C-36113

REGULAR ARBITRATION PANEL

In The Matter of)
United States Post Office)
and)
National Association of)
Letter Carriers (AFL-CIO))

Grievant: Scotty Khamdaraphone
Case No.: 4J 19N-4J-D 22413809
NALC No.: 5521-22-775
DRT No: 05-584272

Before: Arbitrator Earlene R. Baggett-Hayes, Esq.

Appearances:

For the U.S. Postal Service: Vanessa Freedle, Labor Relations Specialist KS/MO District

For the Union: Blake Rockers, Local Business Agent

Location of Hearing: Shawnee Mission, KS

Date of Hearing: February 24, 2023

Post-Hearing Briefs: March 17, 2023

Date Award Due: April 18, 2023

AWARD

Based on the foregoing, the Grievance is sustained.

The Grievant shall be returned to work. The 14-Day suspension that was reflected on his record prior to the current Notice of Removal (NOR) discipline shall remain on his record. That 14-Day suspension shall remain active and shall be tolled and extended to remain on his record for whatever remaining period he had left for it to remain on his record at the time of the current discipline, starting with his return to work date. The Grievant's NOR shall be rescinded and purged from his record. The Grievant shall be made whole for all lost wages and benefits, including missed overtime.

April 23, 2023

Earlene R. Baggett-Hayes, Esq., Arbitrator

BACKGROUND

Scotty Khamdaraphone (hereafter referred to as Khamdaraphone or "the Grievant") was hired as a City Carrier Assistant (CCA) on November 30, 2013, and was converted to a Career City Carrier on November 29, 2014. On September 1, 2022, the Grievant was issued a Notice of Removal (NOR) with a charge of Failure to Maintain a Regular Work Schedule. The Postal Service maintains that the Grievant has been provided multiple opportunities to correct his unacceptable attendance and has failed to do so. The Grievant had previously received a 7-Day Suspension and two 14-Day Suspensions. One of the 14-Day suspensions was a conversion from a prior NOR.

In response to the NOR contained in the present matter, The Union filed a grievance alleging violations of Articles 16, 35, and 19 via the M-39 section 115 of the National Agreement. The matter matriculated through the various steps of the grievance procedure and the parties failed to reach an agreement; therefore, it was submitted to arbitration for resolution. According to contractual procedures, the undersigned was appointed to hear and decide the matter in dispute. An in-person arbitration hearing was conducted on February 8, 2023. During the hearing, the parties were afforded full opportunity to present testimony and documentary evidence, and to put forth arguments for their respective positions. Both parties elected to submit written closing briefs, which were duly received and distributed. The record was closed upon receipt of the respective briefs.

ISSUE

Submitted by the Union:

Did management have just cause to issue the Grievant the Notice of Removal dated September 1, 2022, for the charge of failure to maintain a regular work schedule, and if not, what is the appropriate remedy?

Submitted by the Service:

Did management have just cause to issue the Grievant the Notice of Removal for Failure to Maintain a Regular Work Schedule, and if not, what is the appropriate remedy?

The Arbitrator finds that the issues are significantly similar and that the inclusion of the NOR date is inconsequential. Accordingly, the issue statement presented by the Postal Service is preferable and will be relied upon in this document.

RELEVANT CONTRACT AND OTHER PROVISIONS
(in relevant part)

Article 16

Section 1

PS Section 8
In no case may a supervisor impose suspension or discharge upon an employee unless the proposed disciplinary action by the supervisor has first been reviewed and concurred in by the installation head or designee.

Joint Contract Administration Manual (JCAM)

Page 16-2. "Was a thorough investigation completed? Before administering the discipline, management must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective. This is the employee's day in court privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves before the discipline is initiated."

Corrective Rather than Punitive: The basis of this principle of corrective or progressive discipline is that it is issued for the purpose of corrective or improving employee behavior and not as a punishment or retribution.

M-39, Section 115

PS ELM 511.43 "Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required."

PS ELM 665.41 "Employees are required to be in regular attendance.

POSITIONS OF THE PARTIES

Position of the Postal Service

The Postal Service complains of the Grievant's long history of unacceptable attendance, back to 2014, and reports a repeated pattern of unscheduled leave. This is offered in support of its claim that the Grievant has no propensity to be regular in attendance. Also, prior discipline made the Grievant keenly aware of the consequences of non-attendance. The Grievant has continued to incur unscheduled absences and has failed to demonstrate that he is trustworthy and can be a productive employee.

The Grievant received due process protections as he had the opportunity to put forth information during the investigative interview. The CBA does not require a set number of questions. All other tenets of just cause have been established.

