

REGIONAL ARBITRATION PANEL

In the Matter of Arbitration)	Grievant: Watson
Between)	Post Office: Des Plaines, IL
United States Postal Service)	USPS No.: J16N-4J-D 18098831
And)	Union No.: DP2016066
National Association of Letter Carriers,)	

BEFORE: Jo Ann Nixon, Arbitrator

APPEARANCES:

For the U.S. Postal Service Michelle Vandervelden

For the National Association of Letter Carriers Michael Caref

Place of Hearing: 1000 E. Oakton St., Des Plaines, Illinois 60018

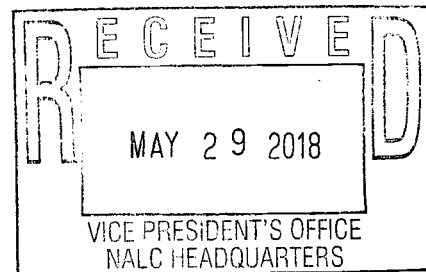
Date of Hearing: May 4, 2018

Date of Award: May 16, 2018

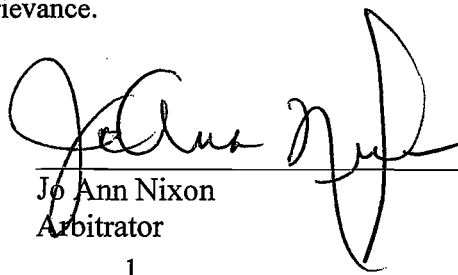
Relevant Contract Provision: Article 16§7

Contract Year: 2011 - 2016

Type of Grievance: Discipline



AWARD: The grievance is sustained. Management was in violation of Article 16 of the National Agreement when they suspended Ms. Watson without pay on December 19, 2017. The Grievant shall be made whole for all loss pay and benefits from December 20, 2017 through March 7, 2018, the date of Removal, which is the subject of a separate grievance.



 Jo Ann Nixon
 Arbitrator

I. ISSUE

Did Management violate Article 16 of the National Agreement when they suspended the grievant without pay on December 19, 2017 and left her in that status indefinitely and also delayed her right to seek union representation when initially questioned by management? If so, what is the appropriate remedy?

II. STIPULATIONS

The parties agreed the following documents are to be considered as exhibits:

1. The Collective Bargaining Agreement between the National Association of Letter Carriers and the United States Postal Service – 2011 - 2016. (Joint Exhibit No. 1)
2. A packet of information containing memoranda and letters documenting the grievance (Joint Exhibit No. 2-Emergency Placement)

III. RELEVANT CONTRACT PROVISIONS

Article 16 Discipline Procedure

Section 1. Principles

In the administration of this Article, a basis 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 or 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 Service 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.

IV. BACKGROUND

This grievance was initiated by the National Association of Letter Carriers (NALC) and is before the Arbitrator for decision pursuant to the National Collective Bargaining Agreement between the parties. The hearing was held on May 4, 2018, at the Main Post Office located at 1000 E. Oakton St., Des Plaines, Illinois 60018. The parties agree that this matter is properly before the arbitrator.

V. FACTS

The grievant, Deizjanea Watson is a City Carrier Assistant at the Des Plaines Illinois Post Office with an enter-on-duty date of February 20, 2016. On December 19, 2017, Ms. Watson was placed on Emergency Placement based on alleged threatening remarks made on Facebook. The grievant posted comments on Facebook under the alias of Vanessa Clay and those comments are outlined in the record at pages 58-59 and 93-94 of the Joint Exhibit 2. Management provided the grievant written notice of the Emergency Placement (EP) which she received on December 21, 2018. The Union filed the instant grievance alleging that Management did not have just cause to issue the Letter of Emergency Placement to the Grievant.

