

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration:

Grievant: S. Asquith
Post Office: White Bear Lake, MN

UNITED STATES POSTAL SERVICE

USPS CASE: E16N-4E-C 18143936

and

NATIONAL ASSOCIATION OF LETTER CARRIERS NALC CASE No: 2018-104

BEFORE: JEFFREY W. JACOBS, ARBITRATOR

For the U.S. Postal Service: Nels Truelson, Labor Relations Specialist

For the Union: Jason Karnopp, Regional Administrative Assistant

Place of hearing: 100 S. 1st St. Minneapolis, MN

Date of hearing: April 30, 2019

Date of post-hearing briefs N/A – none filed

Date of Award: May 16, 2019

Relevant Contract provision: Article 14, 15 and 19.

Type of grievance Contract

AWARD SUMMARY

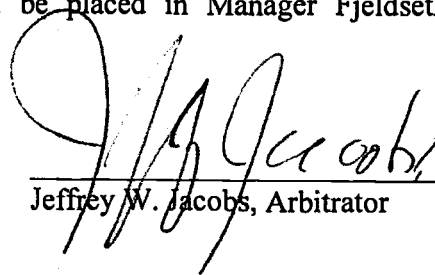
The grievance is SUSTAINED as follows:

Manager Jean Fjeldseth shall not be placed in a supervisory position over craft employees.

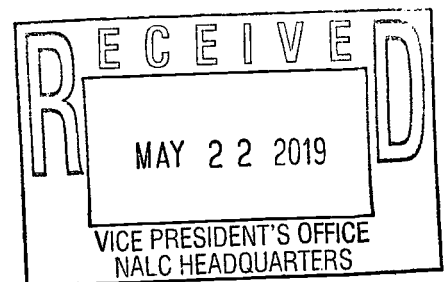
Manager Fjeldseth shall be personally and directly monitored by a manager at a higher level whenever Manager Fjeldseth is in contact with craft employees. Such monitoring shall be for a period of not less than 2 years.

An official copy of this decision shall be placed in Manager Fjeldseth's Official Personnel File.

Dated: May 16, 2019



Jeffrey W. Jacobs, Arbitrator



ISSUE

The union stated the issue as follows: Did White Bear Lake Manager Fjeldseth violate the National Agreement, Joint Statement on Violence and Behavior in the Workplace (JSVB), M-39 Section 115.4 and ELM Section 665.24 by her behavior? If so, what is the appropriate remedy?

Management stated the issue at the hearing as follows: Did Management violate the National Agreement, Joint Statement on Violence and Behavior in the Workplace (JSOV), by its handling of the allegations against White Bear Lake Station Manager Jean Fjeldseth concerning her conduct on February 8, 2018? If so, is the remedy requested by the Union appropriate?¹

Upon a review of the evidence and documents and other evidence in the file the arbitrator framed the issue as follows: Did White Bear Lake Manager Fjeldseth violate the National Agreement, Joint Statement on Violence and Behavior in the Workplace (JSVB), M-39 Section 115.4 and ELM Section 665.24 by her behavior on February 8, 2018? If so, what is the appropriate remedy?

RELEVANT ELM SECTIONS AND JOINT STATEMENT PROVISIONS

ELM 665.24

Joint Statement on Violence and Behavior in the Workplace – dated February 14, 1992

FACTUAL BACKGROUND

The facts of this matter were disturbing. The grievant was on February 8 2018 a CCA in the White Bear Lake, MN postal facility. Ms. Jean Fjeldseth was the manager at that station.

As discussed more below, there was considerable evidence that Ms. Fjeldseth's tenure at the station was fraught with problems due to her demeanor and workplace behavior. There were allegations of threats, intimidation, loud and profane language toward postal employees that not only offended those workers, but also members of the public as well. As noted, there were multiple statements submitted by other employees as well as 8 other similar grievances regarding Ms. Fjeldseth's behavior in the case file. No decision will be reached with respect to those other grievances but some of that evidence was considered in determining whether there was a violation of the JSVB, ELM 665.24 and/or M-39 section 115.4 for her actions on February 8, 2018.

¹At Step B, the Service proposed a slightly different issue statement as follows: Did Management at the White Bear Lake Station violate the National Agreement, Joint Statement on Violence and Behavior in the Workplace (JSVB), M-39 Section 115.4 and ELM Section 665.24 by her behavior? If so, what is the appropriate remedy?

The focus of this case given the grievance at hand, see Form 8190 in the case file and the rulings made at the hearing regarding the scope of the grievance here, is on the events of February 8, 2018.

The evidence showed that on that date Ms. Asquith was delivering mail at a Senior Designated residence and living facility on her route. It was clear from the evidence that the residents are in many cases quite elderly and that the facility is as one can imagine a very quiet and mostly serene location. The evidence also showed that Ms. Asquith knows many of the residents and that they eagerly await the mail delivery. She has a good relationship with the staff and h residents there and is well known by many of them.

On the day in question, Ms. Fjeldseth went to the facility, apparently knowing when Ms. Asquith would be there to deliver a letter to her informing her that she would be moved off her route to another route located in the Roseville, Minnesota area. The overall evidence showed that Ms. Asquith, even though she was a CCA, had a so-called "hold down" on her route. That meant that she could not be transferred to a different route. Ms. Asquith testified that she was of the understanding that the transfer was improper.

For reasons which remain a mystery, instead of having the conversation with Ms. Asquith in the privacy of the station or some other more appropriate location, Ms. Fjeldseth chose to go to the residence facility and give her the letter there.²

There was clear testimony from a staff member at the residence facility that she was working that day when she heard a loud and somewhat disturbing banging on the door to the office. The staff member works at the facility and noted that the office was locked and no one was there to let Ms. Fjeldseth in at the time she appeared there.

