REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	*	
	*	
between:	*	Grievant: J. Smith
	*	
United States Postal Service	*	Post Office: Montgomery, AL
	*	
and	*	USPS Case No: G06N-4G-D 12225680
	*	G06N-4G-D 12192766
National Association of	*	NALC Case No: LP06122012
Letter Carriers, AFL,CIO	*	LP042012B

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Scott Brimer

For the Union: Steve Vadorsky

Place of Hearing: Postal Facility, Montgomery, AL

Date of Hearing: January 3, 2013

Date of Award: February 15, 2013

Relevant Contract Provision: Article 16 - 16.7

Contract Year: 2006

Type of Grievance: Discipline

Award Summary:

The Grievant in this case was issued an Emergency Placement and a subsequent Notice of Removal. The incident occurred while the Grievant was participating in a protected activity. Both grievances are sustained and the Grievant shall be made whole in every respect.

Lawrence Roberts

Lawrence Roberts, Panel Arbitrator

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 3 January 2013 at the postal facility located in Montgomery`, AL beginning at 9 AM. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a tape recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

The Grievant in this case is employed as a Letter Carrier at a Montgomery, AL Postal facility, the Lagoon Park Station. The Grievant has been employed by the Agency for some thirteen years.

The Grievant was placed in an "Emergency Placement in Off Duty Status." And by Letter dated 21 April 2012, the reason for this action, according to that document was:

> **"You are hereby notified that you were placed in an off-duty status (without pay) effective April 21, 2012 and will continue in this status until you are advised otherwise.**
>
> **The reasons for this action are:**
>
> **On Friday April 20, 2012, you indicated both in writing and verbally your intent to create a violence situation in the workplace. Your actions and comments were improper and violated the Joint Statement on Violence in the Workplace.**

A further decision shall be made as to whether or not discipline shall be issued to you for your alleged conduct and actions. That decision shall be forthcoming in the near future.

You have a right to file a grievance under the grievance/arbitration procedure set forth in Article 15 of the National Agreement within 14 days of your receipt of this letter."

A Letter of Decision was then issued to the Grievant on or about 27 June 2012. The document reads as follows:

"On or about May 29, 2012, you were issued a notice proposing to remove you from the Postal Service no sooner that 10 calendar days from your receipt of that letter.

In the notice of proposed removal you were instructed when and where you could review the material related to the action. You were also afforded the right to respond to the proposal to me in person or in writing within 10 days of your receipt of the letter. You did not respond within the 10 day time frame as instructed. I must therefore render my decision.

I have given careful consideration to all the evidence in the record. I find the charges as stated in the Notice of Proposed Removal dated May 29, 2012, to be fully supported and warrant your removal from the Postal Service.

You were charged with Improper Conduct and I considered the nature and seriousness of the offense and their relation to your duties, position, and responsibilities.

Records indicate that on April 20, 2012, during a discussion with Station Manager Julius Williams you stated, "Do you know that Dereck has a gun that's why he parks across the street, a loaded gun. I have a gun too and I have brought mine to work and parked across the street. You better be careful."

When question more about your verbal statements, you again stated "you better be careful", then said "You never know about people."

You have been instructed several times to attend investigative interviews to discuss these comments, but you have failed to attend. You were instructed to report for an interview on April 24, 2012, at 11:00 am, but failed to report. You were then instructed to report for an interview on May 1, 2012 at 10:00 am, but you failed to report. Finally you were provided several dates to choose from for an interview (May 7, 2012 at 10:00 am or 1:00 pm, May 8, 2012 at 9:00 am 12:00 pm or May 9, 2012 at 9:30 am or 1:30 pm.).

The charges are supported by the evidence.

In arriving at this decision, I considered a number of factors, including, but not limited to: (1) the nature and seriousness of the offense; (2) the nature of your position as a Letter Carrier; (3) the effect of the offense on your supervisors' trust and confidence in your ability to perform your assigned duties; (4) your work record, including your length of service, job performance, and dependability; (5) the fact you were clearly aware that the conduct you engaged in was wrong; (6) your potential for rehabilitation; and (7) the adequacy and effectiveness of alternative sanctions to deter such conduct by you or other employees in the future.

In addition to what has been discussed above, I have also considered your tenure with the Postal Service and your time in the Armed Forces. I am compelled to treat you the same as I would any other similarly situated employee. Based on your actions, I do not believe there is any potential for rehabilitation.

I believe your actions violate the Code of Conduct which requires employees to be honest, reliable, trustworthy, and of good character and reputation. I do not believe you can be trusted to uphold the policies of the Postal Service. It is essential to the mission of the Postal Service that employees conduct themselves in a manner which reflects favorably upon the Postal Service, regardless of duty status. You have failed to do this.

