

C-30652

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)
United States Postal Service) Grievant: David Suntheimer
and) Post Office: Norwich, CT
National Association of) Case No: B06N4BD12288144
Letter Carriers, AFL-CIO) Union No: 056112
) DRT No: 14-243869

Before: EILEEN A. CENCI

Appearances:

For United States Postal Service: Scott Duell

For National Association of Letter Carriers: Joseph Mahon

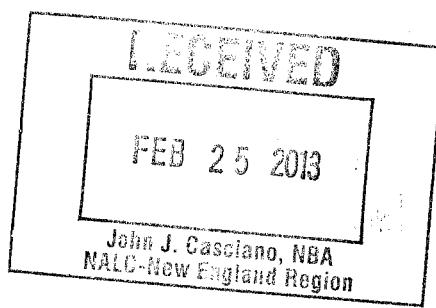
Place of Hearing: Wallingford, CT

Date of Hearing: December 10, 2012

AWARD SUMMARY: There was not just cause to issue the Grievant a Notice of Removal dated June 28, 2012 because much of the evidence on which the removal was based consisted of uncorroborated hearsay. There was, however, sufficient proof of conduct unbecoming a postal employee and lack of truthfulness to justify imposition of a 14-day suspension. The removal is reduced to a 14-day suspension. The grievant is to be reinstated and made whole for all lost wages and benefits, less outside earnings, with the exception of a 14-day period during which he is suspended without pay.

Date of Award: February 14, 2013

Regular Regional Arbitration Panel



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NALC HEADQUARTERS

Eileen A Cenci

Eileen A. Cenci

OPINION

STATEMENT OF PROCEEDINGS:

This matter was arbitrated pursuant to the grievance and arbitration provisions of a collective bargaining agreement (National Agreement) between the United States Postal Service (Service) and the National Association of Letter Carriers (NALC or Union). A hearing was held before me on December 10, 2012 in Wallingford, Connecticut. The parties appeared and were given a full and fair opportunity to be heard, to present evidence and argument, and to examine and cross-examine witnesses. Management called Supervisor Valerie Clark and Postmaster Eileen Kelty as witnesses. The Union called the grievant and Steward June Reszala-Martin. All witnesses testified under oath. At the conclusion of the hearing the parties agreed to file post-hearing briefs, to be postmarked no later than January 15, 2013. The arbitrator received the briefs on January 14, 2013 and exchanged them to the opposing parties as previously agreed. The record was then closed.

ISSUE:

The parties agreed to adopt the issue statement from the DRT decision:

Did management violate the National Agreement, Article 16, and did just cause exist when they issued the Grievant a Notice of Removal dated June 28, 2012 on June 30, 2012 and if so, what is the proper remedy?

FACTS:

The grievant, a letter carrier at the Norwich, Connecticut Post Office, was issued a Notice of Removal (NOR) for Conduct Unbecoming a Postal Employee. The conduct which led to his removal allegedly occurred on June 6, 2012. The grievant is a T-6 carrier and normally covers five different routes on the regular carrier's non-scheduled (NS) day. On June 6, 2012 he was working overtime on his NS day as the carrier on Route 18, which includes the Westwood Park apartment complex. Westwood Park is an elderly apartment complex. It consists of three U-

shaped buildings. The Dorsey Building is a two-story building located across from the courtyards. All the mailboxes in the Dorsey Building are in a central location downstairs. Carriers do not deliver mail to each apartment.

The scheduled scan times, based on the route inspection for Route 18 are that the carrier arrives and makes the 9 Westwood Park scan at 12:07. The next scan is at 27 Oakwood Knolls and is scheduled for 13:00 or 1:00 p.m. The grievant's actual scans on June 6, 2012 were 13:36 at 9 Westwood Park and 14:59 at Oakwood Knolls. He arrived late at Westwood Park because of an earlier run. He took lunch at Westwood Park, which caused the longer than usual gap between the Westwood Park and Oakwood Knolls scans. The carrier normally takes lunch at Oakwood Knolls and Westwood Park is not an authorized lunch spot. However, carriers are permitted to take lunch after working for 6 hours. The grievant completed deliveries to the three U-shaped buildings before going to lunch and made the deliveries to the Dorsey Building after he returned from lunch and before he moved on to Oakwood Knolls.