VI. MANAGEMENT'S POSITION

Management contended that just cause existed to issue the grievant the Letter of Emergency Procedure (EP) based on the information they received from another employee regarding posts to a Facebook page which belonged to the Grievant, Deizjane Watson. According to Management, they were notified by a "concerned" employee on December 19, 2017, that the Grievant had posted apparent "threats" on a Facebook page she maintained under the Alias of Vanessa Clay.

Management stated that on December 19, 2017, Supervisor Michelle Champs received a text message from PSE Lemia Flowers notifying her of threatening remarks made to a Facebook account that was allegedly created by the Grievant under the alias of Vanessa Clay. According to Management, the posts made by the Grievant stated, "**My chill be on life support every time I enter this post office**" and, "**When you have funerals in your head daily for the bitches at your job**". Management maintained that once advised of the Grievant's actions, Management immediately brought Ms. Watson into the Postmaster's office for questioning; the Grievant

initially denied responsibility for the postings, and pointed out that the Facebook page was not in her name and did not belong to her. Management contended that they questioned Ms. Watson about the picture displayed on that page and the Grievant responded that others have access to her account. Management argued that based on the threatening nature of the posts, following their meeting with Ms. Watson, the Grievant was placed on Emergency Placement and escorted out of the building by her Supervisor, Michelle Champs.

Management averred that a written confirmation of the Emergency Placement dated, December 21, 2017 was mailed to the Grievant and provided Ms. Watson with the reason for her immediate removal from duty and placement in a non-pay status. According to Postmaster Lozada, the Grievant was charged with “UNACCEPTABLE CONDUCT/THREATS-VIOLATION OF ZERO TOLERANCE POLICY”. In support of their actions, the Service cited the National Agreement at Article 16.7 which states in pertinent part:

Article 16
Discipline Procedure

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 Service 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.

Management stated that Ms. Watson was subsequently issued a Notice of Removal dated January 25, 2018, and has been kept off the rolls in a non-pay status “until disposition of the case has been had” in accordance with Article 16.7. Management argued that the Postal Service has had a tragic history in relation to workplace violence, and it is incumbent on Management to take all allegations of threats seriously. Management added that there can be no tolerance of any such actions. It was the position of the Service that Arbitrators have consistently ruled that the immediacy required for an Emergency Placement constitutes the use of a modified “Just Cause”.

In support of that position they cited Arbitrator Richard Mittenthal who in National Awards has stated that ***“just cause is not an absolute concept”*** when dealing with Emergency Procedure, but Management noted that the normally accepted elements are:

1. **Is there a rule?** *According to Management, there is a rule and it is undisputed that the Postal Service has a well-established Zero Tolerance Policy and that ELM 665.24 prohibits violent and/or threatening behavior.*
2. **Is the rule reasonable?** *Management argues that it is certainly reasonable for any business to expect their employees to not threaten their co-workers.*
3. **Is the employee aware of the rule?** *Management contends that all employees are notified of the Postal Service’s Zero Tolerance Policy during orientation, in postings and via Service Talks. They added that it is commonly known in any workplace that this type of conduct is prohibited.*
4. **Is the rule consistently and equitably enforced?** *According to the Service, they have consistently invoked on Emergency Placement on employees that have allegedly made threats to co-workers.*
5. **Was a thorough investigation completed?** *Management alleges that there was a thorough investigation and their immediate assessment of the situation warranted the Emergency Placement. They argued that they continued the investigation into the Grievant’s conduct after the EP, including contacting the Office of Inspector General (OIG) and conducted their own investigative interview with the Grievant. Management further argued that this investigation did not yield any information which would lead them to end the Emergency Placement.*
6. **Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee’s past record?** *Management maintained that the seriousness of the Grievant’s actions cannot be minimized. The allegation was that the Grievant made a threat to her coworkers via social media. Accordingly, Management took the appropriate action.*
7. **Was the disciplinary action taken in a timely manner?** *It was the position of Management that the fact circumstances in this case along with the testimony provided at Hearing clearly demonstrates that Management acted immediately when they discovered the threats posted by the Grievant.*

Management further cited this Arbitrator in case no. J11N-4J-D 17475358, where my opinion aligned with that of Arbitrator Mittenthal in his National Award which is controlling:

I agree with Arbitrator Mittenthal’s Interpretation of 16.7, ‘where Management believes that retention of an employee “may” have certain harmful consequences-“just cause” takes on a different cast in these circumstances.

