

REGULAR ARBITRATION PANEL

In the Matter of Arbitration) Grievant: Joseph Whitbeck
between) Post Office: Allentown, PA
UNITED STATES POSTAL SERVICE) Case No.: USPS C06N4CD12083146 A
and) USPS C06N4CD12140041 B
NATIONAL ASSOCIATION OF) Union No.: DRT 12-227954
LETTER CARRIERS, AFL, CIO) DRT 12-232098

BEFORE: John M. Hamrick, Arbitrator

APPEARANCES:

For the U. S. Postal Service: Lyle V. Gaines, Labor Relations Advocate

For the Union: William Bothwell, Union Advocate

Place of Hearing: Allentown, PA

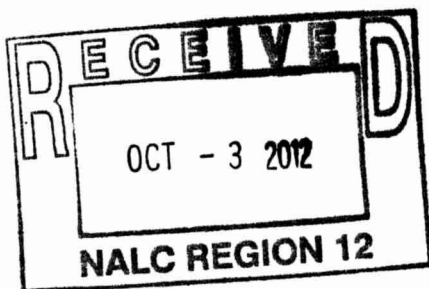
Date of Hearing: July 17 and August 8, 2012

AWARD: Both grievances are sustained for the reasons set forth in the Opinion. The grievant is to be returned to service within 14 days of the date of this Award. He is to be made whole for all loss of wages and benefits from December 22, 2011 until the date of his reinstatement. Any loss of wages is to be offset by any earnings or compensation he received during the period he was off. Also, his record shall be cleared of any mention of these actions.

Date of Award: September 12, 2012

Date of Amended Award: September 30, 2012

PANEL: Eastern



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BACKGROUND:

By letter dated December 22, 2011, the grievant, Joseph Whitbeck, was notified that he was placed in an off-duty, without pay, status effective on December 22, 2011 at 8:27 AM and he was to continue in that status until December 26, 2011 at 7:45 AM at which time he was expected to work as scheduled. The reason given for this action was that his retention on duty could result in injury to himself or others. Specifically, the letter stated he became loud, verbally abusive and disruptive on the workroom floor. He returned to work on December 27, 2011 as directed but was sent home by OIC Edwin Turner and told to return on December 28, 2011. When he reported for work on December 28, as directed, he was again sent home by OIC Turner. He received pay for both days. OIC Turner then sent the grievant another letter, dated December 29, 2011, in which he again placed him in an off-duty, without pay, status effective December 22, 2011 at 8:27 AM.

An Informal Step A discussion was held between Acting Manager Tina Rosado and Shop Steward Chad Dreisbach regarding the emergency placement of the grievant. They were not able to resolve the issue and a grievance was filed at Formal Step A. A meeting was held between OIC Turner and Local NALC President William Sherman on January 24, 2012. The parties could not settle the grievance and it was sent to Step B on February 1, 2012. The Step B Team issued a decision on March 2, 2012. The Team stated that it was unable to reach common ground in their discussions of the grievance

and declare an impasse. By letter dated March 13, 2012, the Union filed a request to arbitrate.

By letter dated March 6, 2012 the grievant was notified that he would be removed from service on April 7, 2012 for improper conduct; specifically for becoming loud and disruptive and being insubordinate and abusive to his supervisors. An Informal Step A discussion was held on March 9, 2012 between Supervisor James Williams and Shop Steward Greg Smith about the letter of removal (LOR). The parties were not able to settle the issue and it was appealed to Formal Step A. A Formal Step A meeting was held on March 16, 2012 and, again, the parties were unable to settle the case. It was appealed to Step B on March 26, 2012. The members of the Dispute Resolution Team were unable to reach common ground in their discussion of this grievance and decided to declare an impasse on April 6, 2012. The Union appealed the grievance to arbitration by letter dated April 25, 2012.

By letter dated July 6, 2012, this arbitrator was informed of his appointment to hear both the emergency placement and discharge of the grievant on July 17, 2012. The hearing began as scheduled on July 17, 2012 and was continued until August 8, 2012. On those dates, the parties were given the opportunity to present testimony, documentation and argument in support of their respective positions. The hearing was declared closed upon the receipt of the parties' post hearing briefs on August 22, 2012.

