C-33127

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration)	Grievant: G. Ortiz
between)	Post Office: Naugatuck CT.
The U.S. Postal Service)	Case Number: B11N-4B-D 17592323
and)	Union Number: 17-06770-15
The National Association of Letter Carriers, AFL-CIO)	DRT Number: 14-407466

Before: Donald J. Barrett, Arbitrator

Appearances:

For the U.S. Postal Service: Mr. Glenn C. Smith, Labor Relations Specialist

For the National Association of Letter Carriers: Mr. George G. Laham, Area Representative

Place of Hearing: Naugatuck CT Post Office

Date of Hearing: December 5, 2017

Award: This grievance is denied

Date of Award: December 10, 2017

AWARD SUMMARY

The Service was able to provide clear and convincing evidence that the accident of July 20, 2017 was the responsibility of the grievant, that the grievant was aware of the policies governing his behavior when dismounting the postal vehicle, yet failed to employ all such requirements, and his failure was the contributing factor in this serious accident.

The Union was unable to provide sufficient evidence that the Service failed to conduct a fair investigation, or that the issuing official did not make the decision independently, or had the authority to settle this dispute.

STATEMENT OF PROCEEDINGS:

The matter before me was brought to hearing on December 5, 2017 pursuant to the grievance-arbitration provisions outlined in the parties 2011-2016 National Agreement, or Contract, or Agreement 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 participants at hearing were provided a full, fair, and objective opportunity to present argument, evidence, and testimony on behalf of their respective positions. The parties exercised their opportunity to present witnesses, and at the request of the advocates each witness was duly sworn an oath prior to offering their testimony.

The Service called the following witnesses:

Mr. Brian Falcha, Postmaster, Naugatuck Ct.

Ms. Fernanda Alves, Supervisor, Naugatuck Ct. Post Office

Mr. Robert Sasso Jr., Manager, Vehicle Maintenance, Waterbury Ct.

The Union called the following witnesses:

Mr. John Wright, Steward, Naugatuck Post Office

Mr. Frank Kish, Informal A Representative, NALC

Mr. Gamalier Ortiz, Letter Carrier, Grievant

Both the Service and the Union provided written & oral Opening and Closing Statements

JOINT EXHIBITS:

Joint 1, The National Agreement, inclusive of the parties Joint Contract Administration Manual. (J-CAM)

Joint 2, Moving Papers, Pages 1-80

SERVICE EXHIBITS:

S-1, 12 Point Serious Accident Review Worksheet.

S-2, CT District Policy Statement/USPS Driver program signed by grievant on March 22, 2017

S-3, (Vehicle) Work Order 19892933 dated July 21, 2017

UNION EXHIBITS:

U-1, Picture of subject postal vehicle with wood block behind wheel.

STIPULATED FACTS NOT IN DISPUTE:

The parties offered none.

ISSUE TO BE DECISDED BY THE ARBITRATOR:

After discussion between counsels for the parties, it was decided that the issue as offered by the parties Step B Team would be that to be decided.

"Did Management violate the National Agreement Article 16 when they issued Carrier Ortiz a Notice of Removal without just cause? If so, what is the proper remedy?"

BACKGROUND:

On July 20, 2017, around 10:45 AM the grievant was in the process of delivering Route 2, which involved a dismount delivery for 51 Johnson Street in Naugatuck Ct. After leaving his vehicle parked on the side of this street, and proceeding to the address, his vehicle, a Long Life Vehicle (LLV) began to roll backwards down the hill, striking a private parked vehicle, and proceeding further into a backyard and striking a garage.

The grievant notified his supervisor, and the local police department, and both conducted on-site inspections.

The grievant was placed into a non-duty status (Not the subject of this grievance), and a Pre-disciplinary Interview (PDI) was held with the grievant, and his Union Steward, and supervisor Alves on July 31, 2017.

The grievant was issued a Notice of Removal dated August 11, 2017, and charged with "Failure to work in a safe manner/Failure to discharge your duties conscientiously and effectively."

