already been established by stipulation, therefore the Union bears a burden to establish that the grievant is a troubled employee before any special consideration or modification of the Notice of Removal is warranted. I find that this burden cannot be met by the mere establishment that the grievant, nearly two weeks after the fact sought outpatient treatment.

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[8] See Just Cause, The Seven Tests, Koven & Smith, BNA 2nd ed. 1992

[9] See The Common Law of the Workplace, The Views of Arbitrators, National Academy of Arbitrators, BNA 2005

[10] See Same, definition of "The Troubled Employee", J. Spencer

At no time during his pre-July 25th employment did the grievant acknowledge a problem with drugs, alcohol, or any other substance other than his blood pressure medication being unaligned causing him to be disoriented on one occasion. In spite of this, the evidence is that the Service offered the services of EAP on more than one occasion, yet the grievant strongly denied a need. Further, the fact that the grievant did have a "clean record" is indicative of no known problems or influences affecting his performance. By the grievant's own testimony he began drinking only after his parents and wife had a disagreement, and while no specific date was offered, there is no other evidence offered that this has been a long standing family feud. Alcohol did not appear to diminish his consistent capacity to perform his duties which may have given cause, or suspicion by the Service to take any pro-active approach toward the grievant, and offer the arbitrator the same. Recognizing his apparently good record of work performance would more likely give rise to the belief that July 25th was an anomaly for which the grievant himself bears responsibility.

It is a recognized practice that the legitimacy of an issued form of discipline will stand, or fall based upon what the employer knew at the time of the discipline, and what the employee did before the discipline. The Union argues with vigor that the grievant has entered into a treatment program since this incident, has been diagnosed, and has remained sober. For those reasons the grievant must be sincerely regarded. However post-discharge conduct, even good conduct cannot erase the reason(s) for the issuance of the discipline.

In an often cited case, the grievant claimed his misconduct was due to his alcoholism, and that following his discharge, but before his arbitration hearing the grievant successfully completed an alcohol rehabilitation program, and at hearing argued that this fact alone made his discharge improper. However, the Judge found that the original discharge was for just cause, and this was not changed by the grievant's subsequent actions.[11][12]

Even arguendo the grievant fell under the auspices of the Americans with Disabilities Act because of alcoholism, that act specifies that employers are within their rights to enforce alcohol policies, and hold alcoholics to the same standards of conduct and performance as all other employees. [13]

Further, if one allows that the grievant bears responsibility, that responsibility surely begins with the start of his day at home, when by the grievant's own testimony he took water bottles from his refrigerator, placed them into his "cooler" and retrieved a bottle of vodka from his closet, placing it into his cooler with the water. This alcohol was disguised in a similar Poland Springs brand bottle. The grievant testified that it was a hot day on July 25th and he had water to drink on his route.

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[11] See Bemis Co., 81 LA 733, W. Wright, 1983

[12] See Dahlstrom Mfg. Co., 78 LA 302, M. Gootnick, 1982

[13] See ADA, PL 101-336, July 26, 1990

However, as the record reflects, when the supervisor found the water bottles strewn about the postal vehicle after the accident, the only bottle that had been drunk was the one with alcohol. How much was in it at the start of his work day, and how much he consumed while driving and delivering his route on July 25th (there was approximately an inch of liquid reportedly in this bottle) can only be left to speculation because the grievant cannot recall. However, the consumption, a reasonable person must presume was significant enough to cause the grievant to pull over to the side of the road, with only his foot on the brake, and fall into such a slumber that both the pedestrian, and the police officer had difficulty awaking him, and then when the policeman was able to do so, the grievant's foot fell off the brake and pushed down onto the gas, causing it to move forward at such a rate of speed as to cause significant damage to the vehicle after hitting a utility pole, and almost hitting the policeman in the process.

This is a responsibility that the grievant alone bears. I do not question the stress he may have been under due to disagreements within his family, nor do I feel qualified to address why alcohol may affect one person's tolerance differently than another's.

I am asked to determine if the Service had just cause to remove the grievant, and if the mitigating circumstances of the grievant's actions on July 25th override the aggravating circumstances.