ISSUE:

Did the Postal Service have just cause to place the grievant in an off-duty, without pay status on December 22, 2011 under the provisions of Article 16.7 of the National Agreement? If not, what is the appropriate the remedy?

Did the Postal Service have just cause to issue a Notice of Removal to the grievant dated March 6, 2012 for improper conduct? If not, what is the appropriate remedy?

CONTRACT PROVISIONS:

ARTICLE 16 - DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of the Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs, alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Section 7. Emergency Procedure

An employee may be immediately placed on an off-duty status (without pay) by the Employer, but remain on the rolls where the allegation involves intoxication

(use of drugs or alcohol), pilferage, or failure to observe safety rules and regulations, or in cases where retaining the employee on duty may result in damage to U.S. Postal property, loss of mail or funds or where the employee may be injurious to self or others. The employee shall remain on the rolls (non-pay status) until disposition of the case has been had. If it is proposed to suspend such an employee for more than thirty (30) days or discharge the employee, the emergency action taken under this Section may be made the subject of a separate grievance

POSTAL SERVICE POSITION:

The Postal Service contended that it had just cause to issue both the emergency placement and the notice of removal.

OIC Edwin Turner testified that, on December 22, 2011, Acting Manager Tina Rosado and Supervisor Joseph Sibilialia approached him to talk about a PDI regarding harassment by Mr. Sibilialia. He claimed that the grievant turned toward them and said that Mr. Sibilialia was a harasser and a bully. Mr. Sibilialia tried to ignore the grievant and attempted to tell Ms. Rosado and him about the PDI. Mr. Sibilialia then turned toward the grievant to ask him what he meant by his threatening behavior. Mr. Turner stated that the grievant charged toward Mr. Sibilialia, yelling and screaming about a DRT decision and that he had proof that Mr. Sibilialia was a liar. He said that Tina Rosado put her arm between the two of them and the grievant hit her arm with his chest into Mr. Sibilialia. Mr. Turner further explained that he told the parties "that's enough!" Ms. Rosado then told the grievant to leave the building and that she was putting him on an emergency

placement off-duty status.

OIC Turner stated that Ms. Rosado sent the grievant an emergency placement letter which instructed him to return to work on December 26, 2011. (NOTE: December 26th, 2011 was the date on which the Christmas holiday was celebrated). He claimed that when the grievant returned to work on December 27, 2011, he was sent home with pay because it was his off-duty day. When the grievant returned to work on the next day, December 28, 2011, Mr. Turner testified that he sent the grievant home because he claimed that Ms. Rosado got a bruise on her arm and Mr. Sibilía said, if the grievant returned to work, he was leaving. The OIC stated he thought that there was a need for further investigation by the Postal Inspection Service. He then sent the grievant another emergency suspension letter dated December 29, 2011. Mr. Turner noted that the grievant's PDI was conducted by Supervisor James Williams and, afterwards, he came to him for higher-level concurrence of his decision to issue the grievant a letter of removal.

Acting Manager Tina Rosado testified, that on the morning of December 22, 2012, she and Supervisor Sibilía were walking toward OIC Turner who was engaged in conversation with the grievant. When they approached Mr. Turner, Mr. Sibilía began to talk to him and Ms. Rosado about a PDI he had done that morning. She stated that the grievant had not moved from where he was standing and she gestured a SSHH to Mr. Sibilía. At this point, the grievant raised his voice in an antagonistic manner and accused Mr. Sibilía of being a bully and a harasser. Mr. Sibilía then turned his back to the grievant to speak with OIC Turner. The grievant then came closer to Mr. Sibilía and

