29015 A-B

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

National Association of Letter Carriers, AFRL-CIO

and

United States Postal Service

Grievant:
Lynette West

Post Office:
Westlake
Bethesda, Maryland

USPS Case Nos.:
K06N-4K-D09433698
K06N-4K-D10004272

NALC Case Nos.:
13-157136/157137

ARBITRATOR:	Mollie H. Bowers
APPEARANCES:	
For the Service:	Sylvester Johnson, Jr.
For the Union:	Robert Harnest
Place of Hearing:	Bethesda, Maryland
Date of Hearing:	April 24 & June 24, 2010
Dates of Hearing Briefs:	USPS - August 2, 2010 NALC - August 11, 2010
Date of Award:	September 20, 2010
Relevant Contract Provisions:	Article 16, Sections 1, 7 JCAM (2009 Article 16
Types of Grievances:	Emergency Placement Termination

AWARD SUMMARY

After consideration of the evidence, Hearing testimony, and the parties' post-Hearing briefs, the Arbitrator finds that Management's actions did not conform to the requirements for establishing just cause. The grievances are therefore sustained. Full discussion of the award follows.

Mollie H. Bowers
Signature of Arbitrator

USPS K06N-4K-D09433698 Emergency Placement NALC 13-157136
USPS K06N-4K-D10004272 Termination NALC 13-157137
Hearing: April 24 and June 24, 2010
Bethesda, Maryland

ISSUES

1st Issue: Did Management have "Just Cause" to put the Grievant into "Emergency Placement", an off-duty/non-pay status, under the provisions of Article 16.7 of the National Agreement, on August 12, 2009, and if not, what is the appropriate remedy?

2nd Issue: Did Management have "just Cause" to issue the Grievant a "Notice of Removal" (NOR), dated October 7, 2009, for a charge of "Improper Conduct/Violation of Zero Tolerance Policy" and, if not, what is the appropriate remedy?

BACKGROUND

The Grievant was hired as a Letter Carrier on August 1, 1998. She was promoted to Acting Supervisor by Manager Gabriel Hamilton effective June 9, 2009. On Saturday, August 8, 2009, the Grievant was informed verbally by Mr. Hamilton that the temporary promotion was terminated. She was directed to resume her Carrier duties effective the following Monday. According to the Grievant, Mr. Hamilton said that he was taking the action because of complaints against her. Effective Sunday, August 9, 2009, Ms. Theresa Ellis was appointed Acting Supervisor.

On the morning of the 10th, Ms. Ellis approached the Grievant, who was casing her mail, and asked her to take a walking bump from another route. According to a written

statement, included with Joint Exhibit 3 (Emergency Placement grievance package) and her testimony at the Hearing, the Grievant told Ms. Ellis that she could not do the bump because she was on walking restrictions under the Family and Medical Leave Act (FMLA). The Grievant testified that Ms. Ellis changed the bump to dismount deliveries.

The following day, Tuesday the 11th, Ms. Ellis again approached the Grievant and assigned her an hour walking bump. When the Grievant again declined because of the FMLA relief from extra walking, Ms. Ellis brought the matter to Mr. Hamilton. Although the Grievant's written statement and testimony regarding what happened next conflicts to a degree with the testimony provided by Ms. Ellis and Mr. Hamilton, it is clear, from all perspectives, that there was a verbal altercation.

According to the testimony of Ms. Ellis and Mr. Hamilton, when Mr. Hamilton informed the Grievant that there was no record of her having FMLA relief and that she would have to work the bump, the Grievant reacted belligerently and aggressively, and her verbal utterances were laced with profanity. They testified that efforts to calm her only increased her threatening behavior.