² Ms. Fjeldseth did not appear at the hearing nor did she testify. She is now apparently living in New York and had informed the representative from the Service that she has no current plans to return to Minnesota. Her refusal to testify at this hearing, despite her clear knowledge of the allegations against her, spoke volumes about her intent and her actions that day and gave rise to a negative inference regarding her possible testimony. See Elkouri and Elkouri, *How Arbitration Works*, 7th Ed at Section 8.4.I where the authors observe that "the failure to call as a witness a person who is available to it and who should be in a position to contribute informed testimony may permit the arbitrator to infer that had the witness been called, the witness adduced would have been adverse to the position of that party."

While one can never know what such testimony would be unless and until it is given under oath, Ms. Fjeldseth's failure to testify here created the situation where the only sworn testimony on this record is that given by the witnesses to the February 8, 2018 incident. The testimony from both Ms. Asquith as well as the staff member and resident was damaging to Ms. Fjeldseth's and the Service's position and showed by clear and convincing evidence and then some that Ms. Fjeldseth's actions that day violated all of the relevant provisions of the ELM, JSVB and M-39 at issue in this case.

Against her better judgment, the staff member went to the door only to be confronted in a somewhat loud and angry manner by Ms. Fjeldseth, who showed her US Postal Service badge and demanded to be let into the facility. The residence facility is a secure building and Ms. Fjeldseth had no authorization to be left in *per se* but the staff member unlocked the door.

The staff member at the facility, who was shown to be entirely disinterested in the result of this matter, testified credibly that instead of even thanking her for letting her in, Ms. Fjeldseth simply barged past her without saying a word and brusquely entered the area where Ms. Asquith was delivering mail. There is a video that was reviewed several times in the deliberation of this matter that supported the staff member's testimony and shows Ms. Fjeldseth brush past her and walk in a strident and somewhat brusque way toward the area where Ms. Asquith was delivering mail.³ There was no evidence that she 'waved her arms or yelled as she walked into the mail delivery area but but was clear that Ms. Fjeldseth's demeanor appeared aggressive to say the least on the video.

The video though does not show the entire interaction between the two women. The video does not show Ms. Fjeldseth entering the door nor does it show the interaction where Ms. Asquith was delivering the mail. There is a considerable gap in time there and the testimony of the eyewitnesses was persuasive enough that there could indeed have been the type of arm waving and shouting that they claimed occurred. Thus, the fact that the video does not show the "arm waving" and other behaviors does not, on this unique record, mean that did not happen.

The evidence then showed that Ms. Fjeldseth and Ms. Asquith are out of view of the video for a short time and both then appear in the foyer area, which is clearly a public area. The video shows a lady seated in a chair who clearly notices the conversation taking place between Ms. Fjeldseth and Ms. Asquith only a few feet behind her. She gets up at one point and appears to look back toward the two while she walks around. That person did not give testimony here but it appeared that she was bothered by the conversation and simply stepped away from it.

³ The video did not have an audio component so it was critical to hear from both a staff member and a resident in the facility in this hearing to get a full picture of what occurred that day and of the loud and somewhat abusive manner in which Ms. Fjeldseth confronted Ms. Asquith.

The overall record showed that Ms. Fjeldseth gave the letter reassigning Ms. Asquith's route to her and that a conversation ensued in which Ms. Fjeldseth waves her finger at Ms. Asquith in a confrontational manner. Ms. Asquith gave credible and persuasive testimony that Ms. Fjeldseth's voice became louder and louder and that her body language in rocking back and forth appeared physically threatening to her. Ms. Fjeldseth can be seen clearly rocking back and forth and while there is no audio it is apparent that she is agitated and points her finger at Ms. Asquith in a somewhat confrontational manner.

There was testimony from a resident at the facility who indicated that she did not witness the actual conversation between Ms. Fjeldseth and Ms. Asquith, but who could hear it from her room, which was only a few feet away from the front foyer area. The resident testified credibly that she was certain that this was an angry and loud conversation; entirely unusual for this location and that she was concerned about the tone of voice Ms. Fjeldseth was using.

There was evidence that Ms. Fjeldseth has a hearing disability and frequently speaks in a loud voice. The Service asserted that her loud voice is due to hearing issues but, on this record, both Ms. Asquith and the witnesses from the facility itself showed that Ms. Fjeldseth can speak in a "normal" inside tone of voice. On this record it was clear that the reason Ms. Fjeldseth was getting louder had little if anything to do with her hearing but rather with her aggressive and frustrated anger over Ms. Asquith questioning whether the reassignment ran afoul of the hold she had on that route.⁴

Ms. Asquith clearly told Ms. Fjeldseth about the hold down on the route and indicated that she simply could not do the Roseville route due to daycare issues. It was at that point, having been confronted with "push back" over the route, that Ms. Fjeldseth became angry, agitated, loud and abusive. There was no evidence of profanity in this particular incident but the overall record showed that Ms. Fjeldseth's action were completely inappropriate, especially given the location where all this occurred.

⁴ The hold down was apparently true as Ms. Asquith was never transferred to the Roseville route. Why Ms. Fjeldseth did not discover this, even though there was some allegation by the Service that she "checked," but did not find anything, was never made clear at the hearing. What was clear was that for whatever reason, Ms. Fjeldseth, whose job it was to determine that did not and that she went to a senior residence facility to confront an employee with the letter and that the conversation, which frankly should never have occurred there, turned into something of a shouting match that resulted in Ms. Asquith being in tears over it. All this occurred in a public place around people with whom Ms. Asquith works every day. There was evidence that one resident offered her tissues and indicated that they were quite upset by Ms. Fjeldseth's actions and demeanor that day.

Ms. Fjeldseth is then seen leaving the area after several minutes. There was some dispute about how long this whole affair took. At one point the union and its witnesses thought it took approximately 36 minutes whereas the video lasts for about 24 minutes. This discrepancy did not result in a material difference in the testimony nor did it show that the witnesses were either lying or mistaken about what they saw or heard. The inescapable fact was that Ms. Fjeldseth was there for reasons that remain unclear and that instead of having the confrontational conversation in a private place – like the postal facility in her office – she opted instead to have it out with a CCA in a public place while that carrier was attempting to do her job and deliver the mail.

