

REGULAR ARBITRATION PANEL

In the Matter of Arbitration	)
	) Grievant: Murray, Steven
between	)
	) Post Office: Kansas City, MO
UNITED STATES POSTAL SERVICE	)
	) USPS No. E16N-4E-D 20123152
and	)
	) NALC DRT No. 05-495493
NATIONAL ASSOCIATION	)
OF LETTER CARRIERS,	) NALC Branch No. KC3020-200
AFL-CIO	)

Before: M. Zane Lumbley, Arbitrator, NAA

Appearances: For USPS: Melvin J. Hampton, Jr.
For NALC: David A. Teegarden

Place of Hearing: Kansas City, MO

Date of Hearing: May 20, 2020

AWARD SUMMARY:

- I. It is the Award of the Arbitrator that Management did not have Just Cause to issue the Grievant a Notice of Removal (NOR) dated 01/21/2020 for Improper Conduct.
- II. It is therefore Ordered that the Notice of Removal be expunged from the Grievant's record and that the Grievant be reinstated and made whole for all loss of wages and benefits resulting from the removal.
- III. The Arbitrator hereby reserves jurisdiction for 90 calendar days from the date of this Award for the limited purpose of assisting the parties as may be required in the implementation of the remedy ordered above.

Date of Award: July 5, 2020

PANEL: Western Regular

OPINION

PROCEDURAL MATTERS

This matter was convened pursuant to Article 15 of the National Agreement at Kansas City, Missouri, on May 20, 2020. The parties were represented, called five witness who testified under oath and presented two exhibits. They agreed at the request of the Arbitrator to file post-hearing briefs and timely briefs were received by the undersigned on June 15 and 18, 2020.

ISSUE

The Parties agreed at hearing to adopt the following Step B framing of the issue:

Did Management have Just Cause to issue the Grievant a Notice of Removal (NOR) dated 01/21/2020 for Improper Conduct, and if not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE NATIONAL AGREEMENT

The relevant provisions of the National Agreement (hereinafter "NA") are:

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.

...

BACKGROUND

The Grievant was employed by the Service as a letter carrier for 13 years, having commenced his employment as a temporary employee in 2007. At the time of his removal, he was a regular carrier assigned to the Kansas City GPO Carrier Annex and a Union steward designated as a Formal Step A Representative and recent addition to the Step B Dispute Resolution Team on behalf of the Union.

On January 21, 2020, the Grievant was issued a Notice of Removal (hereinafter "NOR") charging him with "Improper Conduct" for allegedly falsifying four Requests for Information (hereinafter "RFIs") by copying the signature of Supervisor, Customer Service Johnson on them to indicate she had received them on the date of the requests and for falsifying a Request for Steward Time by dating it on a date neither he nor any member of management was present at work.

The grievance contesting the removal was initiated at Informal Step A on February 4, 2020. It was processed through the contractual grievance procedure and impasse was reached at Step B on March 20, 2020, after which it came on for arbitration before the undersigned as set forth above.

DISCUSSION AND ANALYSIS

Position of the Service

The Service asserts it met its burden of demonstrating by a preponderance of evidence, the appropriate quantum of proof required here, that the Grievant knowingly falsified a number of documents, was afforded his required day in court by management's conduct of three separate Investigative Interviews and was given a timely penalty commensurate with the flagrant nature of his actions that undermined

management's ability to place trust in his actions going forward.

In support of that view, the Service contends as to the allegation of falsification that the Union did not even argue that the Grievant did not commit the acts of which he was accused but, rather, based its case entirely on procedural considerations. In that connection, the Employer argues that even the Grievant did not directly deny copying Johnson's initials on the RFIs in question but merely stated he did not remember doing so and that it would have been out of character for him to do so. Nor, according to the Service, did the Grievant ever produce the originals of the RFIs or say when Johnson put her initials on them. Moreover, the Employer points out that the date the Grievant claims to have submitted the Request for Steward Time was a holiday on which neither he nor any member of management was at work.

As regards its investigation, management asserts it gave the Grievant a second Investigative Interview in an effort to clarify his answers given at the first and then gave him a third Investigative Interview when he claimed that Johnson was biased against him in the first two interviews. Thus, the Service argues it was justified in taking more than the customary 30-day period the Mid-America District attempts to follow in meting out discipline.