Regarding the Union's arguments that the Grievant's alleged "threats" made on Facebook were nothing more than "street lingo" or "abstract poetry"; Management responded that the Postal Service's Policy on Zero Tolerance [Joint Exhibit 2-Page 71], states that "*Threats and assaults made directly or indirectly toward any employee or postal customer, even in jest, will not be tolerated. This misconduct causes very real concern and apprehension on the part of people to whom this type of behavior is directed.*" In this case, according to Management, the Grievant's posts made both Supervisor Champs and Postmaster Lozada feel threatened, and Postmaster Lozada testified that "she didn't know if the Grievant was going to come to the building and start shooting". Management contended that they did not know what Ms. Watson's intent was with those remarks, but reasonably saw her words as threats and acted appropriately by invoking Emergency Placement.

The Union further argued that Management has left the Grievant in Emergency Placement "indefinitely"; Management answers that is not true. Instead, according to Management, in accordance with Article 16.7 of the National Agreement, the Grievant has remained on the rolls in a non-pay status until "disposition of the case has been had."

Finally, Management asserted that they had just cause to place the Grievant in an off-duty non-pay status based upon the actions that were eventually admitted to by the Grievant. They asked that this Arbitrator uphold the Service's commitment to a safe working environment for all employees by denying this grievance in its entirety.

VII. UNION'S POSITION

In the case at bar, the Union contends that Management did not have "just cause" to invoke Article 16.7 Emergency Placement in the case of this Grievant. According to the Union, Management violated the Grievant's contractual rights on several levels, the first of which was not meeting the Basic Discipline Procedures as outlined in the M-39 Section 115.1 which states:

Basic Discipline Procedure

In the administration of discipline, a basic principle must be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause. The delivery manager must make every effort to correct a situation before resorting to disciplinary measures.

It was the position of the Union that Management issued discipline that was not corrective in nature and made no effort to correct the situation before resorting to severe discipline, in this case Emergency Placement (EP) and subsequent removal. The Union argued that While Management tried to determine what happened, they denied the Grievant Union representation. The Union further argued that Management failed to determine who if anyone else, was involved and acted without having all of the facts. The Union stated that the Basic Principles of "Just Cause" were not addressed by Management before issuing the EP at issue in this case. The Union contends that based on those Basic Principles of Just Cause, the following applies in the instant case:

1. **Is there a rule?** *No. No postal rule is mentioned in the Notice provided to Ms. Watson*
2. **Is the rule reasonable?** *No. Vague comments on social media not directed at any postal employees is not grounds for discipline by the employer.*
3. **Is the rule consistently and equitably enforced?** *No. There have been some questionable exchanges between "those four girls", but only Ms. Watson has been suspended without pay. A 14-day paper suspension issued to another carrier, which is still unresolved and in the grievance process. [Exhibit:17-4]*
4. **Was a thorough investigation completed?** *The Union contends that Management's investigation was not thorough and Management based their allegation of Alleged Unacceptable Conduct/Threats-Violation of Zero Tolerance Policy" on a message that was forwarded to Supervisor Michelle Champs, who then showed it to Postmaster Minnie Lozada. The Union further contended when Management initially questioned the Grievant, Ms. Watson requested Union representation and, on two occasions, Management denied the Grievant's request for a Union Steward.*
5. **Was the severity of discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employees past record?** *The Union contends that Grievant is a short term City Carrier Assistant who has no prior discipline and whom Management admittedly informed the Union was a good employee with no prior issues at work and no attendance issues. The Union further contends that Ms. Watson's immediate Supervisor described the*

Grievant as a Very Good Employee.