On this record whether it took 24 minutes or 36 minutes did not alter the operative facts. Neither did it alter the clear evidence, unrefuted by anything the Service or its witnesses were able to provide, that Ms. Fjeldseth was out of control, was abusive and even threatening in her words and that she made decisions and undertook actions that were in clear violation of the ELM, M-39 sections and the JSVB set forth in the case file.

On this clear record, it must be presumed that the sole reason to go to the residence facility was based on an intent to intimidate, embarrass and threaten Ms. Asquith. There was no reason the letter re-assigning her could not have been given to her in another more appropriate time and place. It was clear from the evidence that that Ms. Fjeldseth's actions that day constituted abusive, belligerent and somewhat threatening actions directed toward Ms. Asquith.

There was also considerable evidence that these actions were consistent with her actions that day and showed what the union argued was a troubling pattern of such behavior in the past. See, Federal Rule of Evidence #406, which provides as follows:

“Evidence of a person’s habit or an organization’s routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.”

See also, Federal Rule of Evidence #405, which provides as follows:

Methods of proving Character “(a) By Reputation or Opinion. When evidence of a person’s character or character trait is admissible, it may be proved by testimony about the person’s reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person’s conduct.

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Thus, under the Federal Rules of Evidence, habit evidence is defined as evidence of a repetitive response by a person to particular circumstances, characterized by particularity and frequency. Although the general rule is that propensity evidence is not admissible to prove conduct on a particular occasion, habit evidence is admissible as an exception to the general rule for the purpose of proving how someone would act or react in a particular situation at issue.

Various commentators have opined that such evidence may not be admitted for the purpose of showing that a person committed a given fact on a particular occasion.⁵ That requires evidence of the violation or action by competent evidence on that occasion, but rather may be admitted to demonstrate that a person has a propensity to react in a certain way under given conditions. See e.g., *Loyola University of Chicago Law Journal*, Schroeder, Vol 29, (1998).

The question of habit and character evidence has been the subject of many scholarly articles, law review articles and treatises but it appears that the general rule supported by the clear pronouncements of the Federal Rules is that habit evidence may not be used to show what happened on a particular day but that it may be admitted to show that it was more probable than not that it did, where there is direct and corroborative evidence to support that conclusion regarding a particular event.

There was evidence that Ms. Fjeldseth was counseled on several occasions regarding her workplace demeanor and was given several opportunities for retraining including taking an online course regarding appropriate behavior in the workplace. While this example was one of multiple examples that showed that Ms. Fjeldseth did not take these seriously, one course was to take approximately one hour to complete by answering various questions and scenarios online.

It took her 6 minutes to complete it.

There was thus ample support both through direct evidence by Ms. Asquith as well as from the stipulated statements by some 14 employees and former employees whose stipulated statements showed that they had personal and direct contact with Ms. Fjeldseth regarding her alleged propensity to anger and abusive behavior under certain circumstances.

⁵ See, Federal Rule of Evidence #404, which provides "Character Evidence; Crimes or Other Acts. (1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."

This evidence was of course not admitted to show that she actually violated the JSOV, ELM or M-39 on February 8, 2018, but showed by clear and convincing evidence that her habit was to do exactly what Ms. Asquith and the other witnesses said she did on that day.

The Service claimed on behalf of Ms. Fjeldseth that she was unavailable due to her moving to the State of New York and provided a very short medical document saying that she was under the care of a doctor there. It said little else and there was nothing in the note submitted that indicated that she unable to travel to Minnesota to testify at the hearing, which had been scheduled in December 2018 but rescheduled to April 30, 2019. That claim rang somewhat hollow on this record.

There was thus no credible reason given why she could not have traveled here, even though there was evidence that her address is still listed in the St. Paul Minnesota area and she remains, theoretically assigned to the White Bear Lake facility. The claim that she was somehow unable to travel here was overshadowed by the clear evidence that she did not want to come back to testify. The negative inference referenced by the authors to Elkouri was a factor here that was considered.

Further, there was also a series of statements by "stipulated witnesses" from no fewer than 14 other White Bear Lake postal employees and former employees regarding Ms. Fjeldseth's workplace demeanor and behavior. The parties stipulated that if called to testify live at the hearing these individuals would do so consistently with their statements in the case file at various pages, 80 through 96. Those statements were reviewed as part of the case file, but involved other incidents than those of February 8, 2018. This decision rests entirely on the conduct by Ms. Fjeldseth on February 8, 2018 in relation to the JSVB, M-39 provisions and ELM 665.24. Accordingly, no decision is made with respect to those other allegations here either.

Finally, the parties executed a Pre-Arbitration Abeyance Agreement on December 31, 2018 whereby no fewer than 8 other similar cases were held in abeyance. See, Joint Exhibit 6. All of those other cases involved similar types of allegations by other employees against Ms. Fjeldseth but due to allegations of witness tampering by Ms. Fjeldseth, those other cases were held in abeyance by agreement of the parties. As discussed further herein, no decision regarding the allegations of witness tampering by Ms. Fjeldseth is made here and no evidence regarding those allegations was introduced or considered.

As discussed more below, the essential issue is whether these facts arose to the level of requiring action under the JSOV, ELM and M-39 and what jurisdiction there is based on the arbitral cases submitted by the parties for the remedy requested by the union in this unique case.

There were no procedural arbitrability objections raised and the matter is properly before the arbitrator. It is against that factual backdrop that the analysis of the matter proceeds.