The Union filed a timely grievance on August 28, 2017, and because it remained unresolved throughout the various steps of the grievance procedure, it was presented at this arbitration hearing.

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."

POSTIONS OF THE PARTIES IN THIS MATTER:

The US Postal Service

The Service maintains that just cause exists for the issuance of the NOR to the grievant dated August 11, 2017 for his failure to perform his duties in a safe manner, and conscientiously, and effectively.

That due to his negligence on July 20th, he caused his postal vehicle to roll down a hill, striking a parked vehicle, and continuing down the hill into a backyard where a children's play set was located, and struck a shed with such force as to dislodge the structure from its foundation.

The Service argues that the grievant failed to follow the mandates of the Ct. District policy, of which he was well aware, by failing to curb his wheels, and properly secure his vehicle when leaving it to make his delivery.[1]

[1] See J-2, Page 41 & S-2

That he alone bears the responsibility for this accident, and not due to any mechanical failure of the LLV.

The Service argues further that within hours they brought a similar vehicle to the accident location to reenact the events, attempting to ascertain if an LLV could roll backwards according to the explanation offered by the grievant, and found that it would not do so. That they sent the subject vehicle to a "neutral" garage to be examined independently, which discovered no defects that would have contributed to this event.

The Service further offers that they conducted a pre-disciplinary interview with the grievant who could not recall if he curbed his wheels. That the supervisor gave due diligence to his responses, the reports generated associated with the accident, and reached her own conclusion that removal was the proper course of action. That it was properly reviewed and concurred in by higher level Management, and properly issued.

The Service argues that this grievance should be denied in its entirety.

The National Association of Letter Carriers

The Union maintains that the Service lacks just cause to remove the grievant from his employment due to the accident of July 20th. That the grievant did all he was required to do pursuant to the Ct. Zero Deviation Policy[2] yet is being punished because he could not remember if he curbed his wheels - a slight of memory that is automatically being taken as a fact that he did not do so.

The Union maintains further that while the grievant was associated with this accident, the Service made no independent effort to ascertain if any mechanical defect, or malfunction was actually responsible for the LLV rolling backwards down the hill.

The Union argues that the grievant has no prior discipline, and is recognized as a good employee by his supervisor, who did not want to remove the grievant from his postal employment.

[2] See J-2, Page 41

The Union argues further that the Service failed to even consider corrective action, with the postmaster's mind made up while first at the scene of the accident, insisting to the grievant that he was going to be fired if he didn't tell the truth.

That no investigation, pursuant to the principles of just cause was ever conducted - that the supervisor was not allowed to make an independent judgement to resolve this grievance due to "higher level" influence, and the postmaster, who was on scene of the accident, yelling at the grievant about firing him lost all objectivity as the concurring official, thus violating those just cause principles.

The Union offers that the Service violated the due process rights of the grievant in the manner by which they issued his removal without any consideration of a lessor penalty, or any consideration of the grievant's explanation.

The Union offers further that any reenactment of this accident conducted with another vehicle is simply a sham, and that the Service should have rightfully sent the subject vehicle to an "independent" vehicle facility instead of just another postal facility.

The Union maintains that this grievance should be sustained in favor of the grievant, the NOR be immediately be rescinded, the grievant returned to duty with all entitled benefits.

FINDINGS & OPINION OF THE ARBITRATOR:

There is a favorite line from Dickens for which the issues before me give pause. "There is the wisdom of the head, and… a wisdom of the heart."[3]

I am convinced that the grievant, Mr. Ortiz was a conscientious, sincere, hard trying employee who until July 20th enjoyed a promising opportunity with the postal service. The testimony offered by his supervisor, and to some degree the postmaster confirmed that fact.

[3] Charles Dickens, 1812-1870 (Little Dorrit – 1857-1858)

His appearance before me conveyed sincerity, and remorse. I did not find his testimony devious in any way.