repeated that he was a bully and stated that the DRT said that he was one and that he was going to lose his job. She said that he was so loud that it caused 30 plus employees to stop work and to watch what was going on. Mr. Sibilialia turned to face the grievant and asked him what he meant. Ms. Rosado stated the grievant came at Mr. Sibilialia and she threw her arm against his chest. She added that she never saw the grievant become physical. She told him to stop and he went against her arm and into Mr. Sibilialia's chest. She told him about violence on the workplace floor and instructed him to clock-out and go home. She informed him that he was in an emergency placement status. The grievant then turned to OIC Turner and asked him if he was going to let him do that. Ms. Rosado stated that Mr. Turner asked her if she was placing him on emergency status and she replied yes. Mr. Turner told the grievant that Ms. Rosado was the manager and it was her decision. The grievant then threatened OIC Turner that all agreements were off. Ms. Rosado said she walked the grievant back to the time clock and immediately removed his time card from the case. She said she sent the emergency placement letter because she felt threatened when the grievant pointed his finger in her face and called her a liar.

Supervisor Joseph Sibilialia testified that, about 8:25 AM on December 22, 2011, he was speaking with OIC Turner and Acting Manager Tina Rosado, near the presort distribution cases, regarding a PDI he had just conducted with an employee who alleged that he had been harassing her. The grievant was standing nearby and overheard him and asked him if he was not harassing her. Mr. Sibilialia stated he turned his back toward the grievant in order to face OIC Turner and Ms. Rosado. The grievant continued to call him

names and threatening him. Mr. Sibilía testified that, when he turned around to face the grievant, he charged at him yelling and screaming about a DRT decision, calling him a bully and saying that he intimidated and harassed carriers and was going to lose his job. Mr. Sibilía stated that he began to worry that the grievant would attempt to hurt him physically but Ms. Rosado and OIC Turner put their arms between them to stop any physical harm from being done to him. Mr. Sibilía stated that the grievant pushed Ms. Rosado's arm into his chest which caused him to take a step backwards to catch his balance. Mr. Sibilía stated that Supervisor Alford came on the scene and told him to back away from the grievant which he did.

Supervisor Darren Alford testified that, at about 8:30 AM on December 22, 2011, he heard loud talking going on among OIC Turner, Tina Rosado, Joseph Sibilía and the grievant. He stated he saw the grievant walk toward Mr. Sibilía in an aggressive manner and that Ms. Rosado put her arm between them which the grievant pushed into Mr. Sibilía. At that point, Supervisor Alford stated he walked over to Mr. Sibilía and told him to leave with him and walked Mr. Sibilía to his work area.

Supervisor James Williams testified that he wrote the request for the corrective action of removal from the service and then issued the grievant the NOR dated March 6, 2012. He stated he cited three sections of the ELM which the grievant violated, i.e., Sections 665.16, 665.24 and 662.1. He noted that he conducted a thorough investigation, and that the PDI with the grievant lasted over one hour. He reviewed the Inspector's Memorandum IM and read all of the witnesses statements contained in the IM.

Mr. Williams noted that he issued the NOR because threats in the workplace cannot be tolerated. He acknowledged that he had not witnessed the incident nor did he hear anything on the day in question. Mr. Williams also acknowledged that he had given the grievant permission to talk to the OIC about a union matter just prior to the incident occurring.

The Postal Service argued that management had just cause to issue the emergency placement and NOR. The grievant's conduct rose to the level of a violation of the Joint Statement on Violence and Behavior in the Workplace. Violence is not limited to fatalities or physical injuries. Any intentional words, acts, or actions meant to provoke another can escalate and result in injury if they are not immediately and appropriately addressed by management. The grievant's behavior on December 22, 2011 rose to a level that must be considered, by any reasonable definition, as harassment, intimidation, threats, or bullying. This is in direct violation of the aforementioned Joint Statement.

The Postal Service contended that the grievant failed to adhere to the following Postal policies: ELM 665.13 – Discharge of Duties; ELM 665.16 – Behavior and Personal Habits, and ELM 665.24 - Violent and/or Threatening Behavior.

