

# NALC Arbitration Advocate

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## Understanding the Burden of Proof

Every steward, branch officer and arbitration advocate has undoubtedly been told many times about the importance of “proof” in the grievance-arbitration procedure. We all know that it is never sufficient simply to make a claim, but rather, that assertions must be proven. The term “proof,” however, has a number of distinct meanings which become especially important in the context of arbitration. Advocates should clearly understand the difference between “burden of proof” and “quantum of proof” and the significance of both concepts in arbitration. This article discusses “burden of proof” which is a judicial concept that also applies in arbitration. “Quantum of proof” is the subject of a separate article in this publication.

The “burden of proof” designates which party has the obligation of establishing by evidence a disputed assertion or

charge. Within the arbitration context it is useful to consider the burden of proof as containing two separate components: (1) the initial burden of going forward with the evidence (which party starts first); and (2) the burden of persuading the arbitrator concerning the ultimate resolution of some fact or issue. In both instances, the burden depends on the nature of the issue, arguments and the specific contract provisions involved. During the course of

an arbitration proceeding the burden of proof may shift from one party to the other.

### Initial Burden of Proof

In arbitration there is a well established rule about which party is expected to proceed first as the moving party. In non-disciplinary contract cases, the union is the charging party and has the obligation to proceed first at the arbitration

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## Postmaster, Supervisors Suspended

### *Abusive, Harassing Managers Violated Joint Statement*

A regional arbitrator has ordered the Postal Service to suspend a team of managers—a postmaster and two supervisors—for three days, because they had harassed, intimidated and abused letter carriers in the Lilburn, Georgia Post Office. Faced with over-

whelming testimony from 22 NALC witnesses, Regional Arbitrator Philip Harris had no trouble concluding that managers had committed a “laundry list” of Joint Statement violations. C-25522, October 13, 2004.

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hearing and prove its case. In disciplinary cases, however, the situation is reversed.

Management is the charging party and has the burden both to proceed first with its evidence and to prove employee guilt or wrong-doing.

Exceptions to this pattern are rare and occur only for good reason.

The party that has the initial burden of proof has an obligation to present at least a *prima facie* case. The literal translation of the term *prima facie* is "first face," or as we would say in modern English, "on the face of it." This term is defined in Black's Law Dictionary as "evidence that will establish a fact or sustain a decision unless contradictory evidence is produced." If the moving party fails to present at least a *prima facie* case, the arbitrator may make a ruling that effectively ends the proceeding. However, after a *prima facie* case has been made, the burden of proof may shift to the opposing party.

### Shifting Burdens of Proof

During an arbitration hearing the burden of proof may shift depending upon the exact arguments being made. The general rule is each party must prove to the arbitrator every fact that it relies upon to make its case.

This rule is, however, easier to express in the abstract terms than it is to follow. It is further complicated by the fact that dif-

ferent arbitrators think and rule differently. Thus, it is best explained by giving examples of how the rule is applied by arbitrators in discipline and contract cases.

### Discipline Cases

In a discipline case management must prove that the grievant acted as charged and that the charge constitutes just cause for the level of discipline imposed. In some discipline cases the best strategy may be simply to attack and challenge management's facts and evidence in order to show that it failed to prove that the grievant acted as charged. In such cases the burden of proof rests entirely upon management and the union's role is simply to challenge management's proof.

In other cases, however, the union mounts an affirmative defense. It may do this by seeking to prove that the true facts are different than those presented by management, by raising technical defenses such as a failure of higher management to "review and concur", or by demonstrating that, because of mitigating circumstances, the level of discipline imposed was excessive. When the union makes an affirmative defense, the burden of proof shifts and the union must prove the facts it claims support its case.

For example, in an arbitration involving a discharge for taking an undeliverable magazine to

the swing room to read, the union may choose not to challenge that the grievant acted as charged. Instead, the union may argue that the discharge was without just cause because management knowingly permitted other employees to do the same. In such cases, arbitrators will require that the union provide evidentiary proof of the alleged disparate treatment. Similarly, if the union presents some other affirmative-type defense such as the existence of mitigating factors that should reduce the level of discipline, the arbitrator will require the union to prove its claim.