6. **Was discipline issued in a timely manner?** *The Union states no, since Management was notified about the Facebook postings at approximately 1:45 PM and Management did not invoke Emergency Placement until 5PM which was not immediate.*
7. **Was the discipline issued corrective, rather than punitive in nature?** *The position of the Union was that the discipline was punitive in nature given that the Grievant was placed on EP on December 19, 2017 at 5PM yet Management did not schedule the PDI until January 12, 2018 and the Grievant has remained off the clock without pay since December 20, 2017. The Union argued that the discipline was punitive since in comparison to Letter Carrier C. Montgomery who was also disciplined for Unacceptable Conduct, that employee received a 14-Day paper suspension.*

The Union reiterated their arguments regarding the failure of Management to allow the Grievant Union representation when requested at their meeting on December 19, 2017. They contended that at the end of that meeting, Management invoked Emergency Placement for “alleged” unacceptable conduct/threats violation of Zero Tolerance Policy, yet Management did not provide any “proof” of a threat made by the Grievant to any employee (s). The Union offered the Grievant’s statement, Exhibit 17-8 in which she stated that she has not threatened any employee.

The Union contended that the EP was not immediate and was issued without merit. They cited National Arbitrator Mittenthal whose controlling decision regarding Article 16.7 Suspensions, and the standard of “just cause” which must be met to uphold this disciplinary action, was referenced by Exhibit 17-9, Mittenthal’s Decision in Case No. C-10146. The Union cited that Decision as evidence that Management did not meet their burden in this case.

The Union maintained that a mere allegation does not meet the just cause test according to Arbitrator Mittenthal who stated that ***Emergency Placement for alleged misconduct requires just cause.*** They contended that the allegation of misconduct is not itself sufficient to establish just cause. In the instant case the Union contends that the issue that gave rise to the Grievant being issued the Letter of Emergency Placement was alleged misconduct. The Union argued that

Management never explained or documented how the grievant's posts to Facebook proved to be a threat to any employee. The Union argued that the "just cause" principle is applicable in this case, and requires "**a fair and provable justification for discipline**"

The Union further argued that their Contract or Agreement with the Postal Service demands that "*No employee may be disciplined...except for just cause*". They contended that Ms. Watson, the Grievant, has a reasonable expectation that she will receive a paycheck every two weeks, and the only exception to that should be for "just cause". The Union maintains that if there is no "just cause", there should be no interruption in Ms. Watson's pay. It was the position of the Union that there is also a reasonable expectation of Citizens to their right against "search and seizure" confinement to jail without charges, and their right to freedom of speech. In this case, according to the Union, there were no charges presented in the Written Notice"; and it did not state what Ms. Watson did to cause the interruption of her pay, nor did it give her the information she needed to defend herself. According to the Union, this was a fatal flaw on the part of Management. Additionally, the Union contended, Management denied the Grievant's right to Representation by the Union when they met and interviewed the Grievant on December 19, 2018; another fatal flaw.

The Union argued that the "just cause" provisions require a "fair and provable" justification for discipline; here Management failed to hear the Grievant's side of the story. They contended that Ms. Watson did not intend to be threatening, or for her Facebook posts to be threatening, to any employee. However, Management, specifically Postmaster Lozada, testified that the decision to place the Grievant on EP was made prior to speaking with Ms. Watson on December 19, 2017 because she was fearful for her personal safety due to the Facebook posts. The Union argued that Ms. Lozada called Ms. Watson into her office, but never called police, and never requested the presence of OIG or the Postal Inspection Service while interviewing the Grievant. The Union contended that this was not an act of a person who was truly fearful for her safety. They further contended that Ms. Lozada did not push for security codes to be changed at the office, she did not notify the work force or warn them of any issues with the Grievant, nor did she attempt to verify that security codes were changed or not, at the Des Plaines Post Office.