The Grievant testified that she did become upset when Mr. Hamilton told her that she would have to renew her FMLA

request. She denied using profanity and/or making threatening gestures. She said that, after some time, she simply said that she was going home. According to the Grievant, Mr. Hamilton responded by saying that if she left work, then she would be placed on AWOL. The Grievant testified that she clocked out, but then came back to get the FMLA paperwork. Ms. Ellis was still talking to Mr. Hamilton when the Grievant asked her for the paperwork. She was told she would get it later. The Grievant said that Mr. Hamilton asked her if she had clocked out and, when she replied in the affirmative, he told her to leave the building. Mr. Hamilton testified that he went to the Office of the Inspector General (OIG) for assistance since he felt threatened by the Grievant's presence at the facility. Meanwhile, the Grievant had proceeded to the parking lot where she waited in her vehicle for Ms. Tasha Young-Bennett to bring her the FMLA paperwork. Two Inspectors approached the Grievant there. She called Ms. Young-Bennett to confirm for them that she was waiting for Ms. Young-Bennett to bring the paperwork. The Grievant was then informed that Ms. Young-Bennett had been instructed not to leave the building.

The parties agree that later on the 11th, Ms. Ellis received a faxed medical statement from the Bethesda Chevy Chase Orthopaedic Associates regarding the Grievant (JX-3,

pg. 32). The statement indicated that the Grievant could "only walk on her route. Any other assignments must be mounted and/or apartments". Mr. Hamilton later told the Grievant that the statement could not be accepted to support her assertion for restrictions.

On the morning of the 12th, Mr. Hamilton brought the Grievant and her Union representative, Charles Watson, into his office and informed them that Ms. Ellis was going to conduct a pre-disciplinary interview (PDI). Ms. Young-Bennett, according to Mr. Hamilton's testimony, was there as "a witness". The parties agree that Mr. Hamilton offered the Grievant a light duty package and that she refused it. Mr. Hamilton testified that he then left the office, but he returned just minutes later when he was informed that the Grievant was exhibiting signs of distress, specifically breathing into a latex glove. Both Ms. Ellis and Mr. Hamilton testified that they found this behavior threatening. Emergency Services was called and the Grievant was transported to the hospital. When she later returned later to the facility, the Grievant was told to come back the next day.

Mr. Hamilton testified that he decided to conduct the PDI and, wanting the proceeding to be uneventful, that he requested personnel from the OIG be in attendance. The

record establishes that the PDI was conducted by Mr. Hamilton on the 13th. A typed version of questions asked by Mr. Hamilton and the Grievant's responses are included in Joint Exhibit 5 (pgs. 1314-16).

Mr. Hamilton testified that, at the end of the questioning, he informed the Grievant that she was being put on Emergency Placement "pending investigation". He further testified that he gave his PDI findings to Ms. Ellis who "started the paperwork for removal". Ms. Ellis confirmed that she received the PDI findings from Mr. Hamilton and stated that Mr. Hamilton and she "got the paperwork together".

By letter dated August 14, 2009 (JX-3, pg. 10), signed by Mr. Hamilton, the Grievant was informed that "effective August 12, 2009", she was placed on Article 16.7 Emergency Placement. The reason stated therein for the Placement was "It is believed that your {sic} may be injurious to self or others". The letter also noted that a decision would be made whether discipline would be issued "for the above cited reason".

On August 18, 2009, Union Steward Charles Watson sent a formal Request for Information to Ms. Ellis (JX-3, pg. 42). Among the information requested were copies of information leading to the 16.7 action, including any notes or reports

from OIG personnel. Mr. Watson testified that the information was never provided. Notwithstanding the absence of the requested information, an Informal Step A grievance meeting was held with Ms. Ellis on August 22, 2009 (JX 3, pgs. 14, 20). According to the notes of the meeting, the Union representative indicated that the August 14th letter failed to "state any type of charges" against the Grievant and questioned Mr. Hamilton's authority to issue the action. The official Grievance Worksheet shows a "Denied" decision, and carries Ms. Ellis' signature.

On August 29th, the Union filed a Formal Step A appeal of the Emergency Placement with Mr. Hamilton (JX-3, pg. 38). The appeal notice requested that the Step A meeting be held no later than September 5th. That meeting was not scheduled. A document (JX-3, pg. 12) bearing the initials of Robert March for the Union and Mr. Hamilton for the Service, with a date of February 12, 2010, records the agreement of the of the parties to extend the time line for filing the grievance at Step A until February 20, 2010. A formal Step A Grievance Form indicating that the grievance was "Not Resolved" (JX-3, pg. 8) reflects that the Step A meeting took place on February 19, 2010. The document is signed by Mr. March and Mr. Hamilton. The Management's reason for denying the grievance is not included in the Joint Exhibit 3 materials.

