

UNITED STATES OF AMERICA
BEFORE THE MERIT SYSTEMS PROTECTION BOARD

MATTHEW KNUCKLES

v.

U.S. POSTAL SERVICE

} Docket No. SL075209014

OPINION AND ORDER

This case is REOPENED and REMANDED for processing consistent with this opinion. The postal service charges appellant with converting postal funds to his own use, a criminal offense. 18 U.S.C. § 641. However, the specifications sustained by the presiding official do not support the cited charge. To prove the charge, the postal service was required to show that there was an unlawful taking with intent to wrongfully deprive the postal service of the funds in question. *Morissette v. United States*, 342 U.S. 246 (1951). The Board finds that these elements were not proven by preponderance of the evidence. 5 C.F.R. § 1201.56. Instead, the Board finds that the postal service limited its presentation of evidence to the specifications, which did cite serious violations of agency accounting procedure. Further, the Board find that these specifications were sustained by the evidence of record, consistent with the presiding official's opinion.

The Board therefore concludes that the postal service committed a procedural error, i.e., the postal service mislabeled the charge against appellant. This error forced appellant to defend against a charge which the postal service did not intend to prove.

Therefore, this case is reopened and remanded to the presiding official for further proceedings to determine whether the procedural error, i.e., mislabeling the charge, substantially prejudiced appellant's rights and constitutes harmful error. 5 C.F.R. § 1201.56; *E.E.O.C. v. General Electric*, 532 F.2d 914 (4th Cir. 1976); *Mayor and City Council of Baltimore v. Matthews*, 562 F.2d 914, 922 (4th Cir. 1977).

For the Board:

ERSA H. POSTON.

January 18, 1980.

UNITED STATES OF AMERICA
BEFORE THE MERIT SYSTEMS PROTECTION BOARD

St. Louis Field Office

MATTHEW KNUCKLES, Appellant

v.

U.S. POSTAL SERVICE, Agency

Decision Number: SL075209014

Decided on: December 12, 1979

INTRODUCTION

Matthew Knuckles appealed the action taken by the agency whereby he was removed from his position of Distribution, Window and Markup Clerk, effective September 8, 1979, because of converting postal funds to his own use.

JURISDICTION

Appellant's removal is appealable to the Board pursuant to 5 U.S.C. 7513(d). Under 5 U.S.C. 7701(c)(1)(B), the agency action under consideration must be sustained by the Board if it is supported by a preponderance of the evidence, unless the appellant shows that the provisions of 5 U.S.C. 7701(c)(2) are applicable.

CASE ANALYSIS

The notice of proposed removal has been made an attachment to this decision.

All six specifications concern the handling of funds received for postage due mail. The agency does not assign a separate clerk to be responsible for postage due transactions. Rather, postage due mail is removed from its storage location and delivered to the customer by whichever window clerk happens to wait on that customer. It may be inferred from the record that, when a clerk removes a particular batch of postage due mail for delivery to a customer, this transaction is not recorded. Postal Inspector Elmer T. Brooks testified regarding the three methods used to account for the money paid by customers who received postage due mail. The clerk could affix either a postage due meter strip, postage due stamps, or regular postage stamps (Tr. p. 17). Inspector Douglas T. Farmer testified that, during an August 21, 1979, interview, he had asked appellant if appellant was aware of the procedure for handling postage due mail. Appellant correctly described the three methods identified above (Tr. p. 63). By issuing postage in one of these three ways, the clerk would balance his account for the cash received from the customer in payment for the mail. If no form of postage

was issued by the clerk, he would have surplus cash in his account. Should that cash subsequently be removed by the clerk, there would be a shortage in the postal station's account but that shortage could not be traced to the individual clerk.