This tribunal, however must be governed by the facts, those of the head instead of the heart. To do anything less would be an injustice to the very system employed by the parties, and violate the ethical standards required by the arbitrator.

After a thorough review of all facts presented at hearing, and provided to the arbitrator, there appear two paramount issues to be considered in rendering this decision.

First, did the grievant have an accident on July 20, 2017 for which he alone bears responsibility?

After careful, and deliberate consideration I must find that he did.

Mr. Ortiz states that he secured his vehicle for a delivery at 51 Johnson St - that he "put the vehicle in park, E Break on..took keys off the ignition."[4] And as he moved toward his delivery address he heard a noise, turned and saw the vehicle rolling backwards down the hill. That he attempted to run after the vehicle to stop it from rolling but was unable to reach it.

During his pre-disciplinary interview with his supervisor on July 31, 2017 he acknowledged that, "I don't remember if I curbed the wheels the correct way…". Mr. Ortiz also offered that, "I know I was rushing. First time on Route."[5]

The postmaster, and manager of the Vehicle Maintenance Facility both stated that tests on the subject vehicle showed no defects which would have contributed to this roll-away accident.

The VMF manager testified that if all proper actions had been taken by the grievant, it would have been "impossible" for the vehicle to have rolled backwards.

The postmaster offered that within hours of this accident he, and a district safety specialist brought a similar type vehicle out to the scene of this accident and conducted a "reenactment" of the accident.

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[4] See J-2, Page42

[5] See J-2, Pages 52-53

He stated that they were attempting to determine if a failure of any one of the prescribed procedures such as placing the gear into park, setting the brake, turning off the ignition and taking the keys out of the ignition, and curbing the wheels could have contributed to this accident, and that even pushing the test vehicle forward and backwards failed to dislodge it from its parking spot. The safety specialist states that, "The only circumstances in which the vehicle traveled in a similar direction was with WHEELS NOT CURBED."[6]

With no witnesses to this accident,(and even witnesses can view things differently)we are left with the grievant's offerings, and the investigation conducted by the postal service on a similar vehicle, and the examination conducted by the VMF on the subject vehicle[7] one is left to reach the most reasonable conclusion available.

The grievant acknowledges rushing on this date, either because it was a new route to him, or he was trying hard to complete his assignment. He also states that he cannot recall if he curbed his wheels. Both acknowledgments can only lead to a conclusion that in his haste, while parked on a hill, and rushing across the street to make a delivery he did not curb his wheels, thus leaving the vehicle vulnerable to rolling backwards if disengaged.

However, all testimony offered by the safety specialist and VMF manager offer that if the vehicle had been in park, with the hand brake engaged, and the key out of the ignition, the vehicle would still have no cause (absent a mechanical failure which the VMF manager states did not exist) to roll backwards.

Therefore, considering the grievant's statements that he was rushing, and could not recall the curbing of his wheels (but could recall vividly other required actions) I am left with the reasonable conclusion that, in his haste the grievant likely did not place the gear fully into park, and/or engage the handbrake, or possibly failed to shut off the vehicle.

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[6] See J-2, Page70

[7] The grievant testified at hearing that the tow truck driver informed him that the subject vehicle had no brakes, and it was necessary for him to place wood blocks behind the vehicle to retrieve it from the yard. (See U-1) Grievant also stated that the tow truck driver would validate his statement if needed. However at hearing no such evidence was provided.

In the seven tests of "just cause",[8] two of those tests related to the above are "Notice." Did the Service give the grievant forewarning of the possible consequences of his actions, and the answer to that is yes. The "Zero Deviation Policy" clearly states the likely consequences for such a violation, and the grievant acknowledged such in writing.[9] Further, the postmaster, in what can only be generously described as his enthusiasm at the scene of the accident repeatedly (and needlessly) informed the grievant that he could be removed for his actions.

The other "test" that must be met is whether the "Rule is Reasonable", and that can only be unequivocally affirmed.