The Grievant was removed consistent with progressive discipline options as his file contains a prior 7-Day suspension and two 14-Day suspensions. Faith and trust that the Grievant will be in regular attendance cannot be restored. Although suggested by the Union, Management is not required to consider a 30-day suspension or restricted sick leave. The Union is incorrect in its assertion, and unable to prove, that Customer Services Manager, Jacob Gunther, commanded that Ms. Dominguez issue discipline.

The grievance should be denied.

Position of the Union

The Postal Service must put forth clear and convincing evidence that the Grievant's removal meets the just cause standard. However, the Service failed to establish just cause prior to disciplining the Grievant. The Service denied the Grievant due process and failed to conduct a thorough and objective investigative interview. The investigative interview was inadequate because only three or four (3 or 4) questions were asked. The Service failed to ask any probative questions to determine the who, what, when, where, and why regarding the Grievant's unscheduled absences. Nor did the Service request medical documentation to support the Grievant's absence of August 8, 2022, once he mentioned it. The Grievant has received discipline in the past for failure to have regular attendance and as a result of his prior disciplinary record he has significantly

improved and has regularly presented for work. The absences for which the Grievant was disciplined are inappropriate as he took bereavement leave and actually worked on one of the charged dates. Also, the absences are significantly less than the number he has experienced in prior disciplinary actions. The assessed discipline is punitive in nature, particularly since the Grievant's attendance has drastically improved since his latest 14-day suspension. Accordingly, the Union insists that the Union's grievance must be sustained and the Notice of Removal (NOR) must be rescinded and purged from the Grievant's record. Additionally, the Grievant should be made whole for all lost wages and benefits, including missed overtime.

ANALYSIS

As this matter involves discipline, the Postal Service bears the burden of establishing just cause for the issuance of the discipline. Regarding the quantum of proof, in a discharge case such as this one, the Service's evidentiary responsibilities are rooted in the just cause tenets, which place high obligations on the Service to establish that each has been met. For this reason, this Arbitrator is satisfied that the preponderance of the evidence standard is reasonably applied.

First and foremost, this Arbitrator clearly understands the importance of regularity in employee attendance in order to arrange for work schedules and efficiency in customer service. Also, a lack of regular attendance significantly causes the Service to incur additional costs. Management rightfully asserts that it has the right to expect employees at a minimum to report for work and to do so on a regular basis. According to the Postal Service, in this instance, the Grievant had an overall unacceptable attendance record. The Service makes numerous references to the Grievant's history. The Service emphasizes that Mr. Khamdaraphona acquired 10 unscheduled absences during the 11 months between his being hired and later converted to regular. Based on the Arbitrator's reading of the record, that was many years ago. The Service preys upon the longstanding history of unacceptable attendance exhibited by the Grievant and reminds them that they are not confronted with just a singular episode in this matter. The specifics, however, were not presented. The Arbitrator is not inclined to rely on this information without proof, particularly since the burden rests with the Service. More importantly, the Arbitrator does not find the information on the Grievant's absences dating back to 2014 to be particularly relevant based on the current charges.

The Arbitrator looks to the Postal Service to prove that what it claims to have occurred did in fact occur. The Postal Service claims that the Grievant was irregular in attendance and provides as its support a list of unexcused dates including 7/05/22, 07/07,22, 7/11/22, 7/13/22, 8/8/22, 8/17/22, and 8/24/22. Testimony revealed that this information was inaccurate. In this regard, the Service did not establish that that which was claimed to have occurred is what occurred. Although the Service maintains that the actual charge of irregular attendance remains the same, even though there were corrections to be made to the proposed list, the Grievant nonetheless has failed to maintain regular attendance.

In an analysis of the just cause principles, the Arbitrator is required to interpret the tenets of just cause based on the evidence presented. The Arbitrator finds, and the facts do not dispute, that there are clear rules regarding the mandatory nature of regular attendance. Also, the case file does not reflect that there were issues raised over whether the rules were equitably enforced, or any claims of untimeliness. In the Arbitrator's view, the severity of the discipline, which was a removal, was reasonably related to the infraction itself, although that is not to say that the removal was necessarily appropriate. Further, in reviewing the just cause standards, no evidence was presented to challenge whether the discipline is in line with that usually administered. While the seriousness of the employee's past record was mentioned by the Service, as stated above, no specific information was provided other than to complain that the record had been a problem since over ten (10) years ago.

The Union contends that Management failed to conduct a thorough investigative interview regarding the alleged offense, which is another required consideration under the just cause analysis. During the investigative interview, there were three (3) questions, and another purported question, asked of the Grievant. The Union argues that during previous investigative interviews, the Service listed and asked specific questions, but failed to do so in the current matter. The Union views this as a flaw. The questions asked in the current matter are:

1. Do you understand? That the investigative interview could lead to discipline, and that cooperation is required. The Grievant responded "Yes."
2. Are you aware that you are required to be regular in attendance? The Grievant responded "Yes."
3. Do you have anything you would like to add to this investigation concerning your

unscheduled absences? The Grievant responded "8/8 – day after I had heat exhaustion."