The grievance package was moved to the Step B Resolution Team on March 1, 2010. In its report (JX-3, pgs. 4-7), the Team noted that the Union's position was that the Service had "failed to give the Grievant proper written notice of the charges against her". The Union, the report notes, contended that the reason the Service gave for the action was "vague in scope". The Union further asserted that because the Grievant was not told exactly what work rule was alleged to have been violated, it was impossible to pursue her due process rights. The Union requested that the Grievant be immediately returned to work and that she be made whole for all lost wages and benefits.

The Team report also described the Service's position that the Union has not provided any evidence to show that a contract violation occurred with regard to the Grievant's Emergency Placement. The Service's Team B representative asserted that Management had given prompt, proper notice of the reason for the Emergency Placement. The B Team's report also noted the Service's contention that the Grievant's actions demonstrated that she was a liability to the safety of her colleagues and her superiors.

The Team B report does not speak directly to the February 19, 2010 (JX-3, pg. 44) memorandum to the record submitted by Mr. Hamilton at the Step B level. However,

since Mr. Hamilton presented arguments in support of the Placement not previously in the record, special note should be taken here. In this statement, Mr. Hamilton wrote that the among the reasons for invoking 16.7 were: (1) in the PDI the Grievant "admitted to instructing carriers to falsify there (sic) time records; (2) the Grievant's "inability to follow instructions"; (3) the Grievant's refusal to carry a walking route based on documentation that did not exist; and (4) "due to suspicion of mental instability".

Following its review and consideration of the grievance file, the Step B Team declared Impasse on March 2, 2010. The Union moved the grievance to arbitration on March 9th.

On October 7, 2009, the Grievant was served with a Notice of Removal to be effective November 13, 2009 (JX-5, pgs. 9-12). The letter was signed by Ms. Ellis, as Supervisor, and by Mr. Hamilton as the concurring official. The letter stated that the reason for the removal action; i.e. the charge, was "Improper Conduct/Violation of Zero Tolerance Policy". The narrative that followed the charge statement outlined the August 11th exchange between the Grievant and Ms. Ellis and Mr. Hamilton. Also included was a reference to the August 11th faxed medical statement and an accounting of the PDI on August 12th and 13th. The letter then stated that the Grievant's actions were "in direct

violation" of the "Postal Service's policy regarding Threats and Violence in the Workplace, the Capital District Zero Tolerance Policy on Workplace Violence, of EELM Section 665.24 (Violent and/or Threatening Behavior, ELM Section 666.16 (Behavior and Personal Habits)". The letter then states that "By your actions, you have demonstrated an inability to abide by Postal rules and regulation. The charge against you is very serious and provides Just Cause to issue you this Notice of Removal". After setting forth the Grievant's right to file a grievance, the letter stated that the removal would be deferred "until a decision is made on the grievance". The letter concluded by specifying the extensive documentation that the Grievant would be required to provide for back pay consideration if the Removal action was "reversed or modified on appeal".

The Union alleged that just cause did not exist for the removal. Accordingly, on October 9th, it filed a request with Ms. Ellis for an Informal Step A meeting and a request for information and documents (JX-5, pgs. 48, 49). Mr. Watson testified that the requested information and documents were not provided to the Union during the Step A grievance phases. At the Informal meeting on October 15th, with Mr. Watson representing the Union, Ms. Ellis denied the grievance.

On October 19th, Union Executive Vice President Robert Harnest notified Mr. Hamilton that the grievance was being moved to Formal Step A (JX-5, pg. 41). Mr. Harnest requested that the Step A meeting take place no later than October 26th. By agreement of the parties the time line for the meeting was extended until February 20, 2010 (JX-5, pg. 20). The Step A meeting was held on February 19th and it was noted that the grievance had not been resolved (JX-5, pg. 17). The Union moved the grievance to Step B on March 1, 2010.