The failure of one or more of these requirements of the "policy" can, and did lead to a very serious accident. In the instant matter, while one party, or the other may argue that one should not be held accountable for something that did not happen[10] it remains quite reasonable, and necessary to consider the total circumstances of such an accident and what very easily could have been a far more serious result for life and property.

I find no evidence whatsoever that Mr. Ortiz deliberately, or maliciously caused this accident, but the fault, and responsibility nonetheless is his to bear due to what can only be his failure to adhere to all the requirements of the policies cited above.

The other issue of paramount consideration is due process. Did the Service fulfill their contractual requirements toward this grievant?

The just cause principle, as enumerated in the Agreement, and case law entitles employees to "due process, equal protection, and individualized consideration of specific mitigating and aggravating factors."[11]

The Union argues, with great passion that the Service has denied the grievant these rights.

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[8] See Just Cause, The Seven Tests, Koven & Smith, 2nd ed & J-CAM, Page 16.1

[9] See J-2, Page41 & S-2

[10] Underline added

[11] See The Common Law of the Workplace, The Views of Arbitrators, NAA 2nd.

As part of the rights provided the employee is the obligation of the employer to consider mitigating, and aggravating factors that may have been present, or contributed to the events leading to consideration of discipline.

Mitigating factors include the grievant's seniority, good work record, good faith, or the absence of serious harm from the grievant's conduct.

The Union argues that the grievant has a good work record, and has been a faithful employee, which is not disputed by the Service. However, the grievant has only been employed by the postal service for five months at the time of this accident, and as such the investment incurred by the Service, and Mr. Ortiz is minimal, or as the Service rightfully argues, "he has not been here long enough to build up a well of good will", or what could be correctly applied as a mitigating factor.

Further, there is no dispute that the seriousness of the grievant's contributing actions on July 20th caused harm to others, including the image, and financial costs to the postal service.

Aggravating factors include such things as the seriousness, willfulness, or the presence of serious harm stemming from the employee's misconduct.[12]

As stated above, I do not find a "willfulness", or deliberate intent by the grievant in his actions on July 20th, but the seriousness of this failure, and the harm caused by it cannot be disputed.

I find no evidence that these factors were not part of the due considerations rendered prior to making the decision to remove the grievant from his employment.

The other "tests" of just cause that must be satisfied before issuing such discipline are as follows;

"Investigation" - did the employer, before issuing the discipline to the grievant make a reasonable effort to determine if the grievant did, in fact violate a rule/policy?

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[12] See The Common Law of the Workplace, The Views of Arbitrators, NAA 2nd.

There is no dispute that the grievant had an accident on July 20th. The dispute is who bears the responsibility for this accident. The Service conducted an almost immediate "reenactment" of the accident with a similar vehicle at the scene of the accident, and could find no plausible correlation for the roll-away other than the wheels not curbed, or another failure by the grievant.

The subject vehicle was sent to a maintenance facility other than the one where Naugatuck's vehicles are sent for maintenance, and the reports submitted found no defects in the vehicle.

The Union argues that the New Haven facility, where the vehicle was sent instead of the usual Waterbury vehicle maintenance facility is still a postal facility and could not be unbiased in their examination. However, while a perfect scenario would have been sending the vehicle to an outside business for examination, there is no contractual requirement presented that would require the Service to do so. Further, there is no evidence presented that would give rise to a claim of bias on the part of the New Haven facility, or the manner in which they examined the vehicle. Further, the VMF manager was very credible, detailed, and assuring in his analysis of the finding, and I find no conflicting testimony, or evidence.

After the examination, and reenactments were completed, and the police report was received, the supervisor conducted a pre-disciplinary interview with the grievant, and his Union steward was present.

The Union argues that the questions were already indicative of the grievant being guilty, and gave the grievant little to no opportunity to defend himself.

A review of the questions may give a person reason to think that this was an "interrogation" rather than an "interview", yet they did not cross any line of unfairness, or lack objectivity. They gave the grievant every opportunity to respond, and importantly to add anything he felt important to his position. While it easily could be understood that the grievant simply had nothing more to add than that which he had already stated, he was given the opportunity.