Lastly, the Employer contends the selection of the penalty of removal was appropriate notwithstanding its case is based on circumstantial evidence and the lack of active discipline in the Grievant's record in light of the seriousness of his offense and his undisputed knowledge of what is required of him as an elected Union official.

The Service therefore argues the grievance should be dismissed.

Position of the Union

NALC contends the Service did not meet its burden of demonstrating the presence of just cause for the removal by clear and convincing evidence, the appropriate standard to apply in cases such as this that involve allegations of moral turpitude. The Union argues that is so for a number of reasons.

The first is its view that the Grievant was not given his required day in court because the Employer's investigation was flawed. In support of that view, NALC notes the first two of the three Investigative Interviews given the Grievant were conducted by Johnson who was too close to the matter to be able to approach it impartially since the disputed initials on the RFIs were hers. NALC also contends the third Investigative Interview was no less biased than the first two since Acting MPOO King merely asked the same questions Johnson had asked in the first two interviews, phrased them in a fashion that assumed the Grievant's guilt and never interviewed Johnson, whose initials on the RFIs were at issue. Additionally, the Union argues that Acting MCSO Jarrett, who issued the NOR, testified that she interviewed no one, including either the Grievant or Johnson, before issuing the NOR containing a number of errors.

In addition to its contentions as to the Service's investigation, the Union asserts the Employer relied on purely circumstantial evidence full of factually inaccurate claims without considering other evidence available to it that could have called into question its conclusion that the Grievant falsified the documents in question. Then, according to NALC, it chose a penalty out of line with the asserted infraction given the Grievant's bank of unblemished good will and the fact it demonstrated it believed in reality that the alleged infraction was less serious than it now claims by not putting him on emergency

placement and continuing to deal with him on multiple other grievances during its investigation. Lastly, the Union claims the Service delayed the issuance of the NOR until a point 53 days after the purported infraction came to the attention of Johnson for reasons that management itself created by permitting Johnson to conduct the first two Investigative Interviews instead of assigning a manager unassociated with the alleged falsifications to conduct them.

Accordingly, the Union requests that the grievance be upheld, the NOR be expunged from the Grievant's record and the Grievant be reinstated and made whole.

Decision of the Arbitrator

Having now had the opportunity to consider the entire record in this matter, including the evidence and argument submitted by both parties, I have decided that management did not have just cause to issue the Grievant a Notice of Removal for Improper Conduct. While I have studied all the evidence submitted and considered each argument raised herein, the following discussion will address only those considerations I found either controlling or necessary to make my decision clear.

As to the alleged falsifications, the record in this case paints the following picture. The three RFIs appearing on pages 87, 91 and 95 of Joint Exhibit No. 2 state on their face that they were "received by" Johnson on October 25, November 8 and November 8, 2019, respectively, a claim disputed by Johnson.¹ According to Johnson, she first

¹ Although the NOR references four RFIs the Grievant is charged with falsifying, the file contains only the three identified. While Johnson and the Grievant testified they recalled only three RFIs being discussed during the investigation, that clearly is incorrect given the questions asked about "4 RFI's" during the December 3 and 18, 2019, Investigative Interviews conducted by Johnson as well as the January 3, 2020, Investigative Interview conducted by Acting MPOO King. See, Joint Exhibit No. 2, at pp. 57, 65 and 51, respectively. Similarly, the NOR signed by Acting MCSO Jarrett and concurred in by Acting Senior MPOO Grant clearly takes the Grievant to task for five total documents comprising four RFIs and one Request for Steward Time. See, Joint Exhibit No. 2, pp. 25-27. Moreover, when testifying

saw the RFIs on November 29 that had been signed for in her absence by an unidentified different supervisor when she returned from vacation. While I do not claim to be a forensics or handwriting expert, having examined the three RFIs placed in evidence countless times at and since the hearing, both the purported initials of Johnson and the printed name "Karen Johnson" to the left of the initials appear to me to be identical in their form, their precise location on the documents and their location in relation to each other, something that cannot be said of the numerous other RFIs from various stewards said to have been signed and/or initialed by Johnson contained in the file.² A number of those RFIs, like the ones at issue, were submitted to Johnson by the Grievant whose practice appears to have been to print Johnson's name on the document as the recipient of the RFI before submitting it to her,³ a practice he did not follow with respect to two RFIs he submitted to Supervisor Glover that also are contained in the file.⁴ On each of the RFIs identified in note 2, Johnson's initials are distinguishable in both form and location from those appearing on the remaining RFIs initialed by her. Therefore, given the appearance of the three RFIs I was able to examine, I understand management's concern that her initials on them may have been photocopied.

as to what he recalled occurring on October 25 and November 8, the Grievant stated he submitted two RFIs to Johnson on each date.