The grievant became upset and irate at local management and acted out his frustrations. He is a union vice-president who deals with local management on many levels every day. This type of action from a union representative is not acceptable. He attacked a supervisor and used threatening language and posture towards a supervisor and then turned his wrath upon the OIC and Station Manager. The grievant charged at the

supervisor in a threatening manner and got directly in his face and became verbally abusive toward him yelling and screaming about a DRT decision and calling him a bully and harasser who was going to lose his job. The OIC and Station Manager put their arms in front of the supervisor to separate him from the grievant. The grievant pushed the manager's arm into the Supervisor's chest. After the supervisor left the area, the grievant turned to the Manager and called her a "freaking liar" who lies about everything. When the Manager told the grievant to punch out and go home and that he was in an emergency placement off-duty status, he refused to leave. He turned his anger toward the OIC and told him all deals they had made for grievances were off the table. The manager told the grievant that, if he did not leave, they would have someone escort him from the facility.

The Union's contention that the grievant was in a "protected status", because he was on union time during the incident, fails for a number of reasons. First, the incident occurred on the workplace floor in front of many carriers and not in a closed meeting. Second, he was not on union time when the incident occurred as his TACS record shows that he clocked over from union to office time at 8:19 AM. Third, this case is about violence in the workplace and there is no protected status for this type of claim.

Based on all the evidence in the file and the statements made by the grievant during the course of the investigation, it is management's position that removal from the Postal Service was the only possible corrective action that could be effective.

The Postal Service has proven that the grievant is guilty of the charged offense

and the only question is whether the penalty assessed should be upheld or modified. The Postal Service cited a number of arbitration decisions which held that the circumstances, in which a penalty can be rightfully set aside by an arbitrator, are where discrimination, unfairness or capricious and arbitrary action are proved, in other words, where there has been abuse of discretion.

UNION POSITION:

The Union contended that the Postal Service did not have just cause to place the grievant in an emergency placement status or to remove him from service.

The grievant testified that he came to work on December 22, 2011 at about 6:30 AM and was on union time until about 8:00 AM when he punched into his route. He stated that he needed some additional time to speak to OIC Turner about Supervisor Sibiliala limiting a carrier to five minutes to write a statement about an issue which she had with Mr. Sibiliala. He had heard the supervisor tell this to Shop Steward Dreisbach, a few minutes earlier after the two of them had been involved in a PDI with the carrier. He was given permission by Supervisor James Williams to speak with the OIC about that union matter. He noted he had been speaking with OIC Turner about the matter for a few moments when Manager Rosado and Supervisor Sibiliala approached them. Mr. Sibiliala complained that he had been accused of harassment at the PDI when all he was doing was giving the carrier instructions. The grievant stated that he asked Mr. Sibiliala what the DRT had thought of that argument and he became upset and walked toward him and got

into his face and asked what the DRT had said. The grievant stated that, when he asked Mr. Sibilía if he had not read the DRT decision or if management had not shared the decision with him, he continued, from close range, to ask what the DRT had ruled. The grievant claimed that he did not back away from Mr. Sibilía but stood his ground and, at no time, did he walk toward him or made any contact with him or anyone during the entire situation.

The grievant noted that while Mr. Sibilía was standing in front of him he heard OIC Turner and Manager Rosado saying “that was enough” and “not here.” When Mr. Sibilía walked away, Manager Rosado claimed that I had violated the Statement on Violence in the Workplace by threatening and charging at him. When he denied her accusation, she stated she was a witness to which he replied that he was not concerned about her testimony because she was a liar. She stated that if he called her another name she would have him removed from the building. When he again called her a liar and she said “that’s it” and told him to leave the building. The grievant testified further that he then turned to OIC Turner and asked him if he was going to allow it to happen. The OIC replied that she was the manager and asked her if she was placing him in an emergency placement status. The grievant stated that when she replied that she was taking that action, he was told that was it. The grievant stated he told the OIC that all the oral agreements that they had on the time limits of grievances were off. Ms. Rosado claimed that he had threatened the OIC. The grievant stated he turned and left. He went to the Union office and called the National Union office to inform them of his situation. While

in the office, Ms. Rosado came into the room and then left.