I considered alternate sanctions for your actions, but find a lesser penalty would not be conductive to the integrity and/or efficiency of the Postal Service to serve as a deterrent of similar misconduct by your or other employees. Therefore, it is my decision to sustain the penalty of removal as outlined in the Notice of posed Removal. You removal will be effective on July 10, 2012."

The document goes on to advise the Grievant of his various rights of appeal. The above was signed by a Manager, Post Office Operations.

Both documents cited above resulted in the filing of two grievances, one protesting the Emergency Placement and the second raising opposition to the Notice of Removal.

The Parties were unable to resolve either of the disputes mentioned above. Both issues were combined for the purpose of arbitration.

It was found both matters were properly processed through the prior steps of the Parties Grievance-Arbitration Procedure of Article 15, without resolve. The Step B Team reached an impasse on each of the respective issues. Therefore, the matter is now before the undersigned for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine

witnesses. The record was closed following the receipt of the respective briefs from the Advocates on 20 January 2013.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.
2. Notice of Removal Package (G06N-4G-D 12225680)
3. Emergency Placement Package (G06N-4G-D 12192766)
4. Management of Delivery Services (Handbook M-39)

COMPANY'S POSITION:

The Service believes the evidence will show the presence of just cause for both the Emergency Placement and Notice of Removal action in this case.

Management asserts that as a 13 year Employee, the Grievant was aware of the rules concerning his conduct while, threatening statements and violence in the workplace while on Postal Property.

The Service mentions the Grievant openly admits in several signed statements that he did in fact make written statements on an official US Postal Service form, a PS Form 8190, USPS-NALC Joint Step A Grievance Form. Then, according to the Employer Advocate, the Grievant then told both the Station Manager and his Supervisor that he has brought a gun to work and management had better be careful.

The Employer implies the evidence and testimony will show the Grievant has made several statements in an effort to downplay what was written and what was said, indicating that he was simply the messenger.

It is the contention of the Employer that the Grievant was properly placed on Emergency Placement and the evidence in this case will prove the removal action was with just cause.

The Employer requests that both grievances be dismissed and denied in their entirety.

UNION'S POSITION:

Management initially points out that Management has the burden of proof in both cases. And the Union argues the evidence will show that Management did not have just cause in either matter.

At the time of the alleged threat, according to the Union, the Grievant was on Union time and in a private area, with Management, discussing grievances.

And it is the claim of the Union that the Grievant was in a protected status. The Union insists the Grievant did not threaten Management, instead was pleading with them to curb their abusive behavior toward the work force before any violent action by any disgruntled Employee would occur.

It is the contention of the Union that the Grievant has unsuccessfully been able to obtain any type of intervention at the Lagoon Park Station.

The Union also asserts the Grievant has filed grievances against Management regarding violations of the Joint Statement on Violence and Behavior in the Workplace.

The Union alleges that the Employer has turned the tables on the Grievant in this matter.

It is the claim of the Union that Management's actions in this matter are a blatant suppression of Union activity. The Union also indicates the Grievant actually clocked out and went home, only to later be informed by the Local President that he had been placed on Emergency Placement. It was also explained by the Union that a written notification was not received by the Grievant until a week later.

From the Union's perspective, the Employer failed to conduct a full investigation and also references stale discipline.

Therefore, for all the reasoning mentioned above, the Union requests both grievances be sustained and the Grievant be made whole.

THE ISSUES:

(Emergency Placement)

1. Did Management violate the M-39 section 115, ELM Section 651.4 via Article 19, and Article 16 but, not limited to, of the National Agreement when they placed Letter Carrier Jerry Smith on Emergency Placement in an off duty, no-pay status for Just Cause, and if not, what should the remedy be?

2. Did Management have Just Cause/reasonable cause to place city letter carrier, shop steward, Formal A representative Jerry Smith on Emergency Placement on April 20, 2012, and if not, what should the proper remedy be?

3. Did Management discriminate against the union steward in retaliation for protected activity, and if so, what should the proper remedy be?

4. Did Management violate Article 8 of the national Agreement when it placed the grievant in a no pay LWOP status involuntarily and if so, what should the proper remedy be?

5. Did Management violate ELM via Article 19, and did they violate Article 10 of the National Agreement when they cancelled approved annual leave for April 24 and 25, 2012, and if so, what should the remedy be?

6. Did Management violate Article 17.3 and 31.3 of the National Agreement when they failed to provide information and interviews requested by the union, and if so, what should the remedy be?

(Removal)

Did Management have Just Cause to issue letter carrier Jerry Smith a Notice of Proposed Removal on May 30, 2012 (dated May 29, 2012) for Unacceptable Conduct and subsequent Letter of Decision, and if not, what is the proper remedy?