### Contract Cases

In contract cases the union must make a *prima facie* showing that the contract was violated. If it fails to accomplish this, management will win without even having to mount a rebuttal. However, once a *prima facie* case has been made, the burden of proof may shift. For example, in the regional case C-14002, Arbitrator Raymond Britton, who has also served as a member of the national arbitration panel, wrote the following in a case concerning the equitable distribution of overtime opportunities.

Notwithstanding the contention of the Employer to the contrary, it is not necessary that the Union undertake a daily investigation and analysis of all carriers on the Overtime Desired List in the manner hereinabove described

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by the Employer. For, as the custodian of the records, the Employer is in possession of and therefore more familiar with this information than the Union. Accordingly, while this is a contract case, and the burden of proof is therefore on the Union, the Union, in order to meet this burden, is only required to show that an unexplained divergence exists in the overtime hours and opportunities of those on the list. When this is shown by the evidence, a prima facie case is made by the Union and the burden of going forward with the evidence thereupon shifts to the Employer to rebut the prima facie case established by the Union.

\* \* \*

For while, as above set forth, Supervisor Farrior may have generally described the method used by the Vicksburg, MS Post Office for assigning overtime opportunities, his testimony nevertheless, in the judgment of the Arbitrator, does not sufficiently explain the disparity of hours and overtime opportunities of those particular individuals on the Overtime Desired List. Accordingly, the Arbitrator is required to find that the Employer has not met its burden of presenting the required quantum and quality of evidence necessary to rebut the prima facie case of the Union.

### Advice for Advocates

The union goes first in contract cases and management goes first in discipline cases. That's a straight-forward and easily understood principle. But things often aren't so simple in real cases. Burdens of proof can

shift during the course of a hearing, often in unanticipated ways. Experienced advocates know that the way to prepare to meet the union's burdens of proof is to develop a well thought-out, researched and prepared "theory of the case." That requires careful consideration of the contract provisions and arguments involved, how they are related and exactly what evidence will be required to prove each element of the case. A good case theory allows the advocate to focus the investigation and preparation of the case, and to seek out and develop the facts and evidence that the theory makes material.

However, a bad theory can cripple an advocate's case

The recent arbitration case C-25255 is a good example. An ill-considered theory of the case made left management unable to respond when the burden of proof shifted under its feet. In that case the union argued that the year round employment of casuals violated the "in lieu of" provisions of Article 7.1.B.1. Management's theory of the case was, simply stated, that since the union has the burden of proof in contract cases, the union was required to prove, hour by hour, that any disputed work performed by casuals was

in violation of the contract. But the arbitrator reasoned as follows:

Without doubt. . . the Union shoulders the burden of showing a prima facie violation and, ultimately, proving its claim. But the representation need not be so overly legalistic or formally hyper-technical that it disconnects with reality. . . . [Casual in lieu of] disagreements generally are not discrete, individual matters, but systemic problems that may develop or become evident only over time. At times, the

**Burdens of proof can shift during the course of a hearing, often in unanticipated ways.**

burden of proof shifts. Here, the present record. . . . contains preponderant evidence convincingly showing Casuals were employed routinely to fill predictable, continuous and substantial gaps in the core Career workforce. Casuals became so entrenched in the permanent workforce rhythm their existence was not "limited" and they were present "instead of, in place of or in substitution of" career employees. (emphasis added)

Of course, management lost. It had become so wedded to its oversimplified theory of the case and ideas about the burden of proof that it was unable to respond effectively. Don't fall into a similar trap. A more extensive discussion of this case and Article 7.1.B.1 can be found in the June 2004 *Arbitration Advocate*. ■

**Postmaster Suspended . . .***(Continued from page 1)***New Management Team**

The Lilburn, Georgia case began when the Postal Service decided that employees were using too much overtime in Lilburn. In management's words,

Lilburn had been identified as a poor performing office in the Atlanta District because overtime was high in comparison to the mail volume.