On June 6, 2012 the grievant's wife drove to Westwood Park and met him for lunch there. The two of them left in her private vehicle and returned to Westwood Park approximately 25-30 minutes later. The grievant left his LLV parked in a parking space at Westwood Park while he was at lunch and his wife drove him back to that location. When the grievant returned from lunch with his wife a resident of the apartments approached him and said he had parked his LLV in her parking space. The details of the interaction and the exact time it occurred are in dispute but the record contains the following information:

Supervisor of Customer Service Valerie Clark received a call from a customer, Debra Kennedy at approximately 2:05 p.m. on June 5. Mrs. Kennedy said she lived at the Westwood apartments and that a postal truck had been parked in her parking spot for two hours. Mrs. Kennedy asked the supervisor to contact the carrier and have him move the vehicle. Supervisor Clark drove to the apartments to determine whether the postal vehicle was still parked there and, if so, to have the carrier move it. The drive from the Norwich Post Office to Westwood Park takes about 10 minutes and Supervisor Clark arrived there at approximately 2:15 p.m. When Supervisor Clark arrived, she saw the LLV parked near the fire lane in front of the Dorsey Building. The grievant was exiting the building at the time with a few pieces of mail.

Supervisor Clark told the grievant about the call she had received from Mrs. Kennedy.

He responded that he had not been parked in the space for two hours, that there is no assigned parking at Westwood Park, and the regular carrier parks in any open space. The grievant said that he was finished delivering at that location and was headed to Oakwood Knolls, the next stop on the route. Supervisor Clark checked the mail in the LLV and watched the grievant drive away from the Westwood complex at about 2:15 or 2:20 p.m. Although an LLV should not be parked in a fire lane, Supervisor Clark did not say anything to the grievant about that violation because he was leaving the area and going on to Oakwood Knolls.

Supervisor Clark returned to the Post Office at approximately 2:30 p.m. Just as she was walking back into the office she was informed that Mrs. Kennedy was on the telephone again. Supervisor Clark took the call, and Mrs. Kennedy told her that she was very frightened. Her voice was trembling at the time. She told Supervisor Clark that the grievant had come to her door and handed her a crumpled piece of mail. He had said he'd witnessed her breaking into his mail truck and that she would be getting a phone call from his attorney.

Supervisor Clark spoke to the Postmaster and the two of them went to visit Mrs. Kennedy, but she was not home at the time. The next day they returned and Mrs. Kennedy invited them into her apartment. They saw the crumpled piece of Verizon mail the grievant had allegedly given Mrs. Kennedy. Mrs. Kennedy repeated her story to them and they found her to be a credible witness. Supervisor Clark and Postmaster Kelty asked Mrs. Kennedy to write down her statement and she did so. They returned another day to pick up the written statement from Mrs. Kennedy but did not have further conversation with her. Postmaster Kelty testified at arbitration that Mrs. Kennedy's written statement was consistent with what she had said when she was interviewed.

In her written statement Mrs. Kennedy said that residents of Westwood Park had received a notice on their doors on June 6 reminding them that there was assigned parking and that visitors should park in the visitor parking area. Mrs. Kennedy said she went out for the morning on June 6 and returned around 1:30 p.m. to find the mail truck in her parking space. She drove around the area to try to locate the carrier but was unable to do so, so she parked directly in front of the mail truck as if to block it. She placed the notice she had received about parking on the door of the mail truck and went to her apartment, where she watched from the window. She saw two people talking in a car parked two spaces away from the mail truck, but thought nothing of