The grievant noted that, on December 24, 2011, he received the notice of emergency placement which stated he was to remain in that status until December 26, 2011 which was the day on which the Christmas holiday was observed. After a number of phone calls, he was told to report to work on December 27 at 8:00 AM which was a non-scheduled day for him. He stated that he assumed that he was told to report for the purpose of a PDI. Supervisor Alford told him to start casing and to put in for eight hours. OIC Turner then came to him and talked with him. When he told the OIC it was his off day and that he was not on the overtime desired list, he was told to go home and to report back to work the next day. When he reported to work at 6:30 AM on December 28, his time card was in his slot and he punched in to work. At about 7:00 AM, OIC Turner came to him and said he had to leave because the investigation had not been completed. He left and was paid for both days. He then received another letter dated December 29, 2011 from OIC Turner, placing him, once again, in an emergency placement status.

Letter Carrier Bruce Getz testified he was returning from the "hot case" on December 22, 2011, when he saw the grievant, Manager Rosado and OIC Turner standing in a circle. The grievant was standing and listening to Ms. Rosado who seemed to be doing all the talking and gesturing with her arms. He stated it looked like a discussion was going on and that neither Supervisor Sibilila nor Supervisor Darren Alford were present.

Letter Carrier Keith Slusaw testified that he was retrieving sorted flats from the staging area on the morning of December 22, 2011 when he noticed the grievant and OIC Turner talking. He noted that the grievant's back was to him and his hands were behind his back in the position of parade rest. He stated no yelling or arguing was going on and both parties seemed to be relaxed and just talking. He stated he did not see either Manager Tina Rosado or Supervisor Sibiliala.

Letter Carrier Thomas Bauder testified that he was casing his route on December 22, 2011 when he heard Manager Tina Rosado speaking in a very loud voice. He stated that a few minutes passed and he saw the grievant walking alone and asked him how the meeting went. The grievant then proceeded to the time clock by himself and no one followed him while he was there.

Letter Carrier Kerry McGuire testified that he heard the grievant, Manager Rosado and OIC Turner talking about 15 to 20 feet from him. He heard Ms. Rosado tell the grievant to go home and heard the grievant ask OIC Turner if he was going to allow that to happen. He noted that the voices sounded agitated but that nobody was yelling.

Letter Carrier Chad S. Driesbach testified that around 8:15 AM on December 22, 2011 he had just completed a PDI with Letter Carrier Erie and Supervisor Sibiliala. After Carrier Erie and Mr. Sibiliala left the meeting room by the union office, he stayed in the office for a few minutes to record some notes he had made. When he walked out of the office, he was walking along a row of time clocks to head back to case his route. He

noticed Supervisor Sibilia, Manager Turner, OIC Turner and the grievant standing by route 994. The four were talking and he noticed Supervisor Sibilia walk around OIC Turner and Manager Rosado to within inches of the grievant's face. He noted that he continued to walk back to his route because it did not look like they were arguing.

Letter Carrier Gregory Smith testified that, on the morning of December 22, 2011, he was waiting in the office to meet with Manager Rosado on five disciplines that she had issued. While waiting, he noticed that a copy of a PDI was missing from a file and he walked to the union office to get a copy. On his return, he noticed the grievant, OIC Turner and Manager Rosado standing as a group. His attention was drawn to the group by the yelling of Ms. Rosado. He stated he moved closer to the group because he was concerned that there was a problem by how loud she was yelling and how much she was gesturing with her hands. She yelled that no one was going to approach a supervisor in a threatening manner while she was there. He heard Ms. Rosado tell the grievant she was putting him on emergency placement status and that he was to punch out and go home. The grievant asked OIC Turner if he was going to allow this to happen to which he replied, "she is the manager". The grievant told Mr. Turner that if he was going to allow it to happen that their "Gentlemen's Agreement was done". Ms. Rosado yelled at the grievant that she heard what he said and was a witness to that threat. The grievant stated that, once he walked out the door, their agreement was done. During this entire time scenario, the grievant did not raise his voice but spoke in a clam voice and stood there with his hands in his pockets. The only person yelling and gesturing during this time was

Manager Rosado.