So the Postal Service sent in a new management team to "make improvements." The new team went about this task in a way that many letter carriers will find painfully familiar.

A supervisor told one carrier who sought overtime that he was "like holding up a store." Another supervisor reprimanded carriers for using personal time permitted by the National Agreement. And he told a letter carrier in an intimidating manner, "I'm going to watch you real close." When a union representative requested information, a supervisor shook the request in his face and threatened to destroy it.

The Postmaster was a full, participating member of the abusive attack team. He ignored the national agreement by refusing to recognize grievances, until a Step B decision ordered him to cease and desist and awarded a monetary remedy.

One carrier testified that the postmaster was "abusive, ugly and downright rude."

The Postmaster reserved special treatment for NALC's shop steward in Lilburn. "I'm gonna fix you up real good," the Postmaster told him. "I'm gonna have somebody ride with you." The Postmaster harassed him with numerous one-day counts, and sat behind the steward while he cased mail.

NALC's arbitration advocate presented 22 witnesses to establish that the management team threatened, intimidated and bullied employees throughout the station, including union representatives attempting to exercise their contractual rights.

**USPS Runs from Joint Statement**

At the arbitration hearing the USPS advocate followed the traditional management approach to the Joint Statement by attempting to evade its obligations. She made the usual, discredited argument that the case was not arbitrable because arbitrators lack jurisdictional authority to order sanctions against managers. To support this false claim management submitted two awards dated 1984 and 1992.

NALC's advocate was prepared with the opposing and binding precedent. Arbitrator Harris concluded:

Evolution continues, and the U.S. Postal Service-National Association of Letter Carriers collective bargaining milieu is not excepted. Based on the documents and related arguments submitted, **this is an open-and-shut case favoring the Union.** Management's two citations denying arbitrability are dated 1984 and 1991 respectively. The Union's Snow 1996 award addressed the new turf—the Joint Statement dated 1992—and placed it within the four corners of the National Agreement. This occurred in 1996, rewriting the history analyzed in the two earlier Postal Service submissions. The development was immensely fortified by the U.S. Court of Appeals. The grievance is arbitrable. (Emphasis added.)

**Overruled Precedent, Discredited Arguments**

Arbitrator Harris correctly applied the contractual principle of *overruled precedent*. The national Snow award, issued in 1996, was new and binding precedent. So that award overruled any previous regional awards that had ruled to the contrary. Those earlier awards lost all value as precedent.

When the USPS advocate submitted two such awards in the Lilburn case, she must have known that they were both wrong and valueless as precedent. To argue such cases was patently misleading and smacks of plain dishonesty.

Management knows full well that National Arbitrator Carlton

Snow ruled in 1996 that NALC has the power to enforce management's Joint Statement's obligations through the grievance procedure, and that arbitrators have the authority to order sanctions against supervisors which can include "removing them from their administrative duties." This national award, which USPS never sought to challenge in court, is binding on all regional arbitrators. *C-15697*, August 16, 1996.

Furthermore, two U.S. Courts of Appeals have upheld arbitration decisions ordering sanctions against supervisors who violated the Joint Statement. In two cases the Postal Service, dissatisfied with such award, attempted to vacate them in federal court. NALC challenged and won both cases. *USPS v. NALC*, No. 02-5050 (6th Cir. June 5, 2003), *USPS v. NALC*, No. 02-1159 (4th Cir. Nov. 5, 2002). USPS has never succeeded in such a case.

So the law of the land and the state of precedent are crystal clear:

- The Snow Award is still standing.
- The Snow Award is binding on regional arbitrators.
- Arbitrators have jurisdiction to enforce management's obligations under the Joint Statement and such cases are arbitrable.
- Arbitrators have authority to discharge, demote, sus-

pend, or otherwise order sanctions against supervisors who violate the Joint Statement.

The Postal Service has no basis whatsoever for arguing otherwise.