Inspector Brooks testified that he had personally purchased postage due mail addressed to the Johnson Distribution Company from appellant on the dates mentioned in the notice letter. His testimony shows that he followed essentially the same procedure each time. This procedure was to request the mail from appellant, to pay appellant an amount in excess of the postage needed, and to leave the mail on the counter while appellant made change. Inspector Brooks also testified that in each instance no meter strip, postage due stamps, or regular stamps were affixed to the mail. The record contains photocopies of each of the six bundles of mail received by Inspector Brooks. Examination of these exhibits confirms that no postage was affixed to the letters. (The original bundles of mail were also available at the hearing, but neither party sought to introduce them as exhibits.) In each of the first five transactions Inspector Brooks specifically noted that there was a postage meter machine approximately 18 inches from appellant. At the time of the final transaction, Inspector Brooks was feeling ill and did not specifically notice whether there was a postage meter machine near appellant (Tr. pp. 20-32; Ap. Ex. 11, p. 25).

Inspector Farmer testified that, in the August 21, 1979, interview, appellant stated that on one occasion he might have sold \$20 worth of postage due mail to the Johnson Distributing Company without affixing postage (Tr. p. 63). Beyond a general claim that he followed the proper postal procedures when delivering postage due mail, appellant has not denied that the other five transactions occurred in the manner described by Inspector Brooks. However, it is noted that a clerk could not be expected to remember the details of each routine postal transaction. Based on the specific testimony offered by Inspector Brooks and the photocopies of the postage due mail he received, I find that appellant failed to follow proper procedures under which he should have affixed postage when delivering postage due mail in the six transactions mentioned in the notice letter.

If appellant had merely neglected to affix postage, but had not mishandled the cash which he received, it would be expected that his account would have held a surplus which equaled the \$110.87 received from inspector Brooks for the Johnson Distributing Company mail. If appellant had actually converted the cash to his own use, it would be expected that his account would have balanced. Inspector Farmer testified that he was the leader of a team of inspectors who audited appellant's fixed credit account on August 21, 1979. They discovered a surplus of \$24.89 in the account. (Strictly

speaking, the account had a shortage of \$339.98. However, since appellant had a carry-over shortage of \$364.87 which had appeared in a May, 1979, audit, his account actually contained \$24.89 more than would be expected (Ap. Ex. 11, p. 119). For purposes of this analysis, it is best to simply refer to the reduction in appellant's shortage as a \$24.89 surplus.) The agency notes that the surplus is approximately equal to the \$20.25 which appellant received from Inspector Brooks on the day immediately before the audit. (It is undisputed that clerks' accounts seldom balance exactly at the time of an audit and the \$4.64 difference can easily be attributed to normal deviation.)

Appellant's presentation of evidence principally addresses the possibility that security at Maryville Gardens Station was lax and that it was, therefore, possible that the sum of approximately \$85 which was missing from his account had been removed by an unknown individual. Before discussing the various security matters raised by appellant, it should be noted that, while evidence that station security was inadequate would support a finding that an unknown individual might have stolen money from appellant's cash drawer, such a finding would offer only a partial explanation for the loss of the money received in the transactions with Inspector Brooks. It is clear that appellant had access to the cash in question and, in view of the size of the transactions with Inspector Brooks, would have had a possible reason to select the amount of approximately \$85 for removal from the account. By contrast, there is no evidence to support a finding that any other individual who would seek to remove funds from appellant's account would have had any reason to select that particular amount. Thus, even if we were to find that an unknown individual had an opportunity to steal money from appellant's account, we would have to attribute to pure chance the fact that the amount taken closely approximated the surplus cash received by appellant in his first five transactions with Inspector Brooks. With this reservation in mind, appellant's various allegations regarding station security will be reviewed.

The testimony of Mr. John Bass, a union official, showed that legitimate questions regarding station security were raised by the union early in 1979. The most significant matter was the fact that certain keys within the station would open drawers assigned to more than one clerk. However, the agency has introduced evidence that the locks in question were changed in February, 1979, and appellant agrees that this was done (Tr. p. 142). There is no evidence that similar problems were reported after this time. Since appellant's account was audited in May, 1979, any loss to his account which might have resulted from the duplicate key situation would not be relevant to this appeal. As was noted above, the balance from the May audit was used as the starting point for the deter-

mination of whether appellant's account still contained the funds he had received from Inspector Brooks in July and August.