The Step B Dispute Resolution Team issued its decision of Impasse on March 2, 2010 (JX 5-pgs. 3-8). In reporting its decision, the Team reiterated the details of the events of August 11 through the 13, 2009 contained in the Service's October 7, 2009 Notice of Removal. The Team's report then summarized the Service's position that Just Cause to issue the Notice of Removal did, indeed, exist because the Grievant was "belligerent and threatening" toward her supervisors and she was also "out of control", "argumentative and confrontational". This, the Service contended, shows a clear violation of the Zero Tolerance Policy. The Team report concludes the "Management contends" section by stating that the Service "is of the opinion that the Grievant is a walking time bomb as is demonstrated by the (sic) her being charged

by District Court of Prince George's County in Maryland with the assault of her husband". According to the documentation submitted by the Service, this assault occurred on March 22, 2009.

In summarizing the Union's position, the B Team's report noted that in addition to the Union's assertion that Just Cause for the Notice of Removal did not exist, the Grievant's due process rights were violated when the Service failed to timely issue the Notice. The report also reflected the Union's position that information provided by the Service "for the case file from the District Court of Maryland concerning the Grievant is totally unrelated to this case and should be disregarded".

Among the documents included in the grievance package submitted to the B Team were an August 14, 2009 "To Whom It May Concern" letter, signed by Ms. Ellis, a February 19, 2010 "To Whom It May Concern" letter signed by Mr. Hamilton, and a typed document containing the PDI questions and answers. At the Hearing, Mr. Watson testified that these documents had not been previously shared with the Union.

Ms. Ellis' August 14, 2009 letter was a two-page recounting the events of August 10-13, 2009 from her perspective. Among other things, she wrote that Mr. Hamilton

had conducted the August 13th PDI and, at the conclusion, "Gabe then handed over to me his findings".

Mr. Hamilton's February 19, 2010 letter stated, in the opening paragraph, that when he arrived at Westlake he found it necessary to revoke the Grievant's temporary acting supervisor promotion because of her failure to perform. Specifically, he wrote that "her integrity was an issue due to the Fact [the Grievant] instructed carriers to falsify their time records". After reviewing the events of August 11-13, 2009, Mr. Hamilton concluded by stating that it was his "honest concern" that the Grievant "is a walking time bomb", that the "emergency placement was issued due to suspicion of mental instability", that "an evaluation of fitness for duty is in order", and that "she also attacked another postal employee (who happens to be her husband) to the point he was close to dying".

Following receipt of the B Team's Impasse decision, the Union invoked arbitration on March 9, 2010.

POSITION OF PARTIES

Service Position:

The Service asserts that the Grievant's behavior, on August 11, 2009, constituted just cause for her Emergency Placement under Article 16.7 of the National Agreement and

for her subsequent removal from the Service. The Grievant's belligerent and threatening behavior toward Acting Supervisor Ellis and Manager Hamilton created a hostile work environment. Her continued use of profanity and aggressive movements toward her supervisors were clear violations of Postal rules and regulations. When the Grievant would not calm down despite repeated urgings to do so, Ms. Ellis and Mr. Hamilton had a clear responsibility to protect themselves, other employees, and the public, and to hold her accountable for her actions.

The Service maintains that the decision to place the Grievant on 16.7 Emergency Placement, effective August 12th, was appropriate given her aggressive behavior on August 11th and her history of violent behavior. The Service, despite the Union's contentions to the contrary, did not violate the Grievant's due process rights when the formal notice of Emergency Placement was not issued until August 14th. The Service argues that the National Panel's decision, issued by arbitrator Richard Mittenthal, did not specify a particular timeline for the official notice of emergency placement. The decision simply stated that the formal notice should be made as soon as possible so that the affected employee could immediately file any challenging grievance. Communication of the placement, on the 14th, was issued after a PDI hearing

that commenced on the 12th and was concluded on the following day when the Grievant's was able to continue her participation in the PDI.

The Service continues to assert that the issuance of the Notice of Removal to the Grievant, on October 7, 2009, was for just cause. The Grievant's behavior on the 11th of August was properly determined to be Improper Conduct and a violation of the Service's Zero Tolerance Policy on Workplace Violence. Given the severity of the offense, and in light of the Grievant's prior history of violence, termination was the appropriate action to take. The Service further adds that the resulting creation of a hostile work environment also violated ELM 665.6 (Behavior and Personal Habits)and 665.24 (Violent and/or Threatening Behavior).