### **No MSPB Appeal for Suspended Managers**

Arbitrator Harris ordered all three managers—a Level 25 OIC and 2 supervisors—suspended without pay for three days (with an option to use leave instead). The suspensions, unlike a demotion or discharge, cannot be appealed to the MSPB. They must be served unless the Postal Service seeks to vacate the award in court and somehow succeeds despite the weight of federal court precedent against it.

Advocates may recall that in the Hatten case, an arbitrator discharged a Postmaster for a loud, possibly violent incident with a letter carrier. The 4th Circuit upheld the arbitration award but permitted Hatten to appeal his removal to the MSPB. *USPS v. NALC*, No. 02-1159 (4th Cir. Nov. 5, 2002).

At the MSPB hearing the Postal Service sat on its hands and did not make a case for upholding Hatten's removal, and the MSPB refused to permit NALC to intervene in the case. The MSPB reinstated Hatten with full back pay.

No MSPB appeal is possible in the Lilburn, Georgia case because a supervisor's right to appeal an adverse action to MSPB is limited to a specified list of sanctions:

- removal from federal employment,
- suspension for more than 14 days,
- a reduction in grade,
- a reduction in pay, or
- a furlough of 30 days or less.

Civil Service Reform Act of 1978, 5 U.S.C. § 7511-13.

### **Arbitrator Easily Finds Facts of Violation**

Management attempted to undermine NALC's case by arguing that testifying letter carriers were troublemakers, that management was simply enforcing the rules, and that the union had orchestrated the testimony. Nonetheless Arbitrator Harris had no trouble rejecting those claims in the face of NALC's overwhelming factual presentation.

While acknowledging management's right to seek productivity gains, the arbitrator wrote:

... there are right ways and wrong ways to achieve goals, and the Joint Statement provided a most commendable road map of do's and don't's in seeking peaceful change. . . . [A]t Lilburn . . . the new management moved

in the direction of the wrong way to create change. . . .

The third paragraph of the Joint Statement says:

We openly acknowledge that in some places or units there is

an **unacceptable level of stress** in the workplace; that there is no excuse for and will be no tolerance of violence or any threats of violence to anyone at any level of the Postal Service; and that **there is no excuse for and will be no tol-**

**erance of harassment, intimidation, threats or bullying by anyone.**

(Emphasis added by arbitrator.) ■

## Interpretive Issues

It is just after 9:00 a.m. and your arbitration hearing is getting underway. Exhibits are offered and marked, issue statements are made and the arbitrator looks to you and asks if the case is properly before her. You answer that it is. The Arbitrator then looks to the management advocate and asks if the Postal Service has any procedural issues. To your surprise management's advocate states that the case is not properly before the arbitrator because the issue is interpretive. This is the first time you have heard this argument. How did this happen? Why didn't the management advocate tell you this before the hearing started?

The parties at the National Level have taken steps make sure this doesn't happen in order to avoid the loss of hearing dates and last minute surprises. As an advocate you have the responsibility not only to adhere to these steps but to also ensure that management complies with them also. Two contractual provisions that have been enacted help to ensure that

cases are no longer declared interpretive at the whim of an advocate or at the last minute.

Article 15, Section 4 of the National Agreement deals with Arbitration. The following language was added to Article 15.4.A.4 in the 2001 Agreement

The designated advocates will discuss the scheduled cases at least thirty (30) days prior to the scheduled hearing date, if possible.

If management's advocate believed that the case presented an interpretive issue, you should have been informed thirty days in advance. NALC requires its advocates to strictly comply with the 30-day discussion requirement and expects no less from the Postal Service.