Another security problem was caused by the fact that customers would at times venture behind the "screen line." Joseph N. Nelson, another window clerk, testified that there was difficulty with customers who would enter through the employees' entrance and proceed unescorted through areas where only postal employees were authorized to be (Tr. p. 117). Appellant testified that on occasion customers would actually walk up behind him to ask for stamps while he was working at his window (Tr. p. 136). Here again, this problem seems to have been corrected, at least in large part, before appellant's May audit. Mr. Nelson testified that in late 1978 or early 1979 a table had been placed at the "caller door" and customers had been instructed to stay behind that table and wait for service. he stated that most customers abided by these rules (Tr. p. 124). Mr. Nelson also testified that he had never seen a customer who actually had access to his money drawer or to appellant's drawer (Tr. p. 125). It is noted that appellant agrees that clerks were expected to lock their stamp and cash drawers when it was necessary to leave them unattended (Tr. p. 141). While it may be true that the agency's control of customers within the employees' work area was less than ideal, the evidence adduced by appellant will not support a finding that theft from appellant's drawer by such a customer was more than a remote possibility.

Appellant has also testified that at times he was so busy with customers that he would have occasion to leave the counter without locking his stamp drawer. For example, he might do so when a customer came to pick up a package. Appellant stated that under normal circumstances the other window clerk would watch his stamp drawer during his absence. However, at times both clerks would have to leave the counter while serving their customers. Of course, at these times there would be at least two customers at the counter. Thus, in most instances, the other window clerk and/or additional customers would have been present. It may be presumed that this fact would have inhibited any customer who might have wished to steal from appellant's stamp drawer. While it cannot be said that it is impossible that appellant was so careless that he occasionally left a customer entirely alone near his unlocked stamp drawer, I find no basis for a conclusion that there was a significant possibility that the \$85 in question had been stolen by a customer at appellant's window.

Mr. Elmer Guy, a letter carrier, testified that in July or August, 1979, appellant had asked him to examine a drawer in a cabinet. There were scrape marks on the drawer which were similar to those which might have been made by a screwdriver (Tr. p. 98). Presumably the drawer in question was appellant's. It was

stipulated that a second letter carrier, Mr. Bill Gantz, would have offered testimony of a similar discussion with appellant. Although appellant brought these marks to the attention of two of his co-workers, there is no evidence that he advised his supervisor or the union of this matter. Moreover, Postal Inspector Farmer stated that he examined the wooden drawer to appellant's safe compartment at appellant's request on August 21, 1979. Inspector Farmer noted that he had observed pry marks some 25 times during investigations of post office burglaries (Ap. Ex. 11, p. 144). He stated that in his opinion the marks on the drawer to the safe compartment were not pry marks but were probably caused by trying to slam the drawer shut with the lock mechanism extended (Ap. Ex. 11, p. 137). Based on the evidence reviewed above, I find no basis for a conclusion that there had been an attempt to pry open appellant's safe compartment.

Appellant has identified only one instance which actually shows a specific opportunity for another individual to have removed cash from appellant's drawer. The record shows that Mr. Joe Kunkel, a window technician, had removed a supply of food stamps from appellant's drawer when appellant was absent from work on July 12, 1979. It is undisputed that Mr. Kunkel had received the supervisor's permission to remove the food stamps, had received the drawer key from the supervisor, and had left a receipt for the food stamps. However, Mr. Kunkel agrees that he had been alone when he actually opened appellant's stamp drawer (Tr. p. 164). (It is undisputed that such unsupervised access to another clerk's stamp drawer is a violation of agency procedures.) Thus, Mr. Kunkel had an opportunity to remove cash or stock from appellant's drawer in addition to that which he was authorized to remove. However, it is noted that this incident did not actually provide an attractive opportunity to steal money from appellant. The fact of Mr. Kunkel's access to the drawer had been clearly recorded and suspicion would have immediately fallen on him if appellant had discovered a shortage when he returned to work. Also, as was discussed above, no reason has been shown why Mr. Kunkel would have selected the particular amount of \$85 to remove from appellant's stamp drawer.