The Union maintained that in the Investigative Memorandum [JX-2, beginning Page 42], there were no direct threats demonstrated, nor was there any violence indicated or threats of

violence made. The Union contended that Management, specifically Postmaster Lozada, made no attempt to understand the Facebook posts, yet in testimony when reviewing other Facebook posts she stated she understood them. The Union further contended that the Grievant testified that her posts were meant to be funny to her friends and a way for her to express her frustrations while she was struggling at work, even as she loves her job; Ms. Watson even took down the posts once she understood they were upsetting. The Union noted that she testified to the non-violent nature of her posts in her PDI and admitted that they were perhaps childish and she regretted them. However, Management never considered the Grievant's account, nor did they consider any alternate action.

Finally, the Union argued that sometimes people use language that isn't meant to be taken literally, and Facebook posts are even harder to decipher. They further argued that some words take on different meanings altogether and young people these days use a totally different vernacular and even have an "urban dictionary" to translate some words and terms. In this case, according to the Union, the Grievant posted "funerals in my head", not referring to someone's death but referring to someone being "dead to me" or in other words, someone who you choose not to relate to anymore. The Union offered other idioms that if considered literally would constitute a threat to most people- "*drastic times call for drastic measures*", *kill two birds with one stone*, *add fuel to the fire*, "*bite someone's head off*". The Union contended that Ms. Watson was a victim of Management not attempting to understand the "intent" of her Facebook posts prior to issuing the Emergency Placement and was irreparably harmed by the Postal Service not complying with the basic rules of discipline. For those reasons, the Union requested that this grievance be sustained and the Grievant made whole from December 20, 2017 until March 7, 2018.

VIII. DISCUSSION

The Joint Contract Administration Manual is very clear on Emergency Suspensions governed by the provisions of Article 16.7. The JCAM provides that the purpose of 16.7 is "*to allow the Postal Service to act "immediately" to place an employee in an off-duty status in the specified "emergency" situations.*"

While Article 16.7 allows Management to act immediately in these "emergency"

situations, and doesn't require **advanced** written notice before taking action, Article 16.7 does still require that *"an employee placed on emergency off-duty status is entitled to written charges within a reasonable period of time"*. The JCAM cites National Arbitrator Mittenthal in H4N-3U-C 58637, August 3, 1990 (C10146), National Arbitrator Mittenthal where he wrote as follows: *The fact that no "advance written notice" is required does not mean that Management has no notice obligation whatever. The employee suspended pursuant to Section 7 has the right to grieve his suspension. He cannot effectively grieve unless he is formally made aware of the charge against him, the reason why Management has invoked Section 7. He surely is entitled to such notice within a reasonable period of time following the date of his displacement. To deny him such notice is to deny him his right under the grievance procedure to mount a credible challenge against Management's action.*

The JCAM goes on to explain the *"test that management must satisfy to justify actions taken under this Article 16.7"* and tells us that it *"depends upon the nature of the "emergency."* Once again in case no. H4N-3U-C 58637, August 3, 1990 (C10146), National Arbitrator Mittenthal wrote as follows: *"My response to this disagreement depends, in large part, upon how the Section 7 "emergency" action is characterized. If that action is discipline for alleged misconduct, then Management is subject to a "just cause" test. To quote from Section 1, "No employee may be disciplined...except for just cause."*

There is no doubt that in the instant case, Management invoked Emergency Placement based on alleged misconduct, which Postmaster Lozada characterized as a threat to the employees of the Des Plaines Post Office. Ms. Lozada stated that the posting made her uncomfortable. Since the discipline was based on misconduct, then Management is subject to the "just cause" test and cannot rely solely on a reasonable belief or inference that could subject the Grievant to any of the "specified" emergency situations governed by Section 7 of Article 16.