In support of its position the Service submitted five (5) prior awards by this Arbitrator which denied grievances relating to Emergency Placement and, in two (2) cases, Removal. These cases were: C01N-4C-D03024668 (2/03); C98N-4C-D01064621/D01121039 (7/01); H98N-4H-D00143721 (10/01); K01N-4K-D02213128 (1/03); and, C98N-4C-D01245865/D0126477 (3/02).

For the reasons described above, the Service requests that the grievances be denied in their entirety.

Union Position:

The Union asserts that there are numerous technical flaws in both the Emergency Placement and the Notice of Removal actions which are "so apparent as to defeat the disciplines without entertaining the merits". Some of these technical flaws include: a failure to provide the Grievant basic due process rights; the untimeliness and vagueness of the Emergency Placement; the illegal withholding of requested information from the Union; the unlawful actions to obstruct the Grievant's right to FMLA protections and to force her to comply with unsafe instructions; and the use of the Capital District Zero Tolerance Policy Statement -- a statement which is not a part of the National Agreement, as the basis for discipline.

With regard to the Notice of Removal, the Union contends that the basic requirement for a full and fair pre-disciplinary investigation was completely ignored by the Service. Although Ms. Ellis signed the Notice of Removal as the charging party, it is clear from both the written statements Mr. Hamilton and she provided, and from their testimony at the Hearing, that she did not conduct an investigation. Mr. Hamilton conducted the only PDI, gave Ms. Ellis his "findings", and then acted as the reviewing official. This clearly violates the contractual requirement that the final decision to discipline will be made by an independent party.

The Union also maintains that it was Mr. Hamilton's behavior on August 18, 2009 that caused the escalation of events. He was the first to use profanity and the first to take an aggressive stance. A full and fair investigation, which included other employees on the floor at the time, would have readily identified Mr. Hamilton's improper actions and disproved the claim that the Grievant had created a hostile work environment.

It is absolutely clear, the Union argues, that the charge of Improper Conduct/Violation of Zero Tolerance Policy is not, and cannot be, supported by the facts. At the very most, the Grievant was close to being insubordinate by the position she took on accepting the pivot assignment. Even if this had been the charge, the Union remains constant in its position that this would not have provided just cause of removal.

In light of the above, the Union requests that the subject grievances be sustained and that the Grievant be reinstated with full back pay and benefits. In addition, the Union reminds the Arbitrator that under the terms of the Memorandum of Understanding (MOU) on Interest on Back Pay, signed by the parties in 1990, the Grievant is entitled to interest on the back pay. The relevant part of the MOU states "When an arbitration award specifies that an employee is entitled to back pay in a case involving disciplinary suspension or removal, the Employer

shall pay interest on such back pay at the Federal Judgment Rate".

In support of its positions, the Union submitted prior arbitration awards authored by: Howard Gamser (C3200 - 1979); Richard Mittenthal (C6238 - 1998); Dennis Nolan (C23621 - 2002); Wayne Howard (C10293A and B - 1990); and Dana Eischen (C23828 - 2002).

DISCUSSION AND OPINION

The Arbitrator agrees with the Union that the Service is guilty of a number of technical violations of the disciplinary policy set forth in the National Agreement. The Arbitrator finds that three of these violations are fatal to the actions taken by Management and, thus, both grievances must be sustained. The three violations are: (1) the failure to provide the specific charge forming the basis of the Emergency Placement; (2) the failure to conduct a full and fair investigation before the imposition of discipline; and (3) the failure to provide an independent review of the proposed charges before taking action to Remove.

Section 16.7 of the Agreement permits the Service to take immediate action when Management believes that there is the possibility of harm to the employee involved, co-workers, and/or the public. It does not, however, give Management the right to

deny due process to any impacted employee. Arbitrator Mittenthal made it perfectly clear in his National award that the immediate action must be followed, within a reasonable time, with a statement of the specific charge providing the basis for the emergency action. Mr. Hamilton's letter, dated August 14, 2009, simply states that the reason for the emergency placement of the Grievant is a belief "that you may be injurious to self or others". This statement fails absolutely to meet the requirement for specificity. It does not provide the Grievant with enough information to exercise her due process right to mount an affirmative defense to challenge the action.