While appellant has shown that the security at the Maryville Gardens Station was less than ideal, the evidence reviewed above does not offer significant support for a conclusion that an unknown individual had gained access to appellant's stamp drawer and had removed the particular amount of approximately \$85.

Since appellant's account contained a surplus of \$24.89 at the time of the August 21, 1979, audit, I find that the agency has failed to show that appellant converted the \$20.25 which he received as a result of the August 20, 1979, transaction with Inspector Brooks.

Therefore, the specification which concerns that transaction is not sustained.

With regard to the five remaining specifications, I find that:

- (1) Appellant knew the proper procedures for handling postage due transactions;
- (2) Appellant failed to follow these procedures in his transactions with Inspector Brooks;
- (3) Appellant's financial accountability did not contain the surplus of approximately \$85 which would have occurred if the cash acquired in these five transactions had been properly handled; and
- (4) Appellant's suggestion that an unknown individual might have removed the sum of approximately \$85 from his accountability is speculative and is not persuasive.

These findings support a conclusion that appellant had converted the money received from Inspector Brooks. Therefore, the specifications concerning the transactions on July 23, July 31, August 9, August 13, and August 17, 1979, are sustained.

With regard to the agency's selection of the penalty of removal, appellant has submitted various documents concerning five employees who were disciplined for conduct which reflected on their integrity. These employees were either given discipline which was short of removal or were restored to duty after a removal action. If an agency has established, either formally or informally, a policy regarding discipline for a particular type of infraction, the Board would consider that policy in determining whether an appellant's conduct warranted the penalty selected. In a situation where an agency has clearly applied a more strict disciplinary standard to an appellant than it applies to employees in general, the action may be found to be improper. The exhibits offered by appellant contain little information regarding the various cases, and there is insufficient information to determine what considerations (e.g., mitigation or insufficient evidence) might have influenced the agency's disposition of these cases. The exhibits are of little probative value and are clearly insufficient to establish the unlikely proposition that the agency's general policy was to not seek removal of those employees who had converted agency funds to their own use.

In view of the serious nature of the conduct and the position of trust which appellant held, I find that the penalty of removal was warranted.

DECISION

Based on the foregoing analysis, I find that five of the six specifications were supported by a preponderance of the evidence

and that there is no basis on which to disturb the agency's selection of the penalty of removal. Therefore, the action is affirmed.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on January 16, 1980, unless a petition for review is filed with the Board within thirty-five (35) calendar days after the date of this decision.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board. The Director may request review only if he/she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office (5 U.S.C. 7701(e)(2)). The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule, or regulations.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, Washington, D.C. 20419, no later than thirty-five (35) calendar days after the date of this decision.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tend to show that:

- (a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
- (b) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Under 5 U.S.C. 7703(b)(1) the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any *final* decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

JAMES H. FREET,
Presiding Official.

St. Louis, MO 63155

RRx

Notice of Charges—Removal—Crime

August 24, 1979.

MATTHEW KNUCKLES—SS# 489-48-1762

Distribution, Window and Markup Clerk, 829 Manitou, St. Louis, MO 63119

This is notice that it is proposed to remove you from the Postal Service no earlier than 7 days from the time you receive this notice. There is reasonable cause to

believe that you are guilty of a crime for which a sentence of imprisonment can be imposed.

The reasons for this proposed action are:

1. CONVERTING POSTAL FUNDS TO YOUR OWN USE

As a Distribution, Window and Markup Clerk at the St. Louis Post Office, you are employed at our Maryville Gardens Stations, 2920 Meramec St., St. Louis, MO 63118, during the hours 8:20 a.m. to 5:20 p.m.

While you were on duty and performing window service on July 23, 1979, Postal Inspector E. T. Brooks approached you and purchased postage due mail in the amount of \$7.25 which was addressed to the Johnson Distributing Company, Post Office Box 2855, St. Louis, MO 63111. During the transaction, you did not attempt to account for the postage due funds in any manner. Postal Inspector Brooks noted that you had a postage meter assigned to you on July 23, 1979.