PERTINENT CONTRACT PROVISIONS:

~~ARTICLE 16~~

DISCIPLINE PROCEDURE

SECTION 1. Principles

SECTION 7. Emergency Procedure

DISCUSSION AND FINDINGS:

This case involves two separate issues, the first being an Emergency Placement, the second, a subsequent Notice of Removal. Both issues were merged into this single case. While the quantum of proof may differ between the two matters, most, if not all of the facts and circumstances remain the same.

Both cases involve an issue of discipline, wherein the conclusions drawn, are contrasting between the Parties. Regardless of circumstance or respective argument, the burden of proof falls on Management to establish reason for their actions.

While Article 3, Management Rights, provides the Employer with the power to "suspend, demote, discharge, or take other disciplinary action...", the Employer is limited in any decisions as restricted by other Articles or Sections of the Agreement.

In my considered opinion, the discipline meted out by the Employer, in both the Emergency Placement and the subsequent removal action was inappropriate. The Grievant, at the time of the alleged incident, was performing his duties as a Shop Steward and not a Postal Employee. Therefore, the Grievant was in a protected status.

Management attempted to invoke discipline upon an Employee, when in fact, at that time, the Grievant was certainly acting in his official capacity of a Union Steward. And given the facts of this case, Management was not within their authority to invoke any type of discipline. The Grievant at that particular time was working under the broad umbrella of a protected status category.

There were many arguments raised by the Union in this matter, from failure to conduct a full investigation, failure to provide information, leave cancellation, etc. However, since the Grievant was in a protected status, any and all other arguments or charges become irrelevant. The Grievant should not have been disciplined in any respect.

I concur with the findings of **Arbitrator John M. Hamrick**, where, in a **12 September 2012** Opinion **(C06N-4C-D 12083146A/B)** wrote:

> **"The Union claimed that the grievant was in a protected status as a union representative. The Postal Service contended that the grievant was not acting in his capacity as a union representative because he was not on union time and the incident occurred on the workplace floor in front of many carriers. The facts indicate, as noted herein, that the grievant, although not on "union time", had sought and received permission from Supervisor Williams to speak with OIC Turner regarding a union matter about a PDI held that morning. He met up with OIC Turner on the workplace floor in an area that was, according to**

testimony, about 10 to 15 feet from the nearest case. Also, again, as noted herein, there was no credible evidence that any disruptions of the workplace took place. Based on the foregoing, the grievant did have protected status. As noted by Arbitrator Goldstein, in Case No. C1N-4B-D3937, if the grievant was acting in his capacity as a steward, his personal abusiveness to his supervisor falls into the zone for which special immunity status was created; a closed meeting or closed discussion to discuss union matters. He continued that it was in this context that the parties meet as equals and a steward is entitled to same deference and latitude as his or her supervisor and, it is in this situation, away from the audience of other employees, where a steward may display a loss of temper or use profanity and still be protected from discipline.

The grievant was having a closed discussion with the OIC to discuss a union matter away from the audience of other employees and, therefore, had the protected status of a union representative and was protected from discipline."

Differing in this instant matter is the fact the Grievant was acting on the capacity of a Steward while on Union Time and was not on the workroom floor. The Grievant was working as a representative of the bargaining unit and not as an individual. His comments, both oral and written were made as a Steward, rather than an individual Employee. Those comments were made on behalf of the bargaining unit. Granted, the supervisor may have been upset and even taken back. But what makes the separation here is the fact the Grievant's comments were made on behalf of the bargaining unit, while he was functioning in the capacity of ~~a Union Steward as defined in Article 17 of the Parties~~ Agreement.

By no means am I granting an order upon the Service to totally disregard any and all actions of a Union Representative while in that official capacity. There are certain acts, such as physical violence that will not and cannot be tolerated, regardless of capacity.

However, in this particular case, I was not convinced the instance came close to rising to the level of some type of serious threat or physical violence. For I am of the considered opinion, the statements made by the Grievant, assuming worst case scenario, that of the Employer allegations being true, are well within the confines of the shield granted under the auspices of being a protected activity.

Whatever occurred at that particular time was a protected activity. For the Employer does not possess the authority to discipline any Union Official when that same Union Official is acting in an official capacity. For the Employer, in this case the United States Postal Service, is not the Employer of that Union Representative, when that same Union Representative is acting in an official Steward capacity.

Being a protected activity provides that participant certain shields. And in this case, his activities on that day should not have resulted in either an Emergency Placement or

Removal being issued. Therefore, the Grievant shall be immediately reinstated and made whole of all lost wages and benefits.

AWARD

Both grievances are sustained; the Grievant shall be reinstated and made whole in all respects. In addition, the Emergency Placement and the Notice of Removal are expunged.

Dated: February 15, 2013
Fayette County PA