In addition to the opposing advocate notifying you, the NALC should have been notified at the Headquarters level in accordance with Article 15.4.B.5 which was modified in the 2001 National Agreement to require the following:

If either party concludes that a case referred to Regular Arbitration involves an interpretive issue under the National Agreement or some supplement thereto which may be of general application, **that party's representative shall request input from their appropriate National Representatives at the Headquarters level. If either party's representative at the Headquarters level determines the case is interpretive, a notice will be sent to the other party. The case will be held pending the outcome of the National interpretive dispute. If both parties' representatives determine the case does not involve an interpretive issue, the case, if already scheduled for arbitration, will be heard before the same arbitrator who was originally scheduled to hear the case. Further, if the hearing had convened, the case will continue at the same stage of arbitration.** (New language in bold)

### Contact Your NBA Immediately

When faced with a last minute declaration that there is an interpretive issue, first thing you should do is ask the manage-

ment advocate to provide you with the name and position of the person who provided the input that resulted in the decision to declare the grievance interpretive. This information will be needed if the appropriate postal officials are to be notified. Whether or not you receive the name of the responsible Postal Service representative, you should immediately contact the National Business Agent's office to inform him/her of the recent development in the case. Your

NBA office will be able to provide guidance and possible intervention in resolving this last minute issue.

In addition to your National Business Agent contacting the appropriate Postal Service officials he or she will contact NALC Vice President Gary Mullins in case national level intervention is needed. Vice President Mullins will contact Postal Service Headquarters and voice the NALC's concern

about the Postal Service advocate's actions.

Remember, however, that you cannot insist that the arbitrator hear the case. You should also be aware that the Postal Service cannot insist that the arbitrator hear the back up case(s), if any. Your Business Agent will be able to provide you with instructions on how to handle the remaining cases and how to proceed with the rest of your day. ■

## Quantum of Proof

Stewards often ask, "How much evidence is it going to take to prove my case?" This is not an easy question to answer. It depends on a number of factors. It depends upon the case, what remedy is being sought and who is making the decision.

When arbitration advocates argue about how much proof is needed, they are debating the "quantum of proof," a notion derived from court proceedings. "Quantum" is Latin for "amount," so "quantum of proof" means the amount or level of proof required to prove one's case. Sometimes this is also called the "standard of proof" in a case.

This article reviews how Postal Service arbitrators have

handled the issue of the quantum or standard of proof, and provides guidance to NALC arbitration advocates.

### Three Levels

As noted, it is not easy to say just how much proof is enough. Must the arbitrator be 60 percent convinced? 80 percent? 99 percent? Although we usually employ numbers to describe amounts, such formulations do little to clarify the issue of proof.

Instead, we use language to describe the different quanta or standards of proof. Over many years, judges, lawyers and arbitrators have developed some shared definitions, settling on three different standards of proof:

### Preponderance of the Evidence

Preponderance of the evidence is the lowest or least strict standard of proof. In plain English, it roughly means "more likely than not." Preponderance of the evidence is the level of burden of persuasion typically employed in the civil procedure. It is also the standard most arbitrators will apply contract cases and minor discipline cases. It is defined in Black's Law Dictionary (7th Edition) as "the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side

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of the issue rather than another."

## Clear and Convincing Evidence

Clear and convincing evidence is defined in Black's Law Dictionary (7th Edition) as "evidence indicating that the thing to be proved is highly probable or reasonably certain." The

clear and convincing evidence standard is a heavier burden than the preponderance of the evidence standard but less than beyond a reasonable doubt. It is generally the strictest form of evidence required in arbitration.

Many arbitrators apply this standard to removals and to contract cases where the remedy will be substantial.

## Beyond a Reasonable Doubt

Beyond a reasonable doubt is the standard used by courts in criminal cases. It is evidence by which the judge or jury is fully persuaded of a defendant's guilt "without any belief that there is a real possibility that a defendant is not guilty" (Black's). Some arbitrators require management to meet this standard in certain removal cases.

## Applicability in Arbitration

Arbitration proceedings are not courts and arbitrators are not judges. Consequently, arbitrators differ on how useful formal standards of proof are in arbitration. Some postal arbitrators, such as Clarence Deitsch, explicitly state the standard of proof they used to decide each case (see

Deitsch, C-13274, C-13319, C-19755). Other postal arbitrators appear to reject attempts by advocates to argue that a particular quantum of proof is required. For example, Arbitrator Thomas

DiLauro wrote in C-19737:

Because quantum of proof concerns the arbitrator's evaluative processes, rather than the parties' adversarial burdens, the determination and application of the quantum of proof is uniquely within the arbitrator's purview.