The second fatal flaw in the disciplinary process is the absence of a full and fair investigation. In the instant matters, the only investigation consisted of two Managers - Ms. Ellis and Mr. Hamilton - writing out their interpretation of the events. Mr. Hamilton's testimony that he could not get any employees who were present on August 11th to come forward to support the hostile work environment allegation is simply not creditable. The Arbitrator well understands the reluctance of bargaining unit employees to give information that could be used to adversely affect a co-worker. At the very least, however, Mr. Hamilton could have provided the Union (and the Arbitrator, at the Hearing)with the names of employees that he allegedly attempted to interview. He did not, thus lending credence to the Union's

contention that a full and fair investigation was not even attempted. Additionally, if, indeed, Mr. Hamilton had such names, then it follows that they should have been provided in response to the Union's request for information. They were not and, thus, the Arbitrator drew a negative inference from the absence of this information.

Furthermore, the typed document purporting to be an account of the PDI questions and answers does not rise to a level where it can be accepted as a factual. The document should have been provided to the Union and to the Grievant for confirmation or challenge. It is disturbing that it only surfaced as an inclusion in the Notice of Removal grievance package submitted to the Step B Team. It is equally disturbing that although Mr. Hamilton took great care to announce the attendance of OIG personnel at the PDI, and the Union representative testified that these individuals "took notes", these notes were not provided to the Union nor are they included in the record of the disciplines.

Although Mr. Hamilton testified that he told the Grievant at the conclusion of the PDI meeting that a decision on discipline would be made after investigation, it is clear that no such investigation was done. Ms. Ellis wrote in her formal statement and testified at the Hearing that when Mr. Hamilton concluded the PDI, they immediately began working on the discipline papers.

The final fatal violation of the discipline process was the failure to provide for the independent upper level review of the proposed Removal. It is clear that Ms. Ellis and Mr. Hamilton conspired to avoid any review of their case by having the Notice of Removal issued by Ms. Ellis, thus permitting Mr. Hamilton to be the concurring official. The Arbitrator finds this just one of a number of instances which demonstrate bias in the entire process and supports the Union's position that neither the emergency placement nor the Notice of Removal were issued for just cause. Significant others include references to the Grievant's March 22, 2009 assault on her husband which is completely unrelated to the matters at hand, and Mr. Hamilton's *post facto* provision, at the Step B Team stage, of 'evidence' never mentioned previously to justify the Grievant's emergency placement. To the Arbitrator, this was clear evidence that Mr. Hamilton was attempting to manufacture a case, using information not relied upon when either the emergency placement or the Notice of Removal were issued, to rationalize Management's unjust actions against the Grievant.

Because of these fatal flaws, the outcome of the subject grievances is not dependent on just cause. Even if they were, however, the record before the Arbitrator would not support such a finding. On the surface it appears that the Grievant was insubordinate in refusing to carry the pivot, but she was not

charged with insubordination. The efforts by Mr. Hamilton to present a negative impression of the Grievant by his allegation of falsification of records during her tenure as acting supervisor is rendered moot by the fact that he did not initiate any type of discipline for this alleged violation of regulations. Likewise, his attempt to enhance his assertion that the Grievant was a dangerous person by introducing the Grievant's legal problems is rendered moot by the Service's failure to act. Again, it is clear from the record that the Grievant's assault on her husband occurred on March 22, 2009. Management not only did not move to take any action against the Grievant then, but also she was permitted to continue to serve as Acting Supervisor.

Based on the totality of the record, the Arbitrator cannot help but find that Mr. Hamilton's actions were so blatantly biased that they can only be classified as egregious. In light of the forgoing findings, the Arbitrator sustains both grievances. The remedy for these violations is set forth below.

AWARD

Both grievances are sustained in their entirety.

The Service is hereby directed to **immediately** reinstate the Grievant will full back pay, benefits, and seniority from August 11, 2009 until the date of her reinstatement. The Service shall provide the full back pay, with interest, on or before the second scheduled pay date after the date of this award.

The Service is further directed to **immediately** expunge all records and information relating to the grieved actions from the Grievant's record.

The Arbitrator will retain jurisdiction until notified, in writing, by both parties that the remedies ordered have been fully satisfied.

DATE: September 20, 2010 Mollie H. Bowers

Mollie H. Bowers, Arbitrator