The grievant's current involvement in a program to address his alcohol issue(s) is personally admirable, and hopefully will be rewarding for the grievant, and his family, however it cannot, in and of itself serve to relinquish his responsibility for his very serious digressions of July 25th. It is admirable that the grievant, finally, reached out to the EAP program, but to fully rely upon participation in such a program after the fact of the employer's issuance of discipline as a bar to an otherwise appropriate response by the employer to his actions would surely undermine the parties' intent of such a program, and could serve only diminish the employer's contractual right to hold an employee accountable for his actions under just cause.

While Article 35.1 of the Agreement articulates that an employee's voluntary participation in the EAP for assistance with alcohol abuse will be considered favorably in disciplinary action proceedings, once considered, as the Service's witness stated it was, it does not dictate, nor mandate the Service's ultimate decision. It remains a reasonable assumption that more favorable consideration may be given if the employee had not repeatedly denied any need for such assistance until three weeks after discipline was issued.[14] [15]

[14] See Bemis Co.,81 LA 733, also 90 LA 399, 86 LA 430

[15] See Caterpillar Tractor Co., 44 LA 87

The Union also, justifiably argues that another mitigating consideration must be the grievant's many years of unblemished postal service. I agree that this is, indeed a consideration that must be undertaken prior to the issuance of discipline. However, as offered by the Service's witness, Supervisor Colaccino, and it's very capable advocate this factor was considered but it was determined that the seriousness of the grievant's actions on July 25th far outweighed his years of service.

I am in agreement. As one arbitrator stated, "Even long seniority counts for only so much. It buys extra consideration, it merits the benefit of any reasonable doubts, and it obliges an employer to view the employee's record as a whole rather than treating events in isolation. [16]

I find that the Service fulfilled its obligation to consider the grievant's longevity. The arbitrator has also considered his many years of unblemished service, but finds too that in instances of seriously dangerous actions by an employee, these aggravating circumstances far outweigh the mitigating longevity. [17]

The fact that the grievant, knowingly, and willingly consumed alcohol prior to, and during the time he was diving a postal vehicle upon the roadways posed a most serious risk to not only himself, but the public. The fact that his consumption was to such a degree that he became unresponsive on the side of the road, with his foot on the brake, the gear in drive with the engine running only adds to those circumstances where serious injury was a greater risk, as also evidenced by the policeman being nearly hit by the grievant's moving vehicle when his foot slipped off the brake as it travelled toward the utility pole.

While one is not normally held to account for things that did not happen, only that which did, one would be irresponsible to ignore the dangers inherent with what such behavior could have caused to persons, and property. (Underlined added) The Postal Service has a right to expect employees engaged with the public, and those who operate its vehicles upon the roadways to do so in a safe manner, responsibly. The grievant, on July 25th did neither.

The mitigating factors that have been considered remain the grievant's years of good service, and his claim of alcoholism.

I am satisfied that the Service gave due consideration to these very important factors prior to making their decision to remove the grievant from further postal employment.

I am satisfied by evidence that they did so without bias, or pre-determination.

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[16] See Carolina Tel. & Tel. Co., 97 LA 653,655 (Nolan, 1991) American Welding & Mfg. Co. 47 LA 457, 463 (Dworkin, 1966) See Elkouri & Elkouri, 5th Ed.

[17] See Decar Plastics Corp., 44LA 921, 923 (Greenwald, 1965) & Arden Farms Co., 45 LA 1124 (Tsukiyama, 1965) "Just Cause, The Seven Tests" Koven & Smith, BNA, 2nd Ed.

The aggravating factors, consuming alcohol before reporting for duty, bringing alcohol onto postal property (its vehicle), consuming alcohol while on duty, and driving a vehicle upon the roadways while impaired, becoming so impaired that others could not easily awaken him, not wearing a seat belt, the damage to postal property (vehicle), the arrest for driving under the influence, the public's awareness of this, and the grievant's less than honest answers during his pre-disciplinary interview do far outweigh the "bank of goodwill" he previously established.

The Service had an obligation to balance the mitigating versus the aggravating, as does the arbitrator. In so doing it gives thought to the established position that, "Just cause is essentially a standard of reasonableness and fairness. It requires that the penalty imposed must fit the seriousness of the offense and must take into consideration the total circumstances, both those in aggravation, and those in mitigation."[18]

The guiding principle of just cause is that discipline should be corrective, rather than punitive.[19] However, as stated, when the offense(s) are so serious, so egregious, and has caused such harm to the employer-employee relationship, the employer may be justified in taking the most severe measure at their disposal, i.e. the employee's removal. The Service must not do so in a vacuum, or arbitrarily. They must consider all those factors discussed above. They must give due diligence to those factors, and they must give every reasonable opportunity for the employee to offer a verifiable explanation for their reported actions.