In the case at bar, Management contended that they had just cause to issue the Letter of Emergency Placement to the grievant. They based their position on the fact that the *Postal Service has a well-established Zero Tolerance Policy and that ELM 665.24 prohibits violent and/or threatening behavior; that it is reasonable for any business to expect their employees to not threaten their co-workers; that all employees are notified of the Postal Service's Zero Tolerance Policy during orientation, in postings and via Service Talks; that the Service, has*

consistently invoked on Emergency Placement on employees that have allegedly made threats to co-workers; that there was a thorough investigation and their immediate assessment of the situation warranted the Emergency Placement. They argued that they continued the investigation into the Grievant's conduct after the EP, including contacting the Office of Inspector General (OIG) and conducted their own investigative interview with the Grievant. Management further argued that this investigation did not yield any information which would lead them to end the Emergency Placement; that the seriousness of the Grievant's actions cannot be minimized since the Grievant made a threat to her coworkers via social media and Management took the appropriate action; and that Management acted immediately when they discovered the threats posted by the Grievant.

The Union however disputes Management's claims and offers their own position that Management failed to prove that just cause existed in this case. The Union maintained, *that there was no postal rule mentioned in the Notice provided to Ms. Watson, and therefore was not a reasonable rule, especially since vague comments on social media not directed at any postal employees is not grounds for discipline by the employer; that there have been some questionable exchanges between "those four girls", but only Ms. Watson has been suspended without pay and only a 14-day paper suspension was issued to another carrier, which is still unresolved and in the grievance process; that Management's investigation was not thorough and Management based their allegation of Alleged Unacceptable Conduct/Threats-Violation of Zero Tolerance Policy" on a message that was forwarded to Supervisor Michelle Champs, who then showed it to Postmaster Minnie Lozada; that when Management initially questioned the Grievant, Ms. Watson requested Union representation and, on two occasions, Management denied the Grievant's request for a Union Steward; that the Grievant is a short term City Carrier Assistant who has no prior discipline and whom Management admittedly informed the Union was a good employee with no prior issues at work and no attendance issues. The Union further contends that Ms. Watson's immediate Supervisor described the Grievant as a Very Good Employee; that the Management was notified about the Facebook postings at approximately 1:45 PM and Management did not invoke Emergency Placement until 5PM which was not immediate; that the discipline was punitive in nature given that the Grievant was place on EP on December 19, 2017 at 5PM yet Management did not schedule*

the PDI until January 12, 2018 and the Grievant has remained off the clock without pay since December 20, 2017. The Union argued that the discipline was punitive since in comparison to Letter Carrier C. Montgomery who was also disciplined for Unacceptable Conduct, that employee received a 14-Day paper suspension.

The Joint Contract Administration Manual (JCAM) gives some guidance as to how Article 16 and the “Just Cause” principle has been applied.

Just Cause Principle

The principle that any discipline must be for “just cause” establishes a standard that must apply to any discipline or discharge of an employee. Simply put, the “just cause” provision requires a fair and provable (emphasis added) justification for discipline.

“Just cause” is a “term of art” created by labor arbitrators. It has no precise definition. It contains no rigid rules that apply in the same way in each case of discipline or discharge. National Arbitrator Mittenthal in the previously cited case (H4N-3U-C 58637, August 3, 1990 (C10146)) addressed the elasticity of the term and opined:

One important caveat should be noted. “Just cause” is not an absolute concept. Its impact, from the standpoint of the degree of proof required in a given case, can be somewhat elastic. For instance, arbitrators ordinarily use a “preponderance of the evidence” rule or some similar standard in deciding fact questions in a discipline dispute. Sometimes, however, a higher degree of proof is required where the alleged misconduct includes an element of moral turpitude or criminal intent. The point is that “just cause” can be calibrated differently on the basis of the nature of the alleged misconduct.

Here again in the instant case, Management alleged that the Grievant had some ill-intent toward some or all employees of the Des Plaines Post Office, with Postmaster Lozada stating that she was uncomfortable and felt the need to place the Grievant off-the-clock. Based on the Decision of Arbitrator Mittenthal, this would place a much higher degree of proof upon Management to show that Ms. Watson had some criminal intent in mind when posting the Facebook quotes used by Management to impose Emergency Placement.