Although it is not possible to state broad principles to which all postal arbitrators agree, many useful generalizations and arguments can, nevertheless, be found by studying the large body of available postal arbitration decisions.

## Contract Cases

Arbitrators are in general agreement the "preponderance of the evidence" is the appropriate standard of proof to be used in deciding contract cases where the union has the burden of proof. This is because that is the standard that courts use in civil cases involving a breach of the contract. For example, Arbitrator Clarence Deitsch wrote in C-24800:

The quantum of proof customarily required in contract cases such as this for the NALC to meet its burden of proof is a "simple preponderance of the evidence." This standard will be used to resolve the instant contract dispute. (See also C-19755.)

Nevertheless, advocates should be aware that, as a practical matter, arbitrators tend to hold the union to a higher standard in contract cases that will have a significant impact upon the employer or that involve substantial remedies.

Remember that in contract cases it is one thing to convince an arbitrator that the contract was violated and quite another matter to obtain an appropriate remedy. All too often an NALC advocate succeeds in convincing an arbitrator that management violated the contract, yet fails to obtain a substantial remedy. This can happen because union advocates forget that remedies are not automatic once a violation is established. Rather, in contract cases the union carries the burden of

**"Preponderance of the evidence" is the appropriate standard of proof to be used in deciding contract cases where the union has the burden of proof.**



demonstrating that the remedy requested is appropriate and necessary. Arguments used to convince an arbitrator to grant the requested remedy are conceptually distinct from the arguments used to demonstrate a violation of the contract. In remedy arguments issues concerning the quanta of proof seldom arise. See the article "Arguing for Remedies in Contract Cases" in the February, 2004 edition of the *NALC Advocate* for strategies for arguing remedies and obtaining them from arbitrators.

## Discipline Cases

In discipline cases, unlike contract cases, there are disagreements among arbitrators concerning the appropriate standards of proof and how they should be applied. These disagreements tend to be particularly sharp in cases involving alleged criminal acts or moral turpitude.

The traditional position of the Postal

Service is that in discipline grievances where management has the burden of proof, it must merely prove its case by the "preponderance of the evidence." The Postal Service often argues that, since such cases involve the Union trying to

enforce terms of the contract—namely the "just cause provision"—the standard of proof used by courts in ordinary civil disputes applies. While some arbitrators have accepted this argument; most have not. In C-01190, Arbitrator Seidman discussed this issue and rejected the use of the "preponderance of the evidence" standard in serious discipline cases.

There is no arbitral consensus as to the burden of proof in such cases. A number of arbitrators say that the standard is the same, no matter what the nature of the case, that is, the usual civil standard, the preponderance of the evidence rule. Other arbitra-

tors say that where the offense charged is a crime that the criminal standard of proof beyond a reasonable doubt is required to sustain a discharge. Most arbitrators, of which I am one, say that in such a case something more than a preponderance of the evidence and less than proof beyond a rea-

sonable doubt is required which is usually verbalized as clear and convincing evidence of the doing of the act charged.

In a thoughtful discussion of this issue in regional arbitration decision C-09365, Arbitrator Carlton Snow reaches essential-

ly the same conclusion. His award warrants careful reading, not only because of his status and reputation, but also because it expresses what is probably the majority opinion among postal arbitrators.

There simply is not unanimity among labor arbitrators about the application of a "beyond a reasonable doubt" quantum of proof in cases allegedly involving the commission of a crime. Discharge for misappropriation is a serious matter, but it remains a civil matter. A case can be made for an application of a preponderance of the evidence" standard in such circumstances. An arbitrator, of course, has no power to deny an individual his or her freedom of movement, as is the case in most criminal proceedings.