it. After watching from the window Mrs. Kennedy decided she had been wrong to block the mail truck, so she went back outside and moved her car to a 15-minute drop off spot. She then walked around the neighborhood to find the carrier and noticed mail in some boxes in each of the three courtyards. She went back inside and telephoned the post office about the mail truck parked in her spot. After getting off the phone she noticed that the passenger door was open in the car where the two people had been talking and the man appeared to be wearing Postal Service uniform shorts. She went back outside and spoke to the man, asking if he was the carrier. According to Mrs. Kennedy's statement the carrier shut the car door, so she knocked on the window and asked again if he was the carrier and could move his car. He replied that there was no assigned parking and he could park where he was, then rolled up the window and turned away. Mrs. Kennedy retrieved the parking notice she had placed on the mail truck, gave it to the carrier and asked him again to move his truck. She then got into her car, pulled out and waited for him to move his truck. He continued to sit in the private vehicle and did not acknowledge her, so she blew her car horn. He eventually moved the postal truck near the fire lane next to the Dorsey Building. As Mrs. Kennedy went back inside, she said the carrier asked her what apartment number she was.

Mrs. Kennedy's statement went on to say that the grievant knocked on her apartment door about 8 minutes later and handed her a crumpled piece of mail from Verizon. He said he had seen her trying to break into his truck and that his attorney would be calling her.

Mr. Kennedy said that she was very upset and sat down to think about what to do, and that after regaining her composure she called the Post Office again.

Supervisor Clark conducted a PDI with the grievant on June 11, 2012. In response to her questions the grievant said that it generally takes him between 30 and 40 minutes to deliver the mail to the Westwood Park apartments. On June 6, 2012 he said that he had taken his lunch between the Westwood Park and Oakwood Knolls scans. The grievant was asked, "Did a resident of the apartments approach you while in a POV and request that you move the LLV? The grievant responded, "no" that the customer did not approach him until he got back from lunch when he went to unlock the LLV. When asked what his reaction and response was, the grievant said that she had told him he was in her parking spot and he responded that there was no assigned parking and that he could park where he was. The grievant said that he left the complex

after seeing Supervisor Clark and did not return to the building and never went to the customer's door. The grievant denied that he had told the customer he had contacted his attorney about her breaking into his truck, and said he would not say that since, if someone were breaking into his truck he would call the police or his supervisor. He said the only time he spoke to the lady was when she was yelling at him as he returned from lunch. He then moved the LLV and delivered mail to the Dorsey Building. When he finished doing that he went outside and Supervisor Clark was there to tell him a customer complained that he had parked for two hours in her spot. He said that he could not have parked in her spot for two hours based on the scans.

Supervisor Clark issued a Notice of Removal dated June 28, 2012 for Conduct Unbecoming a Postal Employee. The NOR cited the following elements of past discipline:

- A 14-day suspension dated October 7, 2011 for Failure to be Regular in Attendance, Failure to Follow Instructions and Unacceptable Conduct.
- A 14-day suspension dated April 4, 2012 for Failure to Follow Instructions and Unauthorized Overtime.
- A 14-day suspension dated April 23, 2012 for Failure to Follow Instructions.

The 14-day suspension issued on April 23, 2012 was rescinded by the B Team on June 27, 2012. Supervisor Clark testified that she was not aware of the B Team decision when she issued the NOR on June 28, 2012. Postmaster Kelty reviewed and concurred with the discipline. The grievant received the NOR on June 30, 2012.

The Union filed a grievance over the removal. The grievant and his wife wrote statements about the incident and the grievant gave both to Union steward June Ruszala Martin. The grievant's written statement was dated July 1, 2012. It was consistent with answers he had given at the PDI. He said he had taken approximately a 25-30 minute lunch on June 6, 2012 and that the woman approached him and started yelling when he got out of his wife's car. The statement written by the grievant's wife was dated July 2, 2012. It had not been solicited by the Union. Melissa Suntheimer said that she had met her husband for lunch on June 6, 2012. At the end of his lunch break, from her vehicle, they could see a woman trying to enter his postal vehicle. She stated that her husband had opened her car door and the lady approached him and starting yelling at him that he was in her parking spot.

At arbitration the grievant estimated that his LLV had been parked for approximately 45

minutes in the space Mrs. Kennedy claimed had been assigned to her. He reiterated that he never saw the woman try to break into his postal vehicle and said his wife had not told him she saw that. He again denied having gone to Mrs. Kennedy's apartment or having told her that she would hear from his lawyer.