PARTIES' POSITIONS

UNION'S POSITION

The union contended that Manager Jean Fjeldseth has repeatedly violated the JSVB, ELM 665.24 and M-39, section 115.4 by her abusive demeaning, intimidating and even threatening behavior and has a long history of such behavior as evidenced by the sheer number of complaints and problems she created from almost the moment she appeared at the White Bear Lake Station and that her actions on February 8, 2018 was but one example of such behavior. In support of this position the union made the following contentions:

1. The union introduced evidence from the grievant as well as other employees at the hearing who reiterated that Ms. Fjeldseth's workplace demeanor and actions have created a hostile and toxic work environment. Ms. Fjeldseth frequently yells at employees so loudly that she can be heard by other employees and even members of the public – some of whom have gone so far as to file complaints about what they heard and saw at the White Bear Lake Station.

2. The union argued that while the focus of this case is on the February 8, 2018 incident, evidence of Ms. Fjeldseth's overall workplace demeanor can and should be considered as supporting the allegations of violation of the JSVB, ELM and M-39 on the day in question. The union argued that her general demeanor was no different than what she exhibited on February 8th.

3. The union introduced multiple statements from both former and current employees who have had contact with Ms. Fjeldseth to show that she has a habit of abusive and demeaning, even threatening, behavior towards those she supervises and that her workplace demeanor and actions constituted violations of the JSOV, ELM and M-39. See, Case file at pages 80-96.

4. The union also introduced evidence of several prior grievances and issues regarding Ms. Fjeldseth's behavior when she was assigned to facilities in Minneapolis. These were resolved, or so it was thought, but the behavior recurred. In a very unusual move, the representatives from both the union and the Service sent a letter to the St. Paul Postmaster essentially warning him of Ms. Fjeldseth's propensity for abusive and hostile behavior. For whatever reason, instead of heeding that warning, Ms. Fjeldseth was promoted and put in charge of the White Bear Lake facility where almost immediately the bad behavior that the parties had sought to rectify by having her go through training, started all over again.

5. The union argued that Ms. Fjeldseth simply cannot be trusted to supervise craft employees no matter where she goes and that she must be limited from doing so and the award ordering that be placed in her official file so that even a facility in another state as far away as New York is aware of her issues.

6. The union also introduced evidence of prior problems with her workplace demeanor that were brought to her attention with the requirement that she undergo training and counseling to change her aberrant and bellicose behavior. The union argued that she did not take any of these seriously and that on one occasion, took an online course on improving her workplace demeanor and interactions with co-workers that was scheduled to take one hour but it took her all of 6 minutes to complete. The union argued that this demonstrates an extraordinarily cavalier attitude and a recalcitrant resistance to these directives.

7. The union argued that the eyewitnesses to the events of February 8, 2018 were all credible and that their testimony showed that Ms. Fjeldseth again, as she almost always does, got angry, loud, abusive and threatening with Ms. Asquith.

8. The union further asserted that there was no reason to go to a senior designated residential facility which is a serene and calm place and have a loud exchange, which was so upsetting to Ms. Asquith that she was reduced to tears because of it. The letter was not only in error, in that Ms. Asquith did have a hold on the route – and was never moved to a different route - but also could have been given to Ms. Asquith in a much different location and place.

9. The union asserted that the implication must be that Ms. Fjeldseth did what she did, and when and where she did it that day for the sole purpose of intimidating and embarrassing Ms. Asquith. This was totally uncalled for and demonstrates a troubling almost psychopathic attitude toward other employees.

10. The union submitted multiple cases in support of its position and for the remedy it seeks in his matter. The Union cited *USPS and NALC*, Q90N-4F-C 9402477 (Snow 1996) where the venerable Arbitrator Carlton Snow ruled that the JSOV is subject to the grievance procedure in the National Agreement and that the union had access to the grievance procedure to resolve any dispute that might arise over the JSOV. Slip op at page 23. The Service had argued that there was no remedy available for a violation of the JSOV by management personnel but Arbitrator Snow rejected that argument as set forth above.

11. The union cited *USPS AND NALC*, E90N-4E-C 94051426 (Ames 1999) for the proposition that a supervisor's history of abusive behavior is relevant and can be considered in a case where a violation of the JSOV is alleged. Arbitrator Ames also ordered various actions be taken by the supervisor, including a fitness for duty exam, an apology as well as other things he must do before being reinstated.

12. Arbitrator Ames also cited the Snow award, discussed above, as well as the Gamser award in *USPS AND NALC*, NC-S-5426, *infra*, National Awards in H1N-1J-C 23240 (Bernstein) and H1N-5F-D 2560 (Aaron) in support of the power of the arbitrator to fashion an appropriate remedy where there is a finding that the JSOV has been violated.

13. The union cited several other awards for the proposition that arbitrators have broad powers to fashion remedies where there has been a violation of an agreement between the parties. In *USPS AND NALC*, NC-S-5426 (Gamser 1979) the arbitrator awarded monetary remedies as part of the broad power to fashion remedies. See, also, *USPS AND NALC*, H1N-5-FD-2560 (Aaron 1984) the arbitrator discussed the power of arbitrators operating under the grievance procedure to fashion appropriate remedies for violations of the National Agreement. The arbitrator ruled that there was broad power to fashion appropriate remedies— in that case to award interest on back pay awards. The arbitrator cited cases from the Steelworkers Trilogy and cited the following language with approval: “an arbitrator must be allowed flexibility and the discretion to bring his informed judgment to bear in order to reach a fair solution of a problem.” The union argued that it is thus well within the arbitrator's power to grant the remedy it seeks given the outrageous and abusive behavior Ms. Fjeldseth exhibited on February 8, 2018.