As a general rule, it is more appropriate to apply a "clear and convincing" standard of proof in an arbitration case involving an alleged violation of criminal law. It is appropriate to apply a higher standard of proof if an employer's allegation involves a charge of moral turpitude, but the standard to be applied in an administrative proceeding such as labor arbitration is more appropriately "clear and convincing" proof. Such a higher standard recognizes the civil nature of an arbitration proceeding while also ensuring that the case against a grievant where there is an allegation with criminal overtones is sufficiently strong to justify the result. It is appropriate to apply a "beyond a reasonable doubt" standard in a criminal court proceeding because a person may be sent to jail, but it is equally appropriate in arbitration to recognize

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that a labor arbitrator's decision has a considerably different impact, although a serious one, on a grievant's life...

It is also important to stress the fact that a decision in a case of this sort cannot be resolved solely on the basis of rules about quantum of proof. These evidentiary rules have been developed for application in a more stylized forum, and they provide a source of guidance for decision-making in arbitration, but clearly are not dispositive. Such rules must be understood within the context of a collective bargaining relationship and established principles of discipline in the work force. As Professor Edgar Jones has observed, "the most useful way to think of the requisite quantum of proof is to think in terms of variable degrees of caution, so long as it is recognized that these degrees are metaphorical and not mathematical." ...In other words, it is unwise and impractical to think of quantum of proof as setting forth a precise formula for resolving arbitration cases. Rather, standards of proof serve as a constant reminder to an arbitrator to remain cautious about the weight to be accorded evidence put forth by the parties and to think clearly about what proof is causing the arbitrator to sustain or reject an accusation against a worker. It is reasonable to believe that an arbitrator will be more cautious in the face of an allegation involving moral turpitude than one involving some other rule infraction. It is imprudent to wed oneself to a formulaic standard of proof for application in every case. Such an approach to decision making ignores the diversity of circumstances and soon causes the

formula to become disconnected from a rational application to the facts *so that the formula no longer describes the reality it is supposed to represent.*

Other arbitration awards consistent with this position include: Arbitrator Axon C-11391 and C-11248, Arbitrator Rentfro C-00318 and Arbitrator Snow C-01789.

### **Proof Beyond a Reasonable Doubt**

Almost all postal arbitrators reject the argument that the Postal Service can sustain a removal charge with a simple preponderance of the evidence. They differ, however, over exactly what higher standard of proof the Postal Service must meet in cases concerning alleged crimes or moral turpitude. The majority of arbitrators probably agree with arbitrator Snow's position, above, that the appropriate standard in such cases is "clear and convincing" proof.

Nevertheless, many arbitrators have held that the appropriate standard in such cases is proof "beyond a reasonable doubt." Arbitrator Howard Gamser's June 12, 1976 decision in C-25512 was the first in a line of cases taking this position. Gamser's decision a particularly significant because, even though this was a non-interpretive case, he was serving as a member of the national arbitration panel.

The question then remains whether the USPS has sustained the burden in this proceeding of establishing that [the grievant] did indeed willfully convert to his own use monies that rightly belonged to the Postal Service... . What quantum of proof must the Employer bring forth from this record? Shall the beyond a reasonable doubt standard that the US Magistrate required also be the standard in this Arbitration proceeding or shall some lesser degree of proof such as the clear and convincing evidence standard or the preponderance of evidence standard suffice? In this case, a fifteen year veteran of the USPS who apparently had an unblemished record before this case arose, and who had twenty years of honorable service in the Navy behind him as well, has been accused of criminal and morally reprehensible conduct. In such an instance, in the opinion of the undersigned, the "beyond a reasonable doubt" standard must be met by the Employer. The grievant's reputation cannot be shattered by employing a lesser standard. The Employer cannot brand [the grievant] as an ordinary thief in the eyes of his family, friends, fellow employees by the submission of less proof than would establish his guilt beyond a reasonable doubt. The undersigned is of the opinion that the weight of arbitral authority supports this position. The social stigma of attaching to the employee justifies the higher burden of proof than that which might be required in some other case of a breach of industrial discipline. (Emphasis added.)