The Service does not have to make their decision based upon a belief that the employee may be a participant in an on-going program of assistance, they need only articulate with clear and convincing evidence that the grievant did what they said he did (not in dispute here), and that they followed the principles and standards of just cause. If they demonstrate they met this criteria, without acting unreasonable, arbitrary or capricious – if they testify credibly that they have lost all trust in the grievant's ability to perform his duties satisfactorily, and safely in the future, then it would take a leap of faith on the part of the arbitrator to substitute his judgement for theirs, and arbitral decisions must only be made based on fact, not faith.

I have reviewed the offered arbitral decisions by the parties. I find disagreement with this arbitral decision.

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[18] See Fulton Seafood Indus., Inc. 74 LA 620, 622 (Volz, 1980) (Just Cause, The Seven Tests, Koven & Smith)
[19] See National Agreement, Article 16.1, Page 79

In that case, the grievant exhibited problems in the past related to alcohol, and had previously been disciplined for alcohol related issues, and committed a serious infraction, yet the arbitrator relied almost entirely on Article 35.1, in my opinion erroneously to reinstate the employee. This arbitrator recognizes that the grievant was a long standing alcoholic at the time of his infractions. I am not convinced that the disease of alcoholism was sufficient to justify the events of July 25th, as they represent the only such known alcohol problems by this grievant.

The other submitted case for review by the Union's extremely capable advocate addresses an employee who did not operate a motor vehicle on the clock, so that was not a consideration, as such in the matter at hand. (Underline added)

The case submitted by the Service I find relevant to the matter at hand. Arbitrator Brooks offers a very clear understanding that, "There are a number of instances in which it is appropriate to remove an employee for a first violation. Drinking on the job and driving a Postal vehicle under the influence are certainly among those that could be considered for termination for the first offense." He also offers in relevant part, "To hold that an employee could escape whatever discipline may be due for such a violation by simply going to EAP, after the incident giving rise to the discipline, would remove from Management the right to effectively supervise and discipline its employees. That was clearly not the intent of the language of the National Agreement."[20]

The sad, true facts remain that the grievant did all he was charged with, initially denied such, and only later, confronted with irrefutable facts did he acknowledge such, with much of the total truth emerging only at hearing. The facts remain that the Service met their just cause obligations, without doing so in an arbitrary, capricious, or discriminating fashion – I find no harmful procedural errors, I find no evidence before me that suggests the Service did not consider all the mitigating factors offered before making their decision.

While a trier of fact may offer that, if making the personnel decision themselves they may have decided differently, or that the heart encourages a different outcome, the arbitrator must be true to his/her obligations to the parties' to rule only from that mandate emanating from the Agreement. While the award must draw its essence from that Agreement, they are not precluded from looking beyond for guidance. The parties' offer guidance through their submissions, of course, and arbitrators look at the parties' practice, it's history, and other awards previously issued that may be "on point" with the matter at hand. However, arbitrators may not impose their own form of justice – they must rule from the head, and not the heart.[21]

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[20] See MacManis, G06N-4G-D 09336010, Brooks, 2010

[21] See Enterprise Wheel & Car Corp. v. United Steelworkers, 269 F 2nd 327, 331-32 (4th Cir. 1959)

In finality, there is no dispute that the grievant is guilty of those elements of aggravation cited within, and that the mitigating factors have been duly considered, and found to be insufficient to overcome the grievant's actions, and that the Service met it's due process obligations fairly. Finding such, I must therefore confirm their decision, with no basis found that would lead to a substitution of this decision.

At this time it offers little solace to the grievant, or his family that this decision does not come easily – nor should it. It remains my fervent hope that Mr. Borkowski continue his efforts to address his problems, finds strength in the support of family, friends, and organization, and that in the future, having successfully demonstrating full compliance, the powers that be may consider reinvesting in him.

AWARD:

This grievance is denied.

Respectfully Submitted,

Donald J. Barrett, Arbitrator

Date Feb. 9, 16