14. In *USPS AND NALC*, K16N-4K-D 17682139 (Drucker 2018) the arbitrator discussed the JSOV itself in the context of “finger pointing.” There an employee approached another employee in a threatening fashion waving her finger at the other worker. A physical altercation followed in which the second employee, the eventual grievant in the case, threw the first employee to the ground. The arbitrator overturned the removal basing her decision that the first employee was physically menacing. The union argued that Ms. Fjeldseth was also intimidating and somewhat physically menacing when she waved her finger at Ms. Asquith, rocked back and forth in a physically threatening way and became louder and more verbally abusive. While there was no physical contact in this case, the union argued that the JSOV was meant to prevent such actions before they became physical and before there was a tragedy. The union argued too that the efforts made to get Ms. Fjeldseth to correct her behavior have simply not worked – she is not “getting it” and that the remedy it seeks now is appropriate and necessary to prevent the type of physical assault that occurred in the Drucker case.

15. The arbitrator in *USPS AND NALC*, K94-N4-K-D 98057987 (Carroll 1998) noted that the Service asserted in a case involving a removal for violation of the zero-tolerance policy against workplace violence, that “every employee’ is aware of the zero-tolerance policy. The union asserted that Ms. Fjeldseth should also be held to the same standard yet her workplace demeanor on February 8, 2018 was clearly both threatening and intimidating and entirely inappropriate not only in the words and actions she took but also in the location she chose to have her discussion with Ms. Asquith.

16. In *USPS AND NALC*, E01N-4E-D 06096941 (Frankman 2006) the Service made almost the very same arguments before Arbitrator Frankman that the union made here and argued that the grievant was alleged to be “strong-arming” and bullying co-workers and had been doing so for some time. Management also asserted that it must “err on the side of caution “when dealing with workplace violence and abusive behavior to prevent the very sort of tragedy that the JSOV was drafted to prevent after the Red Oaks tragedy.⁶

⁶ Sadly, there was a terrible tragedy involving a former postal employee who entered a postal facility and shot and killed several other people. It was in response to this that the parties drafted the JSOV. Sadder still, these types of tragedies happen with all too terrifying frequency and it is clear that the very purpose of the JSOV is to prevent such tragedies in the future by making sure people treat each other with dignity and respect.

17. In *USPS AND NALC*, J06-4J-D-D 09363790 (Jacobs 2011)⁷ the arbitrator discussed the JSOV specifically and limited a postmaster's supervision of letter carriers. There the postmaster yelled at letter carriers, ordering them to comply with orders even though they were not on the clock, used a loud and intimidating voice to a carrier in front of customers what made the carrier feel "intimidated and fearful," raised his voice and pointed his finger in a threatening manner toward a different carrier. She ruled that "in fashioning a remedy, it is not the arbitrator's role to determine why the postmaster acted in ways that resulted in letter carriers justifiably feeling harassed, demeaned, disrespected and that created an inappropriate and an unnecessarily stressful workplace. Rather a remedy should prevent or avoid situations where violations may arise." Slip op at page 13. She ordered that the postmaster not engage in any on the street supervision of, or interaction with letter carriers." Slip op at page 14. The union argued that this case is eerily similar in that the interactions took place in the public arena, did not involve any actual physical contact but did involve loud voices and finger waving and threatening behavior that was inappropriate.

18. Likewise, Arbitrator Karen Jacobs also imposed limitations on a supervisor's interactions on craft employees where he also had received training that apparently did not work. See, *USPS AND NALC*, E06-4E-C 09402571 (Jacobs 2010) at Slip op at pages 14-16. The union argued that there, as here, "sitting the supervisor" in front of a computer screen again will not help nor will it alleviate the problem. The most appropriate remedy is to prevent Ms. Fjeldseth from supervisory duties over craft employees.

19. The union cited *USPS AND NALC*, F06N-4F-C 10264533 (Monat 2012) ruling that management also violated the JSOV when it ignored and failed to act on a supervisor's egregious conduct. The supervisor was found to have engaged in sexually harassing, bullying, intimidating, threatening and humiliating behavior and was ordered to issue a written apology and was restricted from "ever supervising directly or indirectly, any letter carrier wherever he would be assigned." The union argued that there is ample precedent for the remedy it seeks and that Ms. Fjeldseth should be subject to this same type of restriction. See also, *USPS AND NALC*, F94N-4F-C 97033030 (Rehmus 1997) where the arbitrator took evidence of past actions by the supervisor into account, even though they had occurred some 20 years before, and found that the supervisor had violated the JSOV. The arbitrator ordered an apology and a cease and desist.

⁷ The arbitrator in that case is Karen Jacobs and is no relation to the undersigned.

20. The union countered the claim that such a remedy would be tantamount to firing her, as asserted by the Service. First, as noted above, there have been many such awards that have imposed similar restrictions. Second, Ms. Fjeldseth was already re-assigned to the downtown post office where she was not supervising craft employees, for a period of several months. Thus, she can remain employed, but not in the capacity of supervising craft employees. The union argued that the restrictions should apply to her no matter where she serves and that simply sending her to another state does not solve the problem, but merely moves it.

The union seeks an award as follows:

1. Ms. Fjeldseth shall not be placed in a supervisory position over craft employees.
2. Ms. Fjeldseth shall be personally monitored by a manager at a higher level whenever Ms. Fjeldseth is in contact with craft employees,
3. An official copy of this decision shall be placed in Ms. Fjeldseth's Official Personnel File.⁸

POSTAL SERVICE POSITION

The Service took the position that there was no violation of the National Agreement, JSOV, ELM or M-39 and that the union's case should be denied in its entirety. In support of this position, the Service made the following contentions:

1. The Service asserted most vigorously that the inquiry in this case must be limited to the events of February 8, 2018 and nothing beyond that. There are other grievances pending, some of which do encompass a broader time frame but that this grievance is over that date only and exclusively. Thus, any attempt by the union to bring in evidence of other interactions between Ms. Fjeldseth and other employees is beyond the scope of this grievance and must be rejected. The Service cited *USPS AND NALC*, S1N-3P-C 14113 (Foster 1984) for the proposition that an individual grievance cannot be recharacterized as a class grievance. Thus, this case must rise and fall on its unique facts, not those that may be brought in on other separate grievances. See also Article 15.