The Union complains that the Service failed to ask sufficient follow-up questions. The record reflects that the Service advised Mr. Khamdaraphone that he had unscheduled absences and presented a list of the dates for his response(s). The Arbitrator is not deterred by the number of questions asked during the investigative interview. Nor does the CBA dictate that a certain number of questions must be asked. Nor is there a template of what must be specifically asked or exhausted. The Grievant acknowledged that during the investigative interview, the unscheduled absence dates were provided to him. According to the Service, he was asked about the dates (although testimony did not reveal that they were specifically "called out" as in previous cases) cited on the NOR and was given the opportunity to provide any relevant information. The testimony also reveals that the Grievant only stated that one of the absences, 8/8/22, was due to heat exhaustion, and provided no additional information regarding the others. The Arbitrator notes that the Grievant was specifically asked if there were anything else that he wanted to add. The Grievant's file was devoid of any indication of a heat-related illness. Nor was there any OWCP claim or request OCWP related to any heat exhaustion. As a consequence, the Arbitrator is convinced that the Grievant knew the dates for which he was being disciplined and had sufficient opportunity to provide additional information. Further, although the Grievant stated that he was caught off guard when he was called into the investigative interview meeting, he did not claim that he never learned of the meeting's purpose.

The Union references Arbitrator Lumbley (E16N-4E-d 20120368 (C-34784), which alluded to the decision in Case No. FO6N-4F-D 11040838/NALC No. 01-188086 (2011) addressing the [Employer's] need to "approach the Investigative Interview with an open mind." However, in the instant case, no evidence was convincingly placed on the record to establish that the Postal Service was predisposed in any way.

There are several quirks in this case that cause the Arbitrator to take pause. First, the Letter of Removal of 9/28/2022 had on its subject line "LOW" representing "Letter of Warning, and made references to "LOW" or "Letter of Warning" throughout the letter. The Service describes this as a "typo," but the Union challenges the Service's attention to detail which is required in a case rising to the level of removal.

Second, the evidence presented during the hearing established that the record was otherwise not exactly accurate. That same purported Letter of Removal reflected that the Grievant was charged with an absence on July 11; however, he worked 8.2 hours on that date. Additionally, the record did not reflect that the Grievant took bereavement leave due to the death of his grandmother on July 5 and July 7, although there was conflicting testimony over whether the Grievant provided funeral documentation before the Formal A meeting.

The Grievant's current disciplinary file contains three (3) pieces of discipline which include a 7-Day suspension and two (2) 14-Day suspensions. With the Grievant's most recent unscheduled absences, this certainly gives the Postal Service ammunition to strike while the iron was hot. The Arbitrator, however, questions whether the iron was actually hot because the record and other evidence upon which the Service relied was not totally reliable. The Arbitrator notes that under Bereavement Leave, the JCAM indicates that documentation evidencing the death of the employee's family member is required only when the supervisor deems documentation desirable for the protection of the interest of the Postal Service. Clearly, Bereavement days should not be counted as unscheduled leave. It went unchallenged that the Grievant provided the bereavement documentation. There was no evidence presented that the information was previously requested and the Grievant refused or failed to present it. Also, it was established that Mr. Kmadaraphone worked on 07/11/22, although reflected erroneously in the Letter of Removal. The record was not clear on whether he was penalized for any failure to work scheduled overtime on o7/11/22. NALC Formal A Representative, Ryan Dercher, testified that the Service was aware that the Grievant's absence dates had been improperly used against the Grievant. This contention was not proven, however, the burden is not on the Union in this matter. The Postal Service did not convincingly argue against it.

A third quirk, in this case, is the Postal Service openly concurs that there were dates cited on the NOR, but later determined that those "forgiven" dates were not necessary to prosecute the discipline. The Service acknowledges that some improper coding had taken place, but indicates that the discipline assessed was still supported by the Grievant's other absences and that the incidental typos do not alter the Grievant's actual failure to report for regular attendance.

If the Arbitrator were to subscribe to this argument, then the question becomes, "Because some of the listed dates may be retractable, at what point did the Postal Service determine that it was appropriate to issue the NOR?" For the Arbitrator, the answers to this inquiry would be a wild guess, particularly since the Service did not provide proofs to respond to this inquiry.

The Service clamors that there was no basis to conclude that the Grievant's attendance would improve. This Arbitrator sees it differently, particularly based on the Grievant's most recent record, which went unchallenged. That record reflects that there has been an improvement. Because the Grievant's attendance has improved, the Arbitrator will not assume that it will just get worse. If it does, however, both sides continue to have provisions to address it. The Arbitrator is inclined to focus on what has occurred more recently. But the employee is not off the hook.