When addressing “just cause” from the perspective of a higher burden of proof, a review of the record provides little or no support to demonstrate that the first reaction of an objective, uninvolved, reasonable person would come to the conclusion that the Grievant in this case was

planning to hurt someone in the Des Plaines Post Office. A simple review of the basic principles of “just cause” frequently finds arbitrators applying six sub-questions and applying the following criteria to determine whether the action was for just cause. In this case, I find the following according to the record:

1. Is there a rule? If there is no rule, or the rule is vague, this fundamental requirement of just cause will not be satisfied (unless the conduct is indisputably intolerable: for example, stealing from the employer or selling drugs on-the-job). Here the allegations of posting on Facebook, in language often used by persons utilizing Social Media, even if interpreted by others to have a meaning other than intended by the writer, doesn’t violate a specific rule outlined in the evidence of record. The evidence of record also failed to demonstrate that the Grievant was forewarned that this behavior (Posting language that could have multiple interpretations, one of which would infer criminal activity), would be in violation of Postal Service rules, absent prior behavior/actions on the part of the Grievant which would indicate criminal intent. If the Service had a requirement that banned all employees from posting on any social media platform then that would be a rule which would have been proved as violated by the Grievant. **Clear and Concise.**

2. Is the rule reasonably related to the orderly, efficient, and safe operation of business? No specific rule, other than the general rule of Zero Tolerance, was provided by Management, so there is no way to know whether the rule is related to the efficient operations of the Service.

3. Was there a thorough investigation, before administering discipline to determine whether the Grievant did in fact violate or disobey a rule or order of management? Management cannot always complete their investigation prior to invoking Emergency Placement; however in this case, Management had the opportunity to interview the Grievant prior to imposing the EP. Based on the evidence of record, the Grievant was not provided her “Day in Court” since she was denied representation, albeit Management contends that Ms. Watson did not request representation. As a short term employee, which the parties both stipulated to, who had no prior discipline she would not have much experience with the Discipline and Grievance process. Thus even if she did not request Union Representation, a Union steward should have been provided since Management knew that the interview would lead to some form of discipline; additionally,

the Grievant contends she twice requested her Union Steward and was twice denied.

4. Was the investigation conducted fairly and objectively? Management alluded to the fact that as soon as they reviewed the Grievant's posts they immediately felt uncomfortable. It would be fair to say that any conversations with the grievant at that point would certainly have held some bias to the guilt or innocence of the grievant at that point. The investigation would have been better left to the OIG or some other outside Management or law enforcement official (OIG or Postal Inspection Service). Additionally, without Union representation, the Grievant herself was ill-prepared to represent her side of the story in the meeting held on December 19, 2017; the meeting which led to the EP at issue in this case.

5. Did the investigation result in proof that the Grievant was of the subject conduct? The question here is, "guilty of what conduct"? The investigation on December 19, 2017 would have established that the Grievant posted to a Facebook page she used as an Alias named Vanessa Clay. However, the investigation fell short of proving any intent by the Grievant to cause injury to herself or any employee of the Postal Service, especially since the evidence of record did not demonstrate any prior behavior on the part of the Grievant that would lead someone to infer criminal intent.

6. Does the Agency apply the penalty evenhandedly without discrimination to all employees? Here the Union contended that the EP issued to Ms. Watson was punitive rather than corrective in nature. They offered a comparison employee who was issued a 14-day paper suspension following an altercation with another employee at work. This employee, like the Grievant, was also charged with UNACCEPTABLE CONDUCT.

7. Was the degree of discipline administered reasonably related to the seriousness of the employee's proven offense and the employee's record in service with the company? Given the lack of evidence in the case file to prove misconduct, Emergency Placement could not be seen as reasonably related to the employee's "proven" offense. The actions of the Grievant falls far short of the limited situations which can justify placing an employee in a non-pay, non-work status under the provisions of Article 16.7. The Grievant's actions may have shown poor judgement, especially when discussing her colleagues, however, the Facebook posts presented as evidence

here fall short of rising to a level that would require indefinitely suspending the Grievant without pay.