2. The Service asserted that while Ms. Fjeldseth has had some issues in the past that have been dealt with and that she undertook training to improve her interactions with co-workers and the employees she supervises.

⁸ The union was quick to point out that it is not seeking the removal of Ms. Fjeldseth from the Postal Service nor was it seeking that she be retrained, since that has already been attempted without success. See allegations above regarding the sensitivity training she was ordered to take and that was scheduled for an hour but took Ms. Fjeldseth a total of 6 minutes to complete.

3. The Service also asserted that the White Bear Lake facility was underperforming prior to Ms. Fjeldseth's arrival and that she was brought in to improve performance. The Service witnesses asserted that the workers, some of whom had been allowed to become somewhat lax in their performance chafed at the stricter application of Postal rules and regulations.

4. Moreover, Ms. Asquith should not have refused to even accept the transfer letter that Ms. Fjeldseth was trying to hand to her. The video shows her refusing to even take it and that she handed it back to Ms. Fjeldseth. This was a violation of the time honored "obey now grieve later" rule that is at the very cornerstone of the employee employer relationship. Ms. Asquith could simply have taken the letter as directed and spoken to her union representative later about it and gotten it straightened out then. Instead, she escalated matters by brazenly disobeying the directive to take the letter and deal with the re-assignment of route.

5. Further, Ms. Asquith was a CCA and generally had no "right" to a particular route. CCA's are advised from the outset that they may be moved around to different routes, just as Ms. Fjeldseth was attempting to do on February 8, 2018.

6. The Service further asserted that Ms. Fjeldseth has a hearing disability and frequently speaks in a somewhat louder voice due to her hearing impairment. That was all that was going on that day and there was no overt attempt to intimidate or threat to anyone.

7. The Service also noted that the entire matter may well be moot since Ms. Fjeldseth is no longer assigned to the White Bear Lake facility and has now moved out of the state of Minnesota to New York. She informed postal representatives that she has no present time intentions to return to Minnesota.

8. Further, Ms. Fjeldseth is undergoing medical treatment for an undisclosed condition in New York and due to that was unable to return to Minnesota to give testimony in this matter. The Service argued that no negative inference should be drawn from her failure to testify. This was a simple case of a manager having a somewhat testy conversation with an employee who simply wasn't obeying her directive or following orders, but it did not rise to the level of a violation of the ELM, the M-39 or the JSOV.

9. The Service cited numerous cases where managers have had loud conversations, even shouting matches with employees but who were not found to have violated the JSOV or any of the applicable regulations regarding workplace demeanor. A manager is entitled to give orders and whether the employees like them or not, they must adhere to them.

10. The Service asserted that the remedy sought by the union is entirely inappropriate and would in effect render Ms. Fjeldseth unemployed by the USPS. She must have the ability to supervise employees since that is her job and her legitimate role. The union's remedy is also outside of the jurisdiction of an arbitrator to order even under the JSOV and should be rejected.

11. The Service cited the following prior arbitral awards: In *USPS AND NALC*, B06N-4B-D 08130117 (Cenci 2008) the arbitrator noted that the JSOV prohibits acts of violence and intimidation and noted that a violation may be found even if there is no overt threat of violence. She tempered that with the statement that not every supervisor with a brusque manner is in violation of the JSOV. Even though multiple employees may feel harassed, that may not be enough to warrant a finding of a violation of the JSOV. She further required that "there be proof of factual circumstances or incidents ... that a reasonable person in the same situation would have felt harassed, intimidated or treated with a lack of dignity or respect." Slip op at page 10. The arbitrator noted that the supervisor in that case had a somewhat brusque style of communication but that it did not rise to the level where a reasonable person would feel threatened or harassed pursuant to the JSOV.

12. In *USPS AND NALC*, B06N-4B-C 0823005 (Ross 2008) the arbitrator found that the Service did not violate the JSOV and required a very high quantum of proof and found that the mere raising of a voice and waving a finger did not on the facts presented constitute a violation of the JSOV. He noted that some employees were annoyed but that this factor alone did not rise to the level necessary to show a violation. Here the Service argued that while Ms. Asquith was upset, it was from being told she would be re-assigned as much as anything Ms. Fjeldseth did. Ms. Fjeldseth was her supervisor and was required to tell her about the transfer. That she did not like it is not a violation of the JSOV. See also, *USPS AND NALC*, C01N-4C-C 04083109 (Furman 2004) for a similar result, i.e. where the conversation was heated but did not rise to the level of a violation of the JSOV. There he noted that the JSOV is not to be used as a "prophylactic against every insult, real or imagined, every harsh tone, real or imagined. It does not eliminate personality conflicts. To implicate Joint Statement in all circumstances where there is a misunderstanding or a perception of rude or unprofessional treatment is counterproductive."

13. In *USPS AND NALC*, H98N-4H-C 02157499 (Stephens 2004) the arbitrator found that the evidence and the supervisor had not violated the JSOV. He used the “reasonable person” standard and noted that there was no physical contact, no profanity no overt threats of violence did not point his finger and no “in your face confrontation”. The supervisor did not shout at the employee. The Service argued that the quantum of proof is indeed high and that here the facts showed that Ms. Fjeldseth made no threats and that her loud voice was the result of her hearing disability.

14. In *USPS AND APWU*, E10-C-1E-C 16082783 (Gomez 2019) the arbitrator required that there be a showing of some failure to act by management, a specific provision of the contract that management violated and a request that bears a nexus to the claimed violation. Without that there can be no remedy. Arbitrator Gomez found on the facts presented that there was no violation. She further found that the APWU had not signed the JSOV and therefore was unable to claim a remedy pursuant to it.