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)

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 are expected to maintain harmonious working relationships and not to do anything that would contribute to an unpleasant working environment.

POSITIONS OF THE PARTIES:

UNITED STATES POSTAL SERVICE (SERVICE)

The Service maintains that there is just cause for the removal.

The testimony of Supervisor Valerie Clark and Postmaster Eileen Kelty is credible. Both spoke personally to Debra Kennedy, observed her demeanor and found her credible.

The grievant had time to go to Mrs. Kennedy's apartment with the piece of Verizon mail before Supervisor Clark arrived at the building. He testified that it takes about 10 minutes to deliver the mail to that building and it takes Supervisor Kennedy about 10 minutes to drive there

from the Post Office.

The grievant and his wife have given conflicting and incompatible accounts of what happened even though they were sitting together in the same vehicle when the events they describe occurred. The grievant insists that he never saw Mrs. Kennedy attempt to break into his postal vehicle and that his wife never told him she saw that. However, almost a month after Mrs. Kennedy wrote her statement Mrs. Suntheimer wrote that she had seen Mrs. Kennedy try to break into the LLV. If the grievant never went to Mrs. Kennedy's apartment on June 6, 2012 and accused her of trying to break into the LLV, it is certainly remarkable that she wrote a statement bringing up such an allegation and that the grievant's wife wrote almost a month later that she had seen it happen. How could Mrs. Kennedy have known on June 7, 2012 that she would later be accused of such a thing? The only explanation is that the grievant made the accusation on June 6, 2012.

The grievant insists that Mrs. Kennedy never spoke to him or yelled at him while he was in his wife's car. Both Mrs. Kennedy and Mrs. Suntheimer say they first spoke when the grievant was seated in the POV.

When Supervisor Clark saw the grievant exiting the Dorsey Building at approximately 2:15 p.m. on June 6, 2012, he did not tell her that Mrs. Kennedy had yelled at him about being in her parking space.

The Union's argument that Mrs. Kennedy's written statement is inadmissible hearsay is a new argument that was not advanced prior to arbitration. It should be rejected as new argument.

The fact that the Union was unable to interview Mrs. Kennedy does not make her statement inadmissible. The Postmaster attempted to help the Union steward speak to the witness but was unsuccessful. She did not want to be further involved in the proceedings.

The penalty of removal was justified because the grievant has an extensive record of discipline even though he has only been employed by the Postal Service for seven years. One fourteen day suspension was expunged from the grievant's record the day before the NOR was written, but Supervisor Clark did not know the discipline had been expunged at the time she cited it in the NOR.

The Service asks that the grievance be denied.

NATIONAL ASSOCIATION OF LETTER CARRIERS (UNION)

The Union objects to the introduction of the statement written by customer Debra Kennedy on the grounds that it is hearsay. The customer did not testify at arbitration and the Service, which could have subpoenaed the witness, elected not to do so. The Union had no opportunity to interview the witness and was therefore unable to test her credibility.

The removal of the grievant was based entirely on hearsay and is therefore without just cause. The grievant has denied every allegation made by Debra Kennedy to Postal supervisors. In the absence of sworn testimony by Ms. Kennedy there is no credible evidence that the grievant engaged in any type of misconduct and there is no just cause for the discipline.

The Union has argued throughout the grievance process that removal cannot be based on Mrs. Kennedy's statement because the Union had no opportunity to question the witness. This is not new argument.

Management relied on prior discipline that had been expunged from the grievant's file.

The Union asks that the arbitrator sustain the grievance and order that the grievant be reinstated and made whole.