The Arbitrator found Station Manager Mr. Gunther's testimony that missing one (1) day of work defeats the definition of being "in regular attendance" as not being probative. This testimony was confusing to the Arbitrator because if that is the case, few if any employees would be in regular attendance.

Fourth, returning to the just cause standards, the Arbitrator is reminded that embodied in another tenet is the requirement that the discipline be corrective, rather than punitive. The discipline must be assessed in a manner that is intended to improve the employee's behavior, rather than punish it. The Arbitrator is not persuaded that the Grievant is beyond rehabilitation based on his recent record. His attendance has significantly improved. As pointed out by the Union, he missed three (3) days within 51 days. This represents a notable improvement since the Grievant's prior 14-Day Suspension. Also, the Grievant indicated that he thought, and had been advised by his supervisor, that his attendance had improved. This was never abashed by the Service. Although the Service alluded to three (3) additional occurrences between the NOR and prior to Step B, the Arbitrator is not inclined to consider these accusations because they do not appear to be within the purported violation period and no additional information was provided.

The Arbitrator is inclined to distinguish the McDowell Arbitration (CT 18T-1C-D 19458174) matter proffered by the Service from the current case. In that case, the Service determined that further discipline would not have any corrective effect. As this Arbitrator sees it, removal does not have a corrective impact as the terminated employee no longer has the job. But if a corrective effect is apparent while the employee is still working, perhaps the ultimate goal of rehabilitating the employee has been reached. It is clear in the current case that the prior 14-Day suspension did have a corrective effect in that the Grievant's attendance record improved significantly. This fact lends itself to support the claim that there was a curative effect resulting from his prior suspension. Also, in the same case that the Postal Service cited as a comparable, the Grievant had a short work history. In the current case, the Grievant's longevity bodes in his favor. This Arbitrator is inclined to determine that the Service should have issued a lesser disciplinary action than removal if any at all.

Although it was alleged during the hearing, the Union did not establish through any contractual provision or other documents that the Postal Service was required to place the Grievant on a 30-day suspension before a removal. Nor did the Union prove that the Grievant was entitled to restricted sick leave. As the Service points out, the language in ELM 513 is optional, and not mandatory language.

Finally, Contrary to the Union's claim, no persuasive evidence was placed into evidence to convince the Arbitrator that the discipline was issued by a command decision rendered by the acting Manager, Jacob Gunther.

CONCLUSION

The Arbitrator fully recognizes the need to have employees at work and that the Service must be able to expect that employees will regularly appear for work. Irregular attendance is a grave issue and problem in the workplace. However, assessing discipline during a period of apparent improvement is not what the parties, the contract, or the progressive discipline process intended. Taking into consideration the Grievant's tenure with the Postal Service, his prior record, and his recent propensity to improve, in the Arbitrator's view, the discipline was overly harsh.

To the Arbitrator, it is certainly understandable that typos and/or other clerical errors may occur while preparing a Letter of Removal. But what the Service is contending is that even without considering those dates that may have otherwise been excusable, the Grievant's record was so

egregious that the NOR should still stand. The Arbitrator is not convinced. The accurate number of unexcused absences is less than what is reflected in the NOR. The Grievant's record reflects an improvement since his prior discipline. If the dates that were improperly considered as unexcused absences are converted to excused absences, or something else, this bolsters the Grievant's record with a more favorable appearance. Also, even though the Service indicates that the revised record would have been sufficient to support the Grievant' NOR, the Arbitrator does not know this to be factual and is not inclined to guess. Finally, although the Arbitrator does not find that the Grievant's due process rights were violated as the investigative interview was sufficiently conducted, the discipline that resulted from the process was overly harsh. Based on the totality of circumstances, the Arbitrator finds that the discipline was rooted in a punitive, rather than corrective, framework. Just cause was not established.

AWARD

Based on the foregoing, the Grievance is sustained.

The Grievant shall be returned to work. The 14-Day suspension that was reflected on his record before the current Notice of Removal (NOR) discipline shall remain on his record. That 14-Day suspension shall remain active and shall be tolled and extended to remain on his record for whatever remaining period he had left for it to remain on his record at the time of the current discipline, starting with his return to work date. The Grievant's NOR shall be rescinded and purged from his record. The Grievant shall be made whole for all lost wages and benefits, including missed overtime.

The Arbitrator retains jurisdiction of this matter for sixty days solely to respond to inquiries regarding the remedy.

April 23, 2023

/s/ Earlene Baggett-Hayes

Earlene Baggett-Hayes, Arbitrator