The Union argues further that the supervisor did not make the decision to impose a removal – that this decision was made by "higher level" individuals. However, the supervisor offered very credible testimony that it was her decision alone to issue a removal notice because of the seriousness of the issue,[13] and had authority to settle the grievance. And lacking any evidence of "higher level" Management involving themselves into the supervisor's decision, this argument cannot be sustained.

The Union argues that the postmaster had already made his mind up to remove the grievant while still at the scene of the accident on July 20th, therefore denying the grievant his due process rights to an objective, and fair investigation of all the facts before making a decision.

I find no dispute that when the postmaster[14] arrived on the scene he immediately began questioning the grievant in a less than calm voice, and told him he would be fired if he didn't tell the truth. While I find that the postmaster's initial demeanor may have been excitable, and excessive, I do not find it impacted negatively the grievant's due process rights. The postmaster offered at hearing that he initially thought, when the grievant called him that the accident was only a "fender bender", and that when he arrived on scene and witnessed the damage, and proximity to the children's play set he reacted to that.

In fact, in the postmaster's immediate report of the accident, the "Accident Follow-Up, Preventative Action" was to "Provide Training/Instruction", not discipline.[15] This dilutes the contention that his mind was set on removal.

The next test is was it a "Fair Investigation"? Based on my opinions stated above, I cannot find it to be other than a fair investigation. While, as stated there could have been a few things done differently, what was done to investigate the issues leading to the grievant's removal cannot credibly be found unfair.

The next test is "Proof" did the decider obtain substantial proof that the person was responsible for the alleged act(s).

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[13] See J-2, Page 36, & hearing testimony.

[14] At the time of this event, Mr. Falcha was the Officer in Charge at Naugatuck Ct.

[15] See J-2, Page 64

The "decider" in this matter, Supervisor Alves gave credible testimony that she considered all of the statements, reports, pictures, and the grievant's responses during his PDI before making her decision for removal, and believed this accumulated information proved the grievant warranted removal.

Absent any evidence to challenge her assertion one is left with her determination alone, yet a reasonable person, I believe may reach the same conclusion that there was sufficient proof that the grievant bore responsibility alone.

"Equal Treatment" is another test to be met. Did the Service apply the rules, and penalties even-handedly, and without discriminating against the employee? There is no evidence provided that questions whether the Service treated the grievant any differently than any other employee in a similar circumstance.

Lastly, and importantly the test of "Penalty"- was the degree of discipline given to the grievant reasonably related to the seriousness of the grievant's proven offense, and the grievant's work record with the postal service? Is the penalty fair and reasonable given the circumstances? Discipline must bear some reasonable relation to the seriousness of the deed.

The Union maintains that the Service has violated the just cause principles of progressive discipline as outlined in the parties' Agreement, Article 16.1 as it states that, "discipline should be corrective in nature, rather than punitive"[16] That the Service makes no effort to correct the grievant's actions, as the postmaster stated in his initial accident report[17], or the Agreement mandates, instead going right to the most serious penalty they can impose.

The Union is partially correct in their summation of this article, in that discipline for all but the most serious offences must be imposed in gradually increasing levels. That is the intent of the parties, *in all but the most serious* instances.[18]

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[16] See Agreement, Page 79
[17] See J-2, Page 64
[18] Italics added

However, it is accepted that some offences may be of such a serious nature as to justify an immediate removal from employment, subject to the employee's due process rights employed. This is commonly referred to as a "Capital Offence"[19]

It is here where the parties, absent agreement, and/or resolution in the grievance procedure seek a "third party", the arbitrator to decide if, in fact the employee's offence is of such a serious nature to warrant immediate removal.

In the instant matter before me, this is rightly where reference to Dicken's head or heart is most relevant.

Were the arbitrator to have been the supervisor, or the postmaster, would he/she have made a different decision regarding the level of discipline to be imposed may be viewed from the heart. However, as stated previously the arbitrator is not the supervisor, or postmaster and his/her decision must be made related only to the clear, convincing, and sufficient evidence at hand.