The three RFIs that do appear in Joint Exhibit No. 2 were filed in support of Grievance Nos. KC3019-1108 for 2019 pay period 22-2, KC3019-1106 for 2019 pay period 23-1 and KC3019-1103 for 2019 pay period 23-2. The fourth RFI, according to the first page of the NOR, was prepared with respect to Grievance No. KC3019-1107 contesting the alleged Article 8 violation during 2019 pay period 22-1.

² See, pages 241, 245-248, 250-254, 256, 258-259, 266, 272-273, 275, 280-283, 286-293 and 297-298 of Joint Exhibit No. 2.

³ See, pages 286-293 and 297-298 of Joint Exhibit No. 2.

⁴ See, pages 295-296 of Joint Exhibit No. 2.

As regards the October 14, 2019, Request for Steward Time at issue appearing at page 102 of Joint Exhibit No. 2, the Grievant conceded that October 14, 2019, the date he dated the form as "received by management," was the last date that grievance could be filed timely inasmuch as the incident date in that matter was September 30, 2019. The Service contends and the Grievant agreed at hearing that October 14 was a holiday and that neither he nor any manager was at work that day. On the associated Form 8190 appearing at page 100 of Joint Exhibit No. 2, he wrote the words "failed to meet" in place of a filing date. On the other hand, while the Grievant claimed on the Request for Steward Time that the request had been received by management, rather than addressing it to a specific supervisor, he addressed it to an "unavailable" supervisor and wrote the words "management unavailable" in the "deliver to" block, thereby conceding on the form that no manager was available to receive it directly from him. He testified that he wrote the October 14 date on the document because, although it was a holiday, that was the day he "processed" the grievance. That review of the forms themselves does not serve the Grievant well at first blush.

However, as Johnson conceded in her interview during the processing of this grievance by Union President Moore on February 24, 2020, the absence of an RFI does not cause a grievance to be untimely and an RFI not submitted at Informal Step A could be submitted subsequently at Formal Step A. Indeed, on December 27, after Johnson had conducted both of her Investigative Interviews with the Grievant in this matter, she and he nevertheless executed extension agreements on the four grievances with which the contested RFIs were associated. In my view, a prerequisite to signing that accord is a concession by management that the grievances were timely filed. In fact, the parties

stipulated at the start of this hearing that, if NALC Formal A Representative Best were to testify, he would say that Johnson made no claim at Formal Step A that KC3019-1106, KC3019-1107, KC3019-1108 or KC3019-1103 had been fraudulently, improperly or untimely filed. KC3019-1106, KC3019-1107 and KC3019-1108 ultimately were resolved at Formal Step A by Johnson and Best on February 12, 2020, and KC3019-1103 was settled by them in early 2020. In all four settlements, Johnson and Best agreed that management had violated Article 8 of the National Agreement and that the payment of back pay to relevant employees was required. Moreover, while the equitability grievance to which the Request for Steward Time related ultimately was found untimely at the January 13, 2020, Step B Meeting on that grievance, that is because the grievance itself, not the Request for Steward Time, was filed in an untimely fashion.

I also note that all the corresponding grievances themselves are undated. Thus, although it appears the Grievant was bumping up against deadlines in KC3019-1107 (Friday, October 25 was the 13th day after the commencement of pay period 22-1 covered by that grievance) and KC3019-1106 (Friday, November 8 was the 13th day after the commencement of pay period 23-1 covered by that grievance) that, if missed, could have imperiled the grievances he was processing, and all contained monetary claims for employees, including the Grievant himself in one grievance, grievances KC3019-1108 and KC3019-1103 were not similarly situated since Friday, October 25, was only the 6th day after the start of pay period 22-2 addresses by the former and Friday, November 8, was only the 6th day after the commencement of pay period 23-2 covered by the latter. Therefore, there was no motivation for the Grievant to falsify anything in connection with KC3019-1108 or KC3019-1103. Moreover, even as to

KC3019-1107 filed for pay period 22-1 and KC3019-1106 addressing pay period 23-1, he presumably could have found a way to assure that those grievances were filed with a different supervisor on his days off Saturday, October 26, and Saturday, November 9, respectively, and they still would have been timely.