It is Management's burden to prove that "just cause" existed to invoke Article 16 Section 7 of the National Agreement in this discipline case. Arbitrator Mittenthal's National Level Award provides for a higher level of proof; proof that did not exist in this case. In contrast, in Case No. J11N-4J-D 15153389 & J11N-4J-D 15177027 which was cited by the Union, this Arbitrator reviewed a case, not exactly similar to the case at bar, but one which required the interpretation of the language used by another. In that case, Management cited, and I offered the language from a Supreme Court decision which reviewed threats in the workplace. In Metz v. Department of Treasury, 780F.2d 1002-1003 (1986) the Court opined:

Any threat made to a Government supervisor is a serious matter that clearly impairs the efficiency of the service. In some cases, however, it is difficult for the agency to determine if a threat has been made. This court has held that the board must use "the connotation which a reasonable person would give to the words" in order to determine if the words constituted a threat.

(1) *In order to apply the reasonable person standard, however, the board must weigh the evidence. We direct the board to consider the following evidentiary factors in deciding whether an employee threatened his supervisors or co-workers:*

- a. *The listener's reactions;*
- b. *The listener's apprehension of harm;*
- c. *The speaker's intent;*
- d. *Any conditional nature of the statements; and*
- e. *The attendant circumstances*

(2) *The United States Supreme Court provided the basis for these standards by writing "the statute initially requires the Government to prove a true "threat"...Our guidelines effect the appropriate standard by directing the board to give objective evidence heavy weight. The standards direct the board to apply the reasonable person criterion by considering what reasonable persons who heard the statements actually did. For instance, a listener who reacted by calling police after hearing a statement is more likely to have heard a threat than a listener who did nothing. Likewise, an employee who made a generalized conditional statement is less likely to have intended to threaten a coworker than employee who stated a simple threat....*

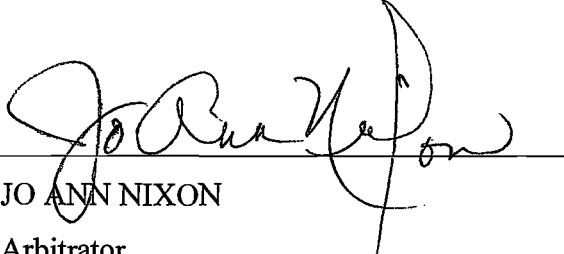
In my prior case the language used by the Grievant was meant to incite fear in a particular person and the words used by that employee were carefully chosen to instill that fear.

Also, the words utilized were direct and to the point, so any reasonable person would interpret the words to mean exactly what he said. Whether or not that employee had intentions of harming the employee he targeted with his words, a reasonable person would have anticipated harm. Comparatively, in the instant case, the Grievant did not target a particular individual, nor did the words she used imply that Ms. Watson would later harm any person or persons. The posts were phrases commonly used by social media participants when speaking in general about things through which they suffer...bad relationships, long meetings, others with whom they must endure, and unfortunately most times it concerns their job and their co-workers. Without additional evidence to show intent by the Grievant, Management has failed to prove that just cause existed to invoke Emergency Placement and thus was in violation of Article 16 of the National Agreement when they suspended Ms. Watson without pay on December 19, 2017.

The grievance is sustained. Management was in violation of Article 16 of the National Agreement when they suspended Ms. Watson without pay on December 19, 2017. The Grievant shall be made whole for all loss pay and benefits from December 20, 2017 through March 7, 2018 the date of Removal which is the subject of a separate grievance.

AWARD

The grievance is sustained. Management was in violation of Article 16 of the National Agreement when they suspended Ms. Watson without pay on December 19, 2017. The Grievant shall be made whole for all loss pay and benefits from December 20, 2017 through March 7, 2018 the date of Removal which is the subject of a separate grievance.


JO ANN NIXON
Arbitrator

New Iberia, Louisiana

May 16, 2018