DISCUSSION:

The grievant was removed on the basis of an incident involving a customer on his route who did not testify at arbitration and was unwilling to speak with Union officials. Mrs. Kennedy's written statement and her conversations with the Postmaster and supervisor are hearsay because she did not testify under oath at the arbitration hearing, there was no opportunity for the arbitrator to observe her demeanor or assess her credibility, and there was no opportunity for the Union to question her. Although hearsay evidence is generally admissible in arbitration, it is not given the same weight as evidence provided by a witness who testifies under oath and is subject to cross-examination. An arbitrator would be unlikely to uphold the removal of an employee solely on the basis of uncorroborated hearsay testimony under the just cause standard. This is due in part to the less reliable nature of hearsay evidence, and also to the general principle in American jurisprudence that an accused has the right to confront his or her accuser in a courtroom or other legal forum. Where, however, hearsay evidence is corroborated by other

reliable evidence there may be sufficient proof to justify discipline. It is therefore necessary to determine whether Mrs. Kennedy's hearsay statement was corroborated by other evidence.¹

In evaluating the evidence in this case it is helpful to begin with a clear focus on the issue that led to the issuance of the NOR. There is evidence in the record about a number of matters that are not central to the removal. The question here is not, for example, whether the grievant's LLV was actually parked in Mrs. Kennedy's spot for two hours. Clearly, the LLV was parked in a spot at the apartment complex and left there for a shorter period of time than the two hours Mrs. Kennedy alleged. The case is also not about whether Mrs. Kennedy was correct in her belief that there is assigned parking at the Westwood Park Apartments or whether the grievant had the right to park anywhere he wanted. Even if the customer was completely wrong about the parking situation and the carrier was completely right in his assertion that he could park where he did, he had an obligation to deal with her in a professional manner and not to engage in conduct unbecoming a postal employee.

Similarly, this case is not about how long the grievant took for lunch, whether he was authorized to have lunch while at Westwood Park or should have waited until he got to Oakwood Knolls, or whether he was illegally parked in a fire lane. If any of those matters constituted infractions, they were not cited in the NOR and the removal was not based on them. The only real issue in this case, and the one on which the NOR was based, is whether the grievant engaged in conduct unbecoming a postal employee in his dealings with an elderly resident of the Westwood Park apartments.

The evidence contains some corroboration of Mrs. Kennedy's hearsay statements but much of what she told Postal supervisors is uncorroborated. The grievant admits that he spoke to Mrs. Kennedy in the parking lot, as she has stated, and that he told her he had the right to park his postal vehicle in any open spot. Given that Mrs. Kennedy is an elderly woman who believed the LLV was parked in her assigned spot, the grievant engaged in at least mildly inappropriate and confrontational behavior by arguing with her in the parking lot, rather than simply moving

¹ I do not accept the Service position that the Union is making a new argument at arbitration that Mrs. Kennedy's statement is inadmissible as hearsay. The Union repeatedly raised concerns throughout the grievance process about its inability to interview the witness. The Service could not be surprised that the Union argued against the admissibility of her statement when it was never able to interview Mrs. Kennedy and she did not testify at arbitration.

the vehicle.

The most serious charge against the grievant is that he went to Mrs. Kennedy's apartment, accused her of trying to break into his postal vehicle and said she would hear from his lawyer. This charge, if proven, would warrant the grievant's removal. It would be outrageous and inexcusable for a carrier to track an elderly resident to her apartment after having words with her in the parking lot, knock on her door and attempt to intimidate her by threatening legal action. The allegation, however, is based almost entirely on hearsay. No one except the grievant and Mrs. Kennedy was present during that alleged incident. No one representing the grievant had an opportunity to question Mrs. Kennedy despite the Postmaster's efforts to arrange such a meeting.

Nothing in Mrs. Kennedy's written statement suggests that it is not credible. Postmaster Kelty and Supervisor Clark described the witness as credible and saw the crumpled piece of Verizon mail she said the grievant brought to her door. The grievant had the opportunity to engage in the conduct Mrs. Kennedy described within the time frame she gave. He was in the Dorsey Building delivering mail after he returned from lunch Mrs. Kennedy said he came to her door about 8 minutes after their confrontation in the parking lot and Supervisor Clark saw him leaving the building when she arrived, about 10 minutes after Mrs. Kennedy called the Post Office. The grievant could have gone to Mrs. Kennedy's apartment about 8 minutes after they spoke in the parking lot and been leaving the building a few minutes later when Supervisor Clark arrived. The fact that the grievant had the opportunity to go to the apartment is not proof that he did so, however.