Mr. Smith noted that he was the Shop Steward of record at both the Informal and Formal Step As. He noted a number of inconsistencies in statements made by various management witnesses as well as the fact that the supervisor who issued the notice of removal was not present when the incident occurred and that the concurrence by OIC Turner was improper since he issued an emergency suspension and was in the middle of the incident. All of these allegations and contentions, along with many others are included in Exhibit 3, pages 19 through 34.

The Union noted that the Postal Service has the right to place individuals on an emergency suspension and then provide them with a written notice of charges within a reasonable period of time to perform a proper investigation. On December 22, 2011, the Postal Service issued the grievant a written notice of emergency suspension apparently satisfied with its investigation. He was charged with being loud, verbally abusive and disruptive on the workroom floor. A second notice dated December 29, 2011, was issued for the same incident with the same exact charge. Nine weeks later the notice of removal charged the grievant with charging Mr. Sibilia, bumping Ms. Rosado's arm and knocking Mr. Sibilia off-balance. Furthermore, there are a number of statements by Ms. Rosado regarding her testimony of how she never saw the grievant become physical, however her December 28 written statement she says that his threats and physical encounters with management have become more frequent. She stated that over 30 employees stopped working to watch the encounter but investigation shows that only a few employees heard

anything and, those that did, said Ms. Rosado was the loud one. Supervisors Sibilía and Alford testified about conversations between Ms. Rosado and the grievant which occurred after they had left the area. Also Ms. Rosado's claim that she followed the grievant to the time clock and watched him punch out, was disputed by Carrier Bauder who stated Ms. Rosado was not at the time clock.

The Union also noted that the grievant was acting in his capacity as a union representative which is proven by the fact that the grievant was given permission by Supervisor Williams to leave his case and act in his capacity as a union official. He was going to OIC Turner's office but met him on the workplace floor and began to discuss with him his concern about a recently completed PDI. It was not until Manager Rosado and Supervisor Sibilía arrived that this issue arose and none of the managers attempted to move the discussion to the office. Finally there was no evidence of a disruption on the workroom floor.

The Postal Service has the burden of proof in this case and clearly did not prove beyond a preponderance of evidence that the grievant acted as charged. Management's statements contain numerous inconsistencies regarding the charges against the grievant. The grievant's testimony has never changed or wavered because it is easy to recall an event when you are telling the truth. Those letter carriers that witnessed the incident support the grievant's testimony and contradict the testimony of management.

The incident has been blown out of proportion by management and, if cooler

heads had prevailed, the grievant would not have lost a day of work. Ms. Rosado testified she was afraid of the grievant and did not want him back to work and, yet, it was her emergency placement letter that ordered him to return to work on December 27, 2011. It is for all these reasons that the Union asked that both grievances be sustained in their entirety and that the grievant be made whole for all loss of wages and benefits.

The Union, in addition to the foregoing arguments regarding the merits of the case raised a number of procedural defects. One of the issues raised was double jeopardy with regard to the issuance of two emergency suspension letters relating to the same charge. Another procedural issue was the review and concurrence procedure followed for both the emergency suspension and notice of removal letters. The Union claimed that OIC Turner was the judge and jury in this case. Clearly, the review and concurring official should have been a higher-level manager who did not witness or participate in the PDI. There was no independent review of the evidence prior to the discharge. The Union asked to sustain the grievances on the basis of these procedural errors and to expunge the grievant's discipline and reinstate him with full back pay for all lost wages and benefits.

OPINION:

This case involves two separate grievances. The first grievance involves the issuance of two emergency placement in off-duty status letters and the second grievance involves the issuance of a notice-of-removal.

Turning to the first grievance, the Postal Service, by letter dated December 22, 2011, notified the grievant that he was placed in an off-duty, without pay, status effective Wednesday, December 22, 2011 at 8:27 AM and was to continue in that status until December 26, 2011 at 7:45 AM, at which time he was expected to report to work as scheduled. The author of the letter was Manager Tina Rosado. She noted that the reason for the action was that his retention on duty might result in injury to the grievant or others. She specified that he had become loud, verbally abusive and disruptive on the workroom floor.