There is no dispute that the grievant had this July 20th accident which resulted in property damage, damage to a postal vehicle, financial liability to the Service, and most importantly could have resulted in serious injury, or worse.

I can find no compelling evidence that anything other than the grievant's action are responsible for this accident, be they inadvertent, or without intent.

While I find the Service's response to this event, i.e. the postmaster at the scene, the type of PDI questions asked, I do not find the investigation flawed to the extent that it overturns the decision made.

I find no compelling evidence to contradict that the initial decision to issue a removal was anyone other than the supervisor, who appears to have followed normal, and established procedures. The fact that she had no direct involvement at the scene, or the reenactment, while it would have placed her in a more direct position of knowledge, did not diminish her ability to "investigate", and reach her decision.

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[19] See Labor Arbitrators' Inference of "Progressive Discipline" in Just Cause Cases, P.A. Zirkel, 1988

The parties are acutely aware 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."[20]

I can find no such factors presented that would serve to override the established facts, and must rely on only those facts as provided.

When the Service presents itself as having met the tenants of just cause, and convincingly articulated the reasons for imposing the decision they have made to issue such discipline, the arbitrator must have good, and sufficient cause to override that decision. There must be evidence of capricious or arbitrary actions on the part of the Service.

That the Service imposed a penalty that was excessive, unreasonable, or that Management has abused its discretion.[21]

Arbitrators have long held that the Employer's decisions should not be disturbed unless any of the abuses offered above are found to have occurred.[22]

In a matter decided by Arbitrator Daugherty which remains relevant to this day, he stated, "...leniency is the prerogative of the employer rather than of the arbitrator, and the latter is not supposed to substitute his judgement in this area for the company unless there is compelling evidence that the company abused its discretion."[23]

In the instant matter before me, I simply cannot find sufficient evidence that the Service did abuse its contractually recognized discretion to remove the grievant, and therefore find insufficient cause to overturn such decision.

I accept the Union's arguments related to the subject vehicle being in the "shop: a week prior to this accident for a "booster brake" job[24] being suspicious, but suspicions are not facts.

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[20] See Fulton Seafood Industries, Inc.,74 LA 620, 622 (Volz, 1080)
[21] See Franz Food Products, 28 LA 543,548 (1957)
[22] See Arbitrator Bothwell in Franz Food
[23] See Enterprise Wire Co. , Carroll R. Daugherty, 46 LA 359, 1966
[24] See J-2, Page 37

The VMF manager testified credibly that the "booster brake" had nothing whatsoever to do with holding the vehicle in place such as this accident was related to, and no evidence to contradict his assertions was provided.

I accept that the grievant had no prior discipline, however that foundation was built upon only five months of postal service, and offers far too little mitigation toward his actions of July 20th.

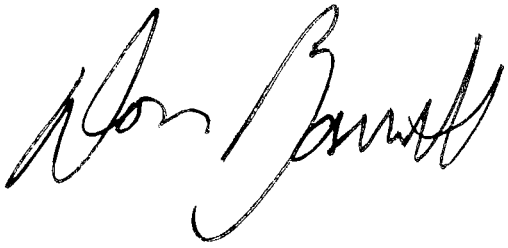
And I accept that this NOR is clearly not progressive in nature, and can rightly be referred to as a penalty, however as stated above, without good cause shown, the penalty imposed remains a Management prerogative unless such abuse can be sufficiently demonstrated, which it has not.

No one wins in this outcome. The grievant, appearing to be a sincere young man loses his position, and the Service loses the investment made, with the need start all over again. As an arbitrator I can only trust that my decision is within the confines of my contractual responsibilities, and correct. As a person, especially at this time of the year, I can only have sadness.

AWARD:

For the reasons set forth above, this grievance is denied in its entirety.

Respectfully Submitted,



Donald J. Barrett, Arbitrator

Date Dec. 10, 17