Other regional arbitration awards that support the posi-

tion that the appropriate standard of proof in such cases is proof "beyond a reasonable doubt" include the following.

### **C-01220 Arbitrator Dash**

The Arbitrator agrees with the Union that, to sustain a discharge involving moral turpitude or an allegation of criminal intent, he should be presented with proof beyond a reasonable doubt that the discharged employee was guilty as charged.

### **C-07490 Arbitrator Purcell**

The highest degree of proof namely, "proof beyond a reasonable doubt" is required as a matter of course in disciplinary cases where the employee is charged with an act of moral turpitude, such as: theft; assault; aberrant sexual practices; or, as in this case, illegal sale of drugs. The reason for the higher degree of proof requirement in such morally objectionable cases is that discharge for theft, etc involves a most unfavorable reflection on the moral character of the employee which is almost impossible to erase and which will seriously hamper if not altogether prevent his/her getting a job elsewhere and will even hurt innocent family members. The employee is branded for life. The Employer, therefore, has a very heavy proof obligation in such cases and the Arbitrator believes that that heavy proof burden rests with the Employer in this case before him.

### **C-02007 Arbitrator Holly**

This is the charge on which the Grievant must be tried, and the burden rests upon the Employer to prove beyond a reasonable doubt that the Grievant did

tamper with the vehicle as charged. Proof beyond a reasonable doubt is the quantum of proof required when an employee is charged with criminal action. If the proof is inadequate to meet this test that settles the matter. In the absence of such a showing there would be no basis for considering other aspects of the case.

### **C-09250 Arbitrator Williams**

While the burden of proof is always on Management in a discipline or discharge case, the quantum of proof required varies with the charge of Management. When the action an employee is accused of is of a kind recognized and punished by criminal law, the quantum generally required by arbitrators is "proof beyond a reasonable doubt."

### **C-20842 Arbitrator Deitsch**

Contrary to the Postal Service's claim that the proper quantum of proof is "a simple preponderance of evidence" for violations of rules and regulations, the workplace's equivalent to capital punishment (i.e., employment termination) for offenses that are simultaneously rules violations and crimes in society (i.e., "fraudulent receipt of pay for time not worked") requires "proof beyond a reasonable doubt." It matters not that the employee is not charged with/prosecuted for criminal misconduct. It is sufficient that the employee simply be charged with/removed for conduct that simultaneously violates rules and regulations and is also a crime in society. Such action severely limits the employee's future employability. That the Service recognized the inherent nature /cause for removal in the

instant case is evident by its Advocate's written statement at the outset of the arbitration hearing, namely, "The actions of the Grievant in this case are tantamount to theft." Hence, "proof beyond a reasonable doubt" will be the standard of proof used to resolve the instant dispute. (See also C-13319, Arbitrator Deitsch)

## **Advice to Advocates**

How does the concept of quantum of proof affect how the advocate should present and argue the case? Obviously, this is a difficult question and there are no clear-cut answers. Not only do arbitrators disagree as to what quantum of proof should be required in a particular case, but each individual arbitrator attaches his or her own definition and meaning to these concepts. Simply stated, advocates should put forth the best possible case regardless of what quantum of proof they believe the arbitrator will apply in resolving the case. This does not mean, however, that advocates should not urge the quantum of proof that they feel should be applied to the case. Although an arbitrator may not agree with the legal principles urged by the advocate, the arbitrator may still be influenced by the party's arguments that a higher quantum of proof should be required in a discipline case. At the very minimum, the advocate should remind the arbitrator to be cautious in discharge cases involving crimes or serious moral turpitude. ■

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Please note that the C-number arbitration cases and M-number Materials Reference System materials cited in this publication are available to interested advocates. All materials are available from the office of the National Business Agent. All but the newest arbitration cases are available on the NALC Arbitration DVDs or CD-ROMs. All M-number materials are available online under Contract Administration at [www.nalc.org](http://www.nalc.org).



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