The grievant, after receiving the letters, called a union shop steward to ascertain exactly what he was supposed to do. His confusion was caused by the fact that December 22 was Thursday and not Wednesday, as stated in the letter, and also that the return date, December 26, was the date on which the Christmas day holiday was celebrated. After telephone calls were made to Supervisor Sibilina and OIC Turner, the grievant was told to report on Tuesday, December 27, 2012. The grievant testified that he was under the impression that he was to report for a pre-disciplinary investigation (PDI) because Tuesday was his non-scheduled day. Supervisor Alford told the grievant that he should begin casing mail even though there was no time card in his slot. When the grievant informed Mr. Alford that it was his non-scheduled day, he called OIC Turner. Mr. Turner spoke with the grievant and told him that he should go home and report back to work on Wednesday, December 28, 2011. When he came to work on December 28, his time card was in the rack and he clocked-in at 6:30 AM. At about 7:00

AM, OIC Turner came to the Union office and told him that he was sorry but he had to leave the building because they had not yet completed their investigation. After a brief discussion the grievant left the building without any escort.

By letter dated December 29, 2011, the grievant was notified that he was placed in an off-duty, without pay status, effective, Wednesday, December 22, 2011, at 8:27 AM. The letter was signed by OIC Turner and contained the same reason and specifics as the letter which had been sent by Manager Rosado dated December 22, 2011. In other words, the grievant was placed in an emergency placement, off-duty status for a second time based upon the same incident noted in the first letter.

Without even examining the question of whether or not the events which occurred on Thursday, December 22, 2011 were cause for the action taken, the fact of the matter is that the grievant had been reinstated by Manager Rosado's letters when she stated that "...you are expected to return to work as scheduled." When the grievant reported as directed, he was assigned work by a supervisor and then told to go home by the OIC because it was his off day. He then reported to work the following day per the OIC's direction, punched-in and then again was told to go home. He was compensated for both days.

The foregoing action violated the grievant's due process rights protecting him from double jeopardy. Arbitrators have concluded that it is not "just" for a grievant to be disciplined twice for the same alleged misconduct. (Fairweather, Practice and Procedure

In Labor Arbitration, Schoonover, ed. BNA, 3rd Ed. (1991). In Auburn Faith Community Hospital, 66 LA 882 (Killion, 1976) a grievant was placed in double jeopardy when, following an oral reprimand for an alleged act of wrongdoing, she was reprimanded again and then placed on probation for the same act. Arbitrator Killion noted that the critical element of a double jeopardy defense is that two punishments must be imposed for the same act of wrongdoing. This is precisely what occurred in this case. Management, by its own volition, directed that the grievant to continue in his emergency status until (underscoring added) December 26, 2011 at which time he was to report to work as scheduled. (Underscoring added). The OIC's subsequent letter, placing the grievant once again an emergency suspension based on the same incident, constituted double jeopardy. As a result the grievance is sustained and the grievant is to be made whole for all loss of wages and benefits from December 22, 2011 through April 7, 2012, the date noted in the March 6, 2012 Notice of Removal, that he would be removed from service.

The second grievance involves the March 6, 2012 Notice of Removal which informed the grievant that he would be removed from service on April 7, 2012 because of improper conduct. The letter specified that he was loud, disruptive, insubordinate and abusive to his supervisors. The letter states that the grievant approached OIC Turner, Manager Rosado and Supervisor Sibilía on the day in question which contradicts what Ms. Rosado testified to regarding the start of this incident. She stated that both she and Mr. Sibilía approached the grievant and OIC Turner who were engaged in conversation. This statement agrees with the testimony of the grievant that he had gotten permission

from Supervisor Williams to talk with OIC Turner regarding a just-completed DRT. During cross-examination, Mr. Williams confirmed that he did give the grievant permission to talk with OIC Turner. (Also see Jt. 3, p. 61). The NOR goes onto describe the way the incident allegedly occurred with the grievant “screaming and yelling” at Supervisor Sibilía and then at Manager Rosado. It is alleged that the grievant “charged” toward Mr. Sibilía; yet, Ms. Rosado testified that, as she, OIC Turner, Supervisor Sibilía and the grievant stood as a group, Mr. Sibilía turned his back to the grievant and when the grievant allegedly said something to him about losing his job, Mr. Sibilía turned to face the grievant. At that point, there is no question that the grievant and Mr. Sibilía were face-to-face and at this point, Ms. Rosado put herself between the two of them.