While on duty and performing window service on July 31, 1979, Postal Inspector E. T. Brooks approached you and purchased postage due mail in the amount of 81¢ which was addressed to the Johnson Distributing Company, Post Office Box 2855, St. Louis, MO 63111. During the transaction, you did not attempt to place postage onto the mail or account for the postage due funds.

While you were on duty and performing window service on August 9, 1979, Postal Inspector E. T. Brooks approached you and purchased postage due mail in the amount of \$14.58 which was addressed to the Johnson Distributing Company, Post Office Box 2855, St. Louis, MO 63111. During the Transaction, you did not attempt to place postage on the mail. Postal Inspector Brooks noted that you did have access to a postage meter at the time of the August 9, 1979 transaction.

While you were on duty and performing window service on August 13, 1979, Postal Inspector E. T. Brooks approached you and purchased postage due mail in the amount of \$27 which was addressed to the Johnson Distributing Company, Post Office Box 2855, St. Louis, MO 63111. You made no attempt to place postage on this mail. Postal Inspector Brooks noted that you had a postage meter available at the time of the transaction on August 13, 1979.

While on duty and performing window service on August 17, 1979, Postal Inspector E. T. Brooks approached you and purchased postage due mail in the amount of \$41.08 which was addressed to the Johnson Distribution Company, Post Office Box 2855, St. Louis, MO 63111. Although you had a meter available, you made no attempt to place postage on the postage due mail.

While you were on duty and performing window service on August 20, 1979, Postal Inspector E. T. Brooks approached you and purchased postage due mail in the amount of \$20.25 which was addressed to the Johnson Distributing Company, Post Office Box 2855, St. Louis, MO 63111. During the transaction, you did not attempt to place postage onto the postage due mail.

On August 21, 1979, your financial accountability was inventoried by Postal Inspector P. L. Busscher, while you were in attendance. After all differences were resolved, you were found to be \$24.89 over in your financial accountability.

On August 21, 1979, you were interviewed by Postal Inspectors R. H. Burbridge and D. L. Farmer. Postage due procedures were discussed with you and you advised that you delivered postage due mail across the window, and, if no postage due meter strip had been affixed to the customer's mail, you did collect the postage and affix the meter strip. You denied taking any funds from your credit for your personal use. You further stated that in every instance except one, you had always affixed meter strips to postage due mail. When approached with the fact that six items of postage due mail were sold by you to the Johnson Distributing Company without meter strips, you could offer no explanation for

the discrepancy or account for the \$110.97 in postage due funds involved.

Your conduct is in violation of Parts 661.53 and 666.2, Employee and Labor Relations Manual.

As a preference eligible employee you have the following rights:

You may review the material relied on to support these reasons at Maryville Gardens Station, 2920 Meramec St., St. Louis, MO 63118, during the hours 7:00 a.m. to 3:00 p.m., Monday through Friday. If you do not understand the reason for this notice, contact the undersigned for further information. You may answer this notice personally and in writing, or both, to Mr. Robert J. Caton, Acting Manager, Stations and Branches (South), Room 318, Main Post Office, 1720 Market St., St. Louis, MO 63155, during the hours 8:00 a.m. to 3:30 p.m., Monday through Friday, and may submit affidavits in support of your answer. If you are otherwise on official duty, you will be allowed a reasonable amount of official time to review the material relied on to support the reasons for this notice, to secure affidavits and prepare an answer to this notice. You will be allowed 7 days from the time you receive this notice to submit your answer. Full consideration will be given to any answer you submit. As soon as possible after your answer(s) is received, or after the expiration of the 7 day limit, if you do not answer you will be given a written decision.

You have the right to file a grievance under the Grievance-Arbitration procedures set forth in Article XV, Section 2 of the 1978 National Agreement within 14 days of your receipt of this notice.

RAY RIDER,

Superintendent, Station and Branch Operations.