Thus, as the Union argues, it has not been demonstrated that the Grievant had a motive to falsify the documents in question. Of course, the Service asserts he did so to make his actions appear timely without taking the step of falsely dating the Forms 8190 themselves. However, that makes no sense to me. If one is willing to falsify documents attached to the 8190s in an effort to make the 8190s appear timely, why not also put the same date on the 8190s in the same block as the notations stating no supervisor was available on whom to serve the packages? To repeat, it is not the date on the RFIs and Request for Steward Time that controls whether the related grievances are timely filed.

The Employer claims the Grievant's inability or unwillingness to produce the originals of the documents in question shows that a set without Johnson's initials never existed. While I understand that view, the burden of proof does not lie with the Union and Grievant but with the Service. Additionally, there is nothing in the record to demonstrate that the ones received by Johnson on November 29 did not originate without initials and were not, as the Grievant claims, Grievant created with or left for Johnson on October 25 and November 8 and subsequently retrieved from her in order to follow the standard practice of transmitting them to the Union office before it, in turn, returned them to the Service. Put another way, it must be recalled that, while the Grievant testified he and Johnson created the RFIs together, nowhere does he state he witnessed her initial them. Nor does he appear ever to have been asked if he departed

with initialed RFIs after his October 25 and November 8 meetings with Johnson or whether he left them with her so that she could locate the various pieces of information requested in them. While that does not prove the Grievant was not the one to place the initials on the RFIs or who else might have, it is a gap in the evidence that the Service did not fill in its quest to prove he did.

I also find, in disagreement with the Service, that the Grievant did testify that he did not write Johnson's initials or photocopy them onto any of the RFIs and he did not know who else might have done so. This is the same denial that he uttered during each of the three Investigative Interviews.⁵ Whether the Union directly made that claim at the hearing or not is irrelevant. The Grievant also testified, and an email exchange between Johnson and him on page 170 of Joint Exhibit No. 2 substantiates his claim, that he and Johnson codified their agreement on October 22 to meet on October 25 regarding a number of grievances as well as his intention to provide her with lists of information needed to process the grievances at that meeting. However, according to the Grievant, when he attempted to meet with Johnson on October 25, although he was able to submit two of the RFI's to her at that time, she told him she had to go and he didn't object because they had already agreed to an extension on the grievances being discussed. As to November 8, the Grievant testified the same thing happened when he submitted two additional RFIs to her and no discussion took place at that time. The Grievant's and Johnson's clock rings at pages 68-72 and 73-76, respectively, of Joint Exhibit No. 2 establish that both worked on October 25 and November 8.

⁵ That the Grievant also stated during a soliloquy invited by the Union advocate at the conclusion of his direct testimony at hearing that he did not remember doing so, that it would have been out of character for him to do so or that he would conduct himself differently in the future, whatever that last observation without amplifying details means, does not change that.

Lastly, as to the evidence contained in the record, I find troubling the fact that only three of the four RFIs for which the Grievant was taken to task appear in Joint Exhibit No. 2. As set forth in note 1, *supra*, I am satisfied there were four that concerned Johnson. In a case such as this, where the Service alleges that all the documents said to have been falsified by the Grievant contain identical initials, the failure to produce one of the four prevents me from testing that argument. That fact, at the very least, reduces the value of the circumstantial evidence offered on which the Service's case relies, a consideration to be discussed *infra*.

In addition to the evidentiary imperfections of the file just discussed, I agree with the Union that the processing of this matter by the Service suffers from enormous procedural shortcomings that undercut a showing that it satisfied its obligation to provide just cause to the Grievant. The first of those is that Johnson was the wrong manager to conduct the first two Investigative Interviews on December 3 and 18, 2019.⁶ As the one whose initials were disputed, she was simply too close to the matter to assure she was impartial. As Arbitrator Maclean found in a decision cited by the Union, "In the Arbitrator's view, the fact that [the relevant supervisor] filled multiple roles in the underlying incident and disciplinary process related to it was so fundamentally unfair as to constitute a violation of Grievant's due process rights."⁷ Indeed, Johnson conducted not one, but two Investigative Interviews covering the same ground with the Grievant before his and the Union's protestations caused management ultimately to appoint a different supervisor to conduct a third, a step that could have been avoided had the

⁶ While the Union believes the second of the two interviews occurred on December 17, Johnson's notes state it occurred on December 18. Here, there is no need to resolve that disagreement.