15. In *USPS AND NALC*, E11N-4E-C 1612904 (Duffy 2016) the arbitrator ruled that the union had not proven a violation of the JSOV. He required clear and convincing evidence of such a violation, which had not been proven in that case. Slip op at page 4. He further found that the supervisor did not wave his arms or flagrantly point a finger at the employee involved in the case. The “fact that [the supervisor] may have used a few harsh words and may have delivered some of them in a loud voice when discussing performance issues with the employees did not violate the JSOV.” Slip op at page 15. The Service argued that Ms. Fjeldseth likewise did not wave her arms and while she may have used a louder voice than usual it was not so loud as to warrant a finding, by clear and convincing evidence that there was a violation of the JSOV.

16. In *USPS AND NALC*, F94N-4F-D 98026513 (Levak 2001) the arbitrator likewise found no violation of the JSOV on the facts presented. These remarks, while harsh were made over the phone and did not constitute a threat or overt intimidation.

17. The Service argued that overall, while Ms. Fjeldseth’s tone may have been harsh it did not constitute a threat of any kind and that there was no violation of the JSOV, M-39 or applicable provision of the Elm and no remedy can be imposed.

The Service seeks an order denying the grievance in its entirety.

DISCUSSION

THE FEBRUARY 8, 2018 INCIDENT

Little more needs to be said about this event beyond the description set forth above. It was clear that Ms. Fjeldseth made a conscious decision to confront Ms. Asquith at the senior residence facility. This decision was entirely inappropriate and as one of the cases cited by the union observed, while an on-street observation is well within the purview of the manager, this must be tempered by some common sense rationale. Why on earth would she have gone to this particular facility and then caused the conversation to degenerate into a screaming match where all the evidence showed that Ms. Fjeldseth shouted and berated Ms. Asquith to the point of tears in front of members of the public, many of whom were quite familiar with the carrier? The answer is rhetorical – there is no rational explanation for why this happened at all or why this entire conversation could not have occurred at the postal facility.

Moreover, there was ample, even clear and convincing, evidence that Ms. Fjeldseth created a hostile environment due to her demeanor in this. There was no evidence that Ms. Asquith raised her voice or made any threatening statements or gestures. She indicated that she thought she had a hold down on the route, which apparently, she actually did since she was never re-assigned to the Roseville, Minnesota route, but that apparently angered Ms. Fjeldseth to the point that she escalated matters beyond what was reasonable.

Both the eyewitnesses and the video showed her aggressive and somewhat belligerent mannerisms throughout the conversation that was wholly inappropriate.

To be sure there was no physical altercation. That was frankly lucky for all concerned. It is exactly this sort of abusive and threatening, even demeaning behavior that can cause fists to fly. Of course, that should never happen and tempers should at all times be kept in check but frankly, as justice Felix Frankfurter observed, “we should not be ignorant as judges of that which we know to be true as men.” He also noted that the best way to resolve conflict is to avoid them.

On this record, it was abundantly clear that on the day in question, Ms. Fjeldseth violated all of the pertinent rules designed to prevent violence in the workplace and to avoid the creation of a hostile workplace.

As noted above, some consideration was given to her prior actions and the fact that she was directed to change her workplace behavior. Most troubling in that regard was that she appeared to “blow off” these efforts, completing one of the online trainings in a mere 6 minutes, when it should have taken an hour to thoroughly understand and internalize the lessons to be learned there. It was apparent on this record that further training of that nature would be fruitless.

It was also of some concern that management at St. Paul was specifically made aware of the prior problems Ms. Fjeldseth had in the Minneapolis area, as evidenced by the somewhat unusual step of a joint letter signed by both union and management representatives informing St. Paul management of these issues, yet nothing was done to prevent the very same things from happening again – almost immediately.

THE CASES CITED BY THE PARTIES

There were numerous cases cited by the Service in defense of Ms. Fjeldseth’s actions. These were distinguishable.

It is certainly true that employees of the Postal Service are required to follow directions. On that point there was nor could there be any serious dispute. The venerable Arbitrator Harry Shulman observed that the industrial plant is not a debating society. That is eminently true. However, it must be remembered that being a supervisor means more than being able to throw one’s weight around and that all postal employees are subject to the JSOV and the ELM and M-39 provisions at play here.

It is certainly clear that orders must be obeyed, but there is a line that must not be crossed and when the supervisor crosses it to intimidation, threats and abuse, that calls for some action with regard to the JSOV, as Arbitrator Snow ruled.

The cases cited by the Service were reviewed. The 2008 Cenci decision requires that a reasonable person be made to feel threatened. On the facts presented to her it did not. These facts were very different. It was clear that Ms. Fjeldseth is more than just “brusque” and that she has used profanity in the past, spoken in a loud and intimidating voice to craft employees in such a way that members of the public could hear it and feel uncomfortable about it. More to the point, she did exactly that on February 8, 2018.

As noted above, her behavior and actions in the residence where the interactions with Ms. Asquith occurred was both unnecessary in time and place and was by all accounts a violation of the JSOV. As Arbitrator Cenci observed, “the Joint Statement is clearly intended to prohibit violence, threats of violence or the kind of intimidating, humiliating or abusive treatment of employee that can sow the seeds of violence.” On these unique facts, the words and actions on February 8, 2018 fit that description.

The Ross decision was also distinguishable. There the conversation got somewhat heated between the supervisor and the employees he was addressing but did not, based on the factual findings go beyond that. Here there was clear evidence that even though Ms. Asquith was brought to tears by Ms. Fjeldseth’s actions she did not quit, did not alter her voice, show any compassion for Ms. Asquith and did not change her errant ways at all during the exchange. The evidence here showed that she continued her tirade well beyond what was reasonable in the circumstances.

The Furman decision also found that the conversation did not rise to the level of a violation of the JSOV. To be clear, these arbitrators rightly noted that not every harsh conversation rises to the level of a violation of the JSOV. Certainly, supervisors are there to supervise and that means sometimes giving employees news or a directive they might not like. Employees are also required to follow orders and they must obey now and grieve later as a general proposition. Nothing about this decision changes any of those well-established rules of the workplace. Here though the evidence showed that Ms. Fjeldseth was indeed out of control and went well past the level of proof necessary to establish that her words and deeds on February 8, 2018 were indeed a violation of the JSOV, as discussed in some detail above.