The Postal Service, in its post-hearing brief, refers to the statement of Carrier Joe Gower to respond to the Union’s position that the grievant remained standing in his original position during the verbal exchange with Mr. Sibilía and nobody outside the group heard their exchange. An examination of Mr. Gower’s statement taken by Postal Inspector Al Herzog is somewhat confusing. In the second paragraph the Postal Inspector wrote that Mr. Gower said he didn’t hear what was said but did see “a lot of hot people” and saw the grievant and Mr. Sibilía arguing and Ms. Rosado putting herself between the two of them to break it up. However, in the third paragraph the Inspector writes that Mr. Gower stated there were no red faces, no yelling and that these kinds of altercations took place all the time. In the fourth paragraph, the Inspector wrote that Mr. Gower stated, when Ms. Rosado yells, you can hear her but neither she nor Mr. Sibilía

were yelling during the alleged altercation. These contrasting statements do nothing but confirm that there was a verbal confrontation between Mr. Sibiliala and the grievant and that Ms. Rosado stepped between them to separate them. She noted that Mr. Alford grabbed Mr. Sibiliala from behind to back him away from the grievant. Ms. Rosado then accused the grievant of violence on the workplace floor. The grievant then called her a liar and she claimed she felt threatened and told him to clock-out for the day and to go home. He questioned OIC Turner if he was going to allow her to take such action and when he said she was the manager, the grievant stated that any gentlemen's agreements they had made regarding time limits of grievances were off.

Based upon this arbitrator's past experiences at this particular facility, this ugly scenario was, as Carrier Gower stated, the kinds of altercations that took place all the time. The grievant, in his capacity as a union representative, was speaking with the OIC about a union matter and, as described herein, with the appearance of Ms. Rosado and Mr. Sibiliala, the situation escalated into a full-blown verbal confrontation. Although Ms. Rosado said she felt threatened, it was until after the grievant called her liar that she told him to punch out for the day and to go home. The fact that she placed him in an emergency placement status with instructions to report to work the following week belies her statement about feeling threatened. Also, she never had him escorted from the workplace or had the locks changed. Her testimony that he was loud and disruptive to the work force was not supported by the evidence. Although the situation may have been testy, it did not amount to violence in the workplace.

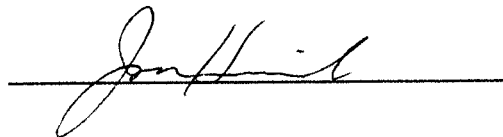
Notwithstanding the foregoing conclusion, was the grievant insubordinate and abusive to supervision? The Union claimed that the grievant was in a protected status as a union representative. The Postal Service contended that the grievant was not acting in his capacity as a union representative because 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 the 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 of 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.

Based on all the foregoing facts and circumstances, the grievance regarding the Notice of Removal is sustained. The grievant is to be returned to service and is to be made whole for all loss of wages and benefits from April 7, 2012 to his date of reinstatement.

AWARD:

Both grievances are sustained for the reason set forth in the Opinion. The grievant is to be returned to service within fourteen days of the date of this Award. He is to be made whole for all loss of wages and benefits from December 22, 2011 until the date of his reinstatement. Any loss of wages is to be offset by any earnings or compensation he received during the period he was off. Also, his record shall be cleared of any mention of these actions.

A handwritten signature in cursive script, appearing to read "John Hamrick", is written over a solid horizontal line.

John M. Hamrick, Arbitrator