The grievant's credibility is also an issue in this case. It is apparent from statements he made during the grievance process that he was not totally forthcoming and truthful when his supervisor first informed him that Mrs. Kennedy had called the Post Office. When he first spoke to Supervisor Clark as he was leaving the Dorsey Building the grievant did not tell her that he had spoken with Mrs. Kennedy in the parking lot or that she had been angry with him about the LLV being parked in her space. In statements he made later, the grievant admitted that Mrs. Kennedy was irate with him and that he responded to her by claiming that parking spaces were unassigned and she should park in one of many open spaces. The grievant displayed a troubling willingness to shade the truth when questioned by a supervisor.

The most bizarre twist in this case is provided by the conflicting statements the grievant and his wife wrote. The two of them were sitting in her car together after lunch but did not report seeing the same things. The grievant adamantly and repeatedly denied Mrs. Kennedy's statement that she recognized him as a mail carrier and approached him while he was still in his wife's car. His wife's statement supported what Mrs. Kennedy wrote by confirming that Mrs. Kennedy approached the grievant and spoke to him as he opened the door of the private vehicle in which the two of them were seated.

The most incongruous aspects of the statements given by the grievant and his wife concern the allegation that Mrs. Kennedy attempted to break into the postal vehicle. Mrs. Kennedy, of course, says the grievant came to her apartment door on June 6 and said he had seen her try to break into the truck. He denies having done so and further denies that he saw her attempt to break into the LLV or that his wife ever told him she saw it. If the grievant is to be believed, Mrs. Kennedy entirely fabricated a story involving the rather unusual accusation that the grievant had seen her attempting to break into a postal vehicle. Yet, almost a month after Mrs. Kennedy supposedly fabricated this entire story, Mrs. Suntheimer provided an unsolicited statement claiming that she saw Mrs. Kennedy try to break into the postal vehicle. Mrs. Suntheimer, without being asked, brought up the exact accusation her husband denies he ever made. She claimed she saw Mrs. Kennedy do the very thing her husband allegedly accused Mrs. Kennedy of doing, while he not only denies doing it but denies that his wife ever told him she made such an observation. Either Mrs. Suntheimer has partially corroborated the evidence against her husband by revealing that the two of them discussed Mrs. Kennedy attempting to break into the vehicle, or the grievant's wife provided a false statement in a clumsy effort to defend her husband. To believe the latter one must conclude that Mrs. Suntheimer became aware of what Mrs. Kennedy had accused her husband of doing, never discussed it with her husband, but decided it would be helpful to claim she'd actually seen Mrs. Kennedy try to break into the vehicle. The logic that such a statement would be helpful is more than a little flawed since even if Mrs. Kennedy had actually attempted to break into the postal vehicle the grievant would hardly have been justified in going to her door and threatening legal action.

The grievant's credibility is terrible and his wife's credibility is, if anything, worse. The non-hearsay evidence, however, proves only that the grievant was somewhat argumentative with

Mrs. Kennedy in the parking lot, less than forthcoming with his supervisors, and that he had the opportunity to commit the most serious allegations against him. Moreover, while the grievant is not a credible witness, there has been no opportunity for the arbitrator to evaluate the credibility of the witness against him or for the Union to question that witness and test the accuracy of her statements.

I cannot conclude that there is just cause to remove this employee where the accusing witness did not speak to the Union or testify under oath, and where proof of the most serious allegations is based primarily on hearsay. Based upon the grievant's statements to his supervisor, at the PDI and in the grievance file, there is evidence that he engaged in conduct unbecoming a postal employee in the parking lot and was less than completely truthful with his supervisor. There is also strong reason to believe that he, his wife or both gave untruthful written statements. The grievant's conduct justifies some level of discipline but not the penalty of removal.

The removal is reduced to a 14-day suspension. The grievant is to be reinstated and made whole for lost salary and benefits, less other earnings, with the exception of a period of 14-days during which he is to be suspended without pay.