The Stephens case is not only distinguishable, but also helps the union's case. Here the facts showed that Ms. Fjeldseth did point her finger, did raise her voice – so much so that it bothered members of the public, she did “get in Ms. Asquith’s face” in the sense that she continued to harangue her long after it was clear that she was so upset she was reduced to tears, yet that did not stop the continued verbal assault leveled in her direction. On these facts, the Furman case did not help the Service’s case.

The Gomez case is distinguishable in a very important respect – it was brought by the APWU, not the NALC. The APWU apparently never signed the JSOV and it was largely on that basis that Arbitrator Gomez’ decision proceeded.

Again, this is a case that helps the union in some respects in that Arbitrator Gomez specifically ruled that "the JSOV can be enforced by the Unions, that unlike the APWU, signed it. The arbitrator cited the Snow award for the proposition that an appropriate remedy can be order if there is a violation of the JSOV on the facts of any particular case. This too supports the union's contention that there is arbitral jurisdiction for an order designed to prevent future incidents that could lead to violence or a violation of the JSOV.

The Duffy case was also a different case. First, while the arbitrator found that there was no arm waving, as noted above, the video did not show the entire episode and there was some evidence that Ms. Fjeldseth may have waved her arms in a somewhat threatening fashion by the eyewitnesses. More to the point, she did wave her finger at Ms. Asquith, as noted multiple times above, whereas the employee in the Duffy case did not.

Further, some of the conversations took place over the phone and involved group settings. Here the conversation was face to face in a public setting with one employee who was clearly upset by the whole incident. This case was thus vastly different in significant ways. Likewise, the Levak decision also involved phone conversations. Obviously unless they were on a speaker phone, which did not appear to be the case, no one else other than the employee could have heard it. Here the employee was in a face to face in your face conversation with a supervisor she knew to be belligerent and abusive and found herself in a public place while being yelled at in front of customers. Again, a very different case indeed.

The cases cited by the union showed conclusively that under the Snow, Aaron, Bernstein and Gamser awards, arbitrators have the power to fashion a remedy and that the JSOV is subject to the grievance procedure and thus subject to the power to fashion appropriate remedies. See also Bernstein and Aaron awards cited above for a similar proposition.

Both the Karen Jacobs cases were similar in nature to this one and she, as well as several others, ordered limits on the supervisory authority of a manager who had been shown to have violated the JSOV and other relevant workplace behavior rules. Arbitrator Ames also imposed limits based on the facts of the case before him, which were not that dissimilar from those presented here.

It was also clear that some evidentiary consideration can be given to past issues, in terms of the appropriate remedy to be imposed once there is a finding of a violation of the JSOV. As Arbitrator Drucker also observed, there are times when finger pointing can be deemed a precursor to violence and that a remedy is thus appropriate under the JSOV. See, Drucker 2018 award cited above.

REMEDY

It was clear from the great weight of arbitral authority cited by the union that a remedy limiting supervisory duties as well as other types of remedies are within the power of regional arbitrators to order where there has been a finding that the JSOV has been violated. Those cases are set forth in the union's contentions and do not need to be unnecessarily repeated here, but it is clear that many arbitrators have ordered the same types of remedies sought by the union here.

As noted, the union did not seek an order that Ms. Fjeldseth go through additional training. That decision is certainly left to the Service if management determines that to be appropriate. The union did not seek that she be removed from the Service. It is frankly questionable whether such a remedy would be appropriate in any event given Ms. Fjeldseth's own due process rights. The union did not seek that she undergoes a fitness for duty examination either. Those are always problematic given the vagaries of the issues to be determined and what happens if the examiner determines that the individual is not fit for duty or recommends additional therapy etc. to be fit for duty. Fortunately, that does not have to be decided either.

The remedy sought by the union here is of a type and character that has been awarded and ordered before by several other arbitrators, especially those where the violations were found to be somewhat similar. It is clear that Ms. Fjeldseth should no longer be supervising craft employees and that imposing that limitation on her role, in and of itself, does not render her unemployable with the USPS. She was re-assigned in that capacity for several months after leaving the White Bear Lake facility and did not directly supervise letter carriers in that capacity yet she remained employed in her managerial role.

Finally, this award is to be made part of her official record so that other Postal facilities are aware of the issues that occurred here and can take appropriate measures to ensure that no further such violations recur.⁹

Accordingly, the remedy sought by the union was determined to be both reasonable and appropriate given the circumstances of this case and will be awarded as set forth below.

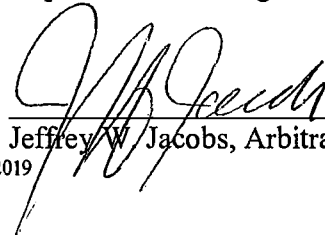
The grievance is SUSTAINED as follows:

Manager Jean Fjeldseth shall not be placed in a supervisory position over craft employees.

Manager Fjeldseth shall be personally and directly monitored by a manager at a higher level whenever Manager Fjeldseth is in contact with craft employees. Such monitoring shall be for a period of not less than 2 years.

An official copy of this decision shall be placed in Manager Fjeldseth's Official Personnel File.

Dated: May 16, 2019



Jeffrey W. Jacobs, Arbitrator

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⁹ There was considerable evidence in this case that Ms. Fjeldseth was re-assigned from a Minneapolis location to a St. Paul location and that despite a letter outlining the difficulties she had in Minneapolis due to very similar types of complaints, the St. Paul facility assigned her in a similar role where the same sorts of actions occurred again – thus giving rise to this and other grievances. So, there is no recurrence of that issue, the award is to be made part of her official USPS file so that even if she is re-assigned in a different location entirely, those facilities are aware of the issues that gave rise to this grievance.