⁷ Case No. E11N-4E-D 17681670 (2018), *sl. op.* at 5.

Service chosen a different supervisor from among those the file indicates were available during times relevant to interview him.

Additionally, as Johnson conceded at the hearing, she investigated no one else in an effort to determine whether someone else could have initialed the RFIs. For example, it appears not to have occurred to her that, since the Grievant never said he witnessed her sign the RFIs and no one asked him if her initials were on them at the time he forwarded them to the Union office for processing and eventual return to the Postmaster's office for filing of the associated grievances, they may not have contained her initials once they left the Grievant's custody. While NALC has not suggested that anyone at the office of Local 30, the office of the Postmaster or GPO Station placed Johnson's initials on the RFIs, it is not its job to do so. It is the Service's job to thoroughly investigate and rule out all other possibilities. That is especially so in a case such as this in which the chain of custody of the RFIs at issue has not been established. Nevertheless, as the Union argues on brief, Johnson's "sole focus" was on the Grievant.

Thereafter, while Acting MPOO King did conduct a third Investigative Interview on January 3, 2020, at the direction of Manager, Labor Relations Gray in an effort to respond to the Grievant's objection to an inappropriate choice of supervisors to conduct the first two, she testified she also interviewed no one else. She did not even interview Johnson who reported that the RFIs came to her on November 29, 2019, with the initials purporting to be hers. That not only constituted an incomplete investigation, it precluded the undersigned from hearing any response from Johnson to the Grievant's claim that they created the RFIs together when there was no option but to sustain the

Union's new evidence objection to the Employer's offer of Johnson's testimony on that question for the first time at hearing.

Subsequently, making matters worse, recommending official Acting MCSO Jarrett, Johnson's immediate supervisor, testified she interviewed no one before reaching her decision to recommend the Grievant's removal. Instead, she testified she found it sufficient to review the notes of the Investigative Interviews conducted by Johnson and King before finding the Grievant's answers given to Johnson in those interviews "evasive" and the conduct for which he was being investigated "egregious" enough to warrant removal. In fact, without ever formally interviewing Johnson, Jarrett was able to state in the NOR, "Manager Johnson is adamant that the RFIs were never submitted to her, and she did not initial them."⁸ That statement and, in particular, the use of the word "adamant," leads to the inference that Jarrett, at the very least, may have discussed the matter with Johnson in some setting other than a formal interview. While that might have been predictable in the circumstances of this case, the failure to do so in the context of a formal interview with questions and answers recorded in writing would preclude the Union from being able to respond intelligently during this process to Jarrett's conclusions and how she reached them. If that occurred, it was a disservice to the guarantee to the Grievant of a full and fair investigation.⁹ As Arbitrator Rentfro found in another decision cited by the Union:

⁸ Joint Exhibit No. 2, at 25.

⁹ I also note that, whereas Jarrett stated in her February 7, 2020, statement of management position submitted after the filing of the grievance herein and contained at page 30 of Joint Exhibit No. 2 that she did not "find a need to interview the grievant as the information in the grievance package was clear and thorough," she stated earlier in the same letter, "During my review of the file, I reviewed several copies of the 8190s that were supposedly initialed by Manager Karen Johnson and each initial aligned perfectly," thereby demonstrating her recollection 17 days after issuance of the NOR was anything but clear and thorough. Lest that observation be misunderstood, I make it not to denigrate Jarrett but to

It has been said that the real heart of procedural due process is not even a question of the employee's guilt or innocence; it is how the company goes about arriving at its decision. When the decision is to impose a penalty as severe as discharge, care must be taken that all the relevant facts and evidence are considered. Discharge without a complete investigation or without affording the employee an opportunity to be heard falls short of minimum standards.¹⁰

Thus, what I am left with is three of the four RFIs at issue that I agree contain initials that appear to have been photocopied onto the documents on the one hand but an ill-conceived and potentially opaque investigation by management that fails to show that the Service satisfied its obligation set forth in Section 115.3 of the M-39 to “[f]ind out who, what, when, where, and why” and “[m]ake absolutely sure you have all the facts” before reaching conclusions in disciplinary matters on the other.¹¹ In this case, it is not difficult to conjure up a number of theories as to how else Johnson’s initials could have appeared in their present form on the documents in Joint Exhibit No. 2 that, after all, itself contains photocopies, and perhaps even photocopies of photocopies, of the forms

underscore the importance of a complete and careful investigation leading to an irrefutable grasp of the facts such as is generally more likely to occur after interviewing all relevant witnesses before a removal is initiated.

This last point provides a convenient segue to respond to the Service's citation of my decision in *Case No. E16N-4E-D 19430575/NALC DRT No. 05-477846* (2020) in support of its case. In that case, the supervisor eventually issuing the removal letter was excused from performing the Investigative Interview in favor of another manager in order to provide additional fairness to the grievant since the issuing supervisor had personally witnessed the biggest part of the grievant's admitted attack on another supervisor at close range and removed a knife from the hands of the attacker, a fact that became the principal consideration leading to my conclusion that it was appropriate for her thereafter to issue the NOR without reading the statements of other asserted witnesses to the attack.

¹⁰ *Case No. NC-W-15, 975-D* (1979). Sl. op. at 8.

¹¹ Indeed, I cannot even be certain as to all the facts management had in its possession before it reached the decision to remove the Grievant since Johnson's typewritten versions of her questions and the Grievant's answers during the Investigative Interviews contain an incomplete handwritten series of questions and answers apparently asked by both Johnson and the Grievant of each other concerning how her initials came to appear on the RFIs at issue and their historic practice with respect to submission of RFIs. See, Joint Exhibit No. 2, at pages 56 and 62. Perhaps had management responded positively to the request for Johnson's handwritten version of the Investigative Interview questions and answers thereto that both the Grievant and Union President Moore claim were made, I would be in a better position to evaluate everything management learned during the investigation.

in question. Yet management in this dispute never considered it necessary to investigate any possibility extraneous to its view that the Grievant had to have photocopied the initials onto the documents and submitted them as though they were Johnson's in order to satisfy some timelines that would not and could not be satisfied by the submission of RFIs. In fact, in the Investigative Interview conducted with him by King, the Grievant made clear that "no purpose" would be served by falsifying Johnson's initials.¹² Of course, management already knew that but appears not to have taken into account the Grievant's lack of a demonstrable motive.

I credit King for asking the Grievant why he would submit RFIs and Requests for Steward Time relating to the same grievance to Johnson on different days. However, when the Grievant responded that he didn't always submit them together because he didn't always have them prepared to submit at the same time and his ability to do so even if he had had them prepared was impacted by Johnson's asserted "sporadic" response to his efforts to meet with her, there is no record that King went to Johnson after that last Investigative Interview to obtain her recollection of her dealings with the Grievant. And, as already pointed out, Jarrett took it upon herself to interview no one. In this connection, it must be kept in mind that Jarrett was the decision-maker here and not merely a concurring official. Moreover, unlike the situation examined in the decision referenced in note 9, *supra*, Jarrett had no personal knowledge of the seminal events such as independently might have informed her before reaching the decision to remove the Grievant. Thus, it was incumbent on her to assure she had a grasp of all the facts, including from Johnson's and the Grievant's own mouths. The view of Arbitrator Shea in *Case No. A94N-4A-D 96001437* (1996) cited by the Union is instructive in this regard:

¹² See, Joint Exhibit No. 2, at 52.

. . . the disciplining supervisor remains contractually responsible for . . . conducting that part of the investigation specifically relating to the decision to discipline an employee. Kilso, as the disciplining supervisor, did not interview the grievant prior to his issuance of the contested NOR. This failure deprived the grievant of the opportunity to provide the disciplining supervisor with any argument or evidence of mitigation which the grievant wished the supervisor to consider when making the determination to discipline and the determination regarding the severity of the imposed discipline. The Service's failure to conduct a contractually proper pre-discipline investigation detracts from its contention that it had just cause to discipline the grievant.

That obligation in no way detracts from the "right to determine which management personnel may initiate disciplinary action against employees, except as otherwise restricted by the provisions of the applicable National Agreement or applicable laws and regulations," of which we are reminded by Arbitrator Das at pages 29-30 of his decision in *Case No. Q98C-4Q-C 01059241* (2006), an opinion cited by the Service on brief.

Similarly, as to the Request for Steward Time, that is another document that cannot cause an otherwise untimely-pursued grievance to be timely. In fact, as to that request, I find no evidence the Grievant was ever even asked whether he thought dating that form October 14 would somehow cause the associated grievance to be found timely. Nor, apparently, did either King or Jarrett find it necessary to ask Johnson how raising the issue of the dating of the Request for Steward Time for the first time on or after November 29 was itself a timely inquiry given the fact the file demonstrates that request had been received by the Service on October 24, 2019, along with the Form 8190 in associated grievance KC 3019-991.¹³ In any event, and particularly in light of the fact he conceded on the face of the document that no supervisor was available to

¹³ The October 24 date of receipt may explain Jarrett's incorrect use of that date on page 2 of the NOR instead of October 14 when referring to the Request for Steward Time that appeared to the undersigned to be a typographical error at hearing. In any event, however the date ironically came to appear in a paragraph of the NOR taking the Grievant to task for writing down "dates that are not exact," in disagreement with the Union, I don't find the error significant here.

receive it, thereby making clear that he wasn't claiming to the contrary, I accept the Grievant's reason for dating the request as he did.

Thus, it cannot be said that the Grievant received a full and fair investigation that examined all the possibilities with respect to the RFIs and gave any consideration to the Grievant's reasonable explanation for the Request for Steward Time. As a result, the Employer did not prove by clear and convincing evidence, the standard I agree with the Union should be applied in a case involving alleged falsification of official documents, that the Grievant was guilty as charged. As I found in *Case No. F06N-4F-D 12351966/NALC DRT No. 01-252556* (2013), a decision called to my attention by the Union:

Initially, I agree with the Union that the appropriate standard of proof to be applied here, a case in which the Grievant is alleged to have committed the egregious acts falsifying and/or misrepresenting official documents and engaging in criminal and dishonest conduct prejudicial to the Postal Service, is that of clear and convincing evidence. *Case No. F06N-4F-D 12232343/NALC Branch No. A12-134* (Monat, 2013); *Case No. F06N-4F-D 11325978/NALC DRT No. 01-219357* (Lumley, 2012); *Case No. F01N-4F-D 07340672/NALC DRT No. 01-086818* (Levak, 2008).¹⁴

To be clear, I do not find that the Service failed to prove its case by clear and convincing evidence merely because it was based on circumstantial evidence, a matter to which both parties devoted some energy on brief. As the Union concedes, discipline may be upheld on the basis of circumstantial evidence. See, e.g., Arbitrator Helburn's decision in *Case No. G01N-4G-D 04090743* (2004), cited on brief by the Employer, in which the arbitrator cites Hill and Sinicropi, Evidence in Arbitration, BNA (2d Ed., 1987), at p. 13, for the proposition that ". . . evidence is not any less probative merely because it is circumstantial." However, as Arbitrator Snow reasoned in *Case No. W7N-5D-D 18820* (1990), a decision provided with the Union's brief:

¹⁴ Sl. op. at 9.

The value of circumstantial evidence **depends on the strength of the inference which can be drawn from established facts**. If circumstantial evidence is ambiguous and permits several different inferences to be drawn, then the evidence is weak and generally will not establish the truth of the proposition for which it has been offered. The force of circumstantial evidence depends on its capability of removing other reasonable explanations except for the proposition it has been offered to support. Circumstantial evidence may be more reliable than direct evidence, but **it is necessary for other reasonable explanations to be eliminated**; and it should not leave legitimate questions unresolved. (Emphasis added).

Here, not only was I unable to examine one of the allegedly identical sets of initials on the RFIs at issue to test the Employer's belief in that regard, as I already found, the possibility of other explanations for those initials was never even considered.¹⁵ As a result, I must conclude the Service did not have just cause to issue the removal.

In light of that conclusion, this decision could end there. However, because the parties expended a great deal of effort arguing whether the discipline was timely issued and because I believe the answer to that question is inextricably related to the Service's investigation detailed above, I intend to respond briefly. In this case, the Service took 53 days from the date of Johnson's receipt of the documents at issue on November 29, 2019, to complete its "investigation" and issue the NOR on January 21, 2020, even though, during that entire time, it performed no investigative steps other than interviewing the Grievant. While the Service eventually did assign an uninvolved manager to interview the Grievant after LR Manager Gray became involved, there is no reason it should have taken 53 days to conclude the process.¹⁶ While Johnson was

¹⁵ In light of this decision, I found it unnecessary to consider the Union's argument that the Employer's view of the seriousness of the Grievant's alleged conduct is belied by its decision to continue to recognize the Grievant as a steward in connection with the processing of other grievances, a matter over which the Service claims it has no control. Nor, in light of the evidentiary shortcomings identified and the fact I have found the Service's investigation lacking, can I address the Employer's arguments regarding the seriousness of the Grievant's purported offense and the appropriateness of the penalty.

¹⁶ Once again, the facts in this case are distinguishable from those in my decision in *Case No. E16N-4E-D 19430575/NALC DRT No. 05-477846, supra*. The subsequently admitted lack of candor of the grievant in a Postal Inspection Service interview that led to an additional such interview and ultimately

very prompt in conducting the first Investigative Interview with the Grievant, that it took 31 more days for her to conduct a second that covered the same ground and for the Service eventually to find an uninvolved manager to conduct a third and then another 18 days to notify the Grievant that he was being removed are inexplicable in a situation where, as noted, there is no evidence that any investigation other than interviewing the Grievant was performed.¹⁷ As a result, I am convinced there was no justification for management's failure to follow the undisputed Mid-America District's policy of issuing discipline within 30 days of discovery of an infraction.¹⁸

In view of all the above, I shall overturn the discharge, direct that it be expunged from the Grievant's record and order that he be reinstated to his former position and made whole for all loss of wages and benefits.¹⁹

delayed the Service's decision in that case until 62 days after the incident investigated cannot be equated with the legitimate claim of the Grievant here that he was deserving of an unbiased interviewer.

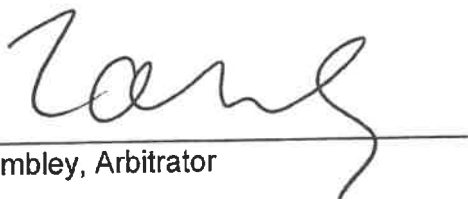
¹⁷ This delay also cannot be attributed to the Grievant on the basis of Johnson's claim in her December 19, 2019, memo written after the second Investigative Interview that he delayed the process by requesting that she contact his Union representatives to schedule that interview when she informed him such an interview would be required on December 9 and again on some unidentified date later in that week. Given the seriousness of the matter that must have become obvious to the Grievant during the first Investigative Interview and his belief expressed during the second that Johnson was biased against him, I find the Grievant's requests that the interview be scheduled through his representatives completely reasonable. Thus, any delay caused by those requests, as in the case of the need for a third Investigative Interview, was created by the Employer, not the Grievant. Moreover, although the Union contends the Service's secondary peak-season response to its timeliness claims was itself tardily raised at Step B, I need not decide that argument here since the Service offered nothing other than the time of year involved to demonstrate why that should be considered a mitigating factor in any event.

¹⁸ See, USPS position statement at Step B herein, Joint Exhibit No. 2, at 4-5. See also, Step B Decisions in *E06N-4E-D 08150237/NALC Local No. 499-08-15* (2008) in which 33 days passed and *Case No. E01N-4E-D 03219245/NALC Local No. Undisclosed* (2003) in which 41 days passed between awareness of the incident and issuance of discipline, in Joint Exhibit No. 2, at 324-325 and 322-323, respectively. In both cases, the Step B representatives agreed the much shorter delays than seen here required granting the grievances.

¹⁹ Although I read with interest the U.S. Court of Appeals decision in *United States Postal Service v. National Association of Letter Carriers*, 847 F.2d 775 (11th Cir. 1988), cited by the Service, that decision is inapplicable here. Unlike in that case, the issue here is not at what level the removal was issued and whether there may ultimately have been undue influence on the decision before it was issued by higher level authority but whether the investigation leading to the decision established by clear and convincing

AWARD

- I. It is the Award of the Arbitrator that Management did not have Just Cause to issue the Grievant a Notice of Removal (NOR) dated 01/21/2020 for Improper Conduct.
- II. It is therefore Ordered that the Notice of Removal be expunged from the Grievant's record and that the Grievant be reinstated and made whole for all loss of wages and benefits resulting from the removal.
- III. The Arbitrator hereby reserves jurisdiction for 90 calendar days from the date of this Award for the limited purpose of assisting the parties as may be required in the implementation of the remedy ordered above.



M. Zane Lumbley, Arbitrator

July 5, 2020

Date

evidence that the Grievant was guilty as charged. Moreover, the public policy considerations of reinstating a grievant who had been convicted of stealing money from the mail entrusted to him that led to the District Court decision to overturn that arbitrator's reinstatement order that was reviewed by the 11th Circuit are not present here. To be clear, I am not saying those public policy considerations could never be present in a falsification case such as this where potential Postal Service funds are involved but simply that they cannot come into play where, as here, the Service does not satisfy its burden of proving the allegations.