

C-25724

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National Arbitration Panel

OFFICE of the PRESIDENT
N.A.L.C. HDQRTS., WASHINGTON, D.C.

In the Matter of Arbitration)
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 between)
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 United States Postal Service)
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 and)
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 American Postal Workers Union)
)
 and)
)
 National Association of Letter)
 Carriers - Intervenor)
)
 and)
)
 National Postal Mail Handlers)
 Union - Intervenor)

Case No.

Q00C-4Q-C 03126482

Before: Shyam Das

Appearances:

For the Postal Service: Larissa O. Taran, Esquire
 For the APWU: Melinda K. Holmes, Esquire
 For the NALC: Keith E. Secular, Esquire
 For the NPMHU: Bruce R. Lerner, Esquire
 Kathleen M. Keller, Esquire

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Place of Hearing: Washington, D.C.

Dates of Hearing: October 16, 2003
May 19, 2004

Date of Award: January 28, 2005

Relevant Contract Provisions: Article 10;
ELM Subchapter 510

Contract Year: 2000-2003

Type of Grievance: Contract Interpretation

Award Summary

The three issues raised in this case are resolved as follows:

Nature of Illness

In applying ELM 513.332 in the context of the RMD process, ACS's may ask questions necessary to make FMLA determinations and to determine whether the absence is due to an on-the-job injury or for a condition which requires ELM 865 return-to-work procedures, in a manner consistent with the Findings in this decision, but may not otherwise require employees to describe the nature of their illness/injury.

FMLA Second and Third Opinion Process

The Postal Service's current process for initiating FMLA review by a third health care provider, at issue in this case, is not consistent with the FMLA or with ELM 515.1 and 515.54, and implementation of that process violates Articles 5 and 10.2.A of the National Agreement. The Postal Service is directed to rescind that process.

FMLA Paid Leave Documentation

The Unions' contention that the protested Postal Service paid leave documentation policy is improper and impermissible under the National Agreement is rejected.



Shyam Das, Arbitrator

In September 2000, the APWU initiated a national level dispute regarding implementation of certain aspects of the Postal Service's Resource Management Database (RMD) and its web-based counterpart, eRMS.¹ In an agreement dated March 28, 2003 the parties were able to resolve their disputes over some, but not all, of the issues raised by the APWU. This settlement agreement, in relevant part, states:

This dispute involves the implementation of the Postal Service Resource Management Database (RMD), its web-based enterprise Resource Management System (eRMS), and the application of current leave-related rules and policies, including the Family and Medical Leave Act.

After discussing this matter, the parties agreed to the following mutual understanding and settlement of this case:

- Pursuant to Article 10 of the National Agreement, leave regulations in Subchapter 510 of the Employee Labor Relations Manual (ELM), which establish wages, hours and working conditions of covered employees, shall remain in effect for the life of the National Agreement. The formulation of local leave programs are subject to local implementation procedures, in accordance with Article 30 of the National Agreement.
- The purpose of RMD/eRMS is to provide a uniform automated process for recording data relative to existing leave rules and regulations. RMD/eRMS (or similar system of records) may not alter or

¹ References in this opinion to "RMD" include both RMD and eRMS.

change existing rules, regulations, the National Agreement, law, local memorandums or understanding and agreements, or grievance-arbitration settlements and awards.

* * *

- Pursuant to part 513.332 of the ELM, employees must notify appropriate postal authorities of their illness or injury and expected duration of absence as soon as possible....
- Pursuant to part 513.361 of the ELM, when an employee requests sick leave for absences of 3 days or less, "medical documentation or other acceptable evidence of incapacity for work or need to care for a family member is only required when an employee is on restricted sick leave (see 513.39) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service." A supervisor's determination that medical documentation or other acceptable evidence of incapacitation is desirable for the protection of the interest of the Postal Service must be made on a case by case basis and may not be arbitrary, capricious, or unreasonable.
- Pursuant to part 513.362 of the ELM, when an employee requests sick leave for absences in excess of 3 days (scheduled work days), employees are required to submit medical documentation or other acceptable evidence of incapacity for work for themselves or of need to care for a family member, and if requested,

substantiation of the family relationship. Medical documentation from the employee's attending physician or other attending practitioner should provide an explanation of the nature of the employee's illness or injury sufficient to indicate to management that the employee was (or will be) unable to perform his or her normal duties for the period of absence. Supervisors may accept substantiation other than medical documentation if they believe it supports approval of the sick leave request.

* * *

The parties agreed to continue discussions related to management requesting the nature of the illness when an employee calls in; FMLA second/third opinion procedures; medical documentation requirements to substitute paid leave for unpaid intermittent FMLA leave. In the event no agreement is reached within fifteen (15) days from the date of this settlement, the Union may initiate a dispute at the national level....

By letter dated April 23, 2003, the APWU initiated the present national level dispute over the three remaining issues. This dispute subsequently was appealed to arbitration, where the NALC and the NPMHU intervened in support of the APWU's position on the three issues.

Nature of Illness

ELM 17, July 2002, provides as follows in ELM 513.332:

Unexpected Illness or Injury

An exception to the advance approval requirement is made for unexpected illness or injuries; however, in these situations the employee must notify appropriate postal authorities of their illness or injury and expected duration of absence as soon as possible. When sufficient information is provided to the supervisor to determine that the absence is to be covered by FMLA, the supervisor completes Form 3971 and mails it to the employee's address of record along with a Publication 71.

When the supervisor is not provided enough information in advance to determine whether or not the absence is covered by FMLA, the employee must submit a request for sick leave on Form 3971 and applicable medical or other certification upon returning to duty and explain the reason for the emergency to his or her supervisor. Employees may be required to submit acceptable evidence of incapacity to work as outlined in the provisions of 513.36, Documentation Requirements, or noted on the reverse of Form 3971 or Publication 71, as applicable.

The supervisor approves or disapproves the leave request.....

Prior to RMD, call-ins sometimes were taken by the employee's supervisor and sometimes by other individuals, including bargaining unit employees. With the implementation of

RMD (at most facilities), the call-ins are taken by designated "Attendance Control Supervisors" (ACS's), who input information previously handwritten on Form 3971 (Request for or Notification of Absence) into a computer system. Most recently, the Postal Service has begun to implement an Interactive Voice Recognition (IVR) system as part of the RMD program. IVR is a computerized speech application system that is replacing ACS's taking employees' calls for absences due to nonjob-related illness and injury. In late 2003, the APWU was provided with the proposed IVR script (APWU Exhibit 23).

The Postal Service maintains that prior to RMD, supervisors routinely asked employees the nature of their illness/injury when they called in absent. It presented testimony by headquarters Labor Relations Specialist Sandra Savoie in support of this contention. She testified to her experience in Dayton, Ohio both as a clerk and local APWU official from 1978 to 1988, and as a Postal Service labor relations official at various locations since 1988. After the APWU raised this issue in connection with implementation of RMD, Savoie testified, she queried the field and was told that supervision considers it very important and necessary that it be able to get this information, and also that it has been asked for "forever".

Although the IVR script does not ask employees to describe the nature of their illness/injury in so many words, Savoie said, it asks a series of questions -- capable of a yes/no response -- designed to provide supervision with

equivalent information. She pointed out that a computer can be programmed to ask the same questions every time it receives a call-in, while it is more difficult to "program" a live person to do that. At the end of the IVR message, she noted, employees are told: "Upon your return to work, you may be required to explain your unscheduled absence."

APWU Director of Industrial Relations Greg Bell testified that when the Postal Service notified the Union of its plans to implement RMD, nothing was said about this including asking employees to describe the nature of their illness/injury when they call in absent. Bell said this had not previously been a problem, but the Union subsequently began to receive many complaints from the field that this now was being done.

Bell stated that during his employment as a clerk and local APWU official in the Philadelphia office starting in 1970, employees were not required to describe the nature of their illness/injury when they called in absent. Such information was provided, pursuant to ELM 513.364, only when medical documentation was required. This practice was reflected in the minutes of a January 2003 Philadelphia BMC labor-management meeting which states: "The parties agreed the nature of the illness should not be requested when employee calls in." (APWU Exhibit 20.) Bell also presented an April 2000 Step 3 settlement of a San Antonio office grievance to the same effect. (APWU Exhibit 21.) He added that, contrary to the Postal Service's claim that the policy always has been to request information about the nature of an employee's illness/injury

when they call in absent, "I'm aware of that not being a policy in many, if not most facilities nationwide."

Union Position

The Unions contend that asking employees to describe the nature of the illness/injury for which they are calling in absent violates the National Agreement because it is neither permitted by, nor consistent with the leave provisions of the ELM. Article 10.2 of the National Agreement requires that those leave regulations remain in effect for the life of the National Agreement.

Since before implementation of RMD, ELM 513.332 has required employees who have an unexpected illness/injury to call in and "notify appropriate postal authorities as soon as possible as to their illness or injury and expected duration of absence".² As explained by APWU witness Bell, the supervisor or clerk who received the call prior to RMD manually completed appropriate parts of a Form 3971 (Request for or Notification of

² The APWU cites ELM 15, December 1999, which was in effect when the APWU initiated a national level dispute over certain aspects of the RMD. The Postal Service cites ELM 17, July 2002, in effect when the APWU initiated the present dispute over the three remaining issues from the earlier dispute which the parties were unable to settle. There is a slight difference in wording between the two versions of ELM 513.332. In ELM 15 employees are required to provide notice "as to their illness or injury", while ELM 17 states "of their illness or injury". The parties agree that this difference in wording does not signify any substantive difference. Unless otherwise stated, references to the ELM in this opinion are to ELM 17.

Absence). Upon return to duty, the employee completed additional parts of Form 3971, thereby requesting leave for the absence. A supervisor then completed the form by approving or disapproving the leave request.

For certain types of absences, such as those in excess of three days or those taken by employees on restricted sick leave, the Postal Service requires the employee to supply medical documentation, typically upon the employee's return to work. ELM 513.364 states that this documentation "should provide an explanation of the nature of the employee's illness or injury". The Unions stress this is the only provision in the ELM that refers to a requirement that a description of the nature of an employee's illness/injury be provided. The Unions contend that if the intent had been to require an employee to explain the nature of the illness/injury when calling in to report an absence, it would have been simple to write such a requirement into ELM 513.332, as was done in ELM 513.364.

The Unions point out that Form 3971 not only does not call for information regarding the nature of the illness/injury to be recorded when a call-in is received, but states in the "Remarks" section: "Do not enter medical information." The Unions also point out that when the Postal Service implemented RMD, it did not expressly require the ACS who takes the call and inputs information regarding the absence into the RMD system to inquire about the nature of the illness/injury. The RMD system continues to use a computerized version of Form 3971, and there was no written requirement that ACS's ask for or employees

provide such an explanation. Nonetheless, with the implementation of RMD, the APWU began to receive numerous complaints that employees were being asked to describe the nature of their illness/injury. When the APWU raised this issue, the Postal Service defended its policy of making such an inquiry.

The Unions assert that the Postal Service has provided no basis for this policy except to suggest it reflects past practice. The Unions insist, however, that the record does not support the existence of such a past practice, and that, in any event, a purported past practice cannot reverse the clear language in the ELM and other Postal Service documents that clearly do not authorize the Postal Service to inquire about the nature of an employee's illness/injury when an employee calls in absent.

The Unions also dispute the Postal Service's assertion that it is necessary to make such an intrusive inquiry at the time an employee calls in absent. Neither determinations about whether an absence is FMLA-protected, nor the need for a return-to-duty exam can or should be made based on what employees report when they call in absent. Instead, the system needs only to flag an employee to receive further follow-up information on the FMLA or an instruction to be cleared by the employee's doctor to return to work. Both outcomes are achieved, without requiring employees to describe the nature of their illness/injury, by asking whether the absence falls within the general categories prompting FMLA information or return-to-duty

exams pursuant to ELM 865.2. The Postal Service implicitly has acknowledged that less intrusive questions can serve these needs in its implementation of the IVR system and in the script it provided for use by the ACS's operating the RMD system, which the APWU obtained from the Los Angeles office (APWU Exhibit 8). Determinations as to whether a fitness-for-duty exam is required in accordance with ELM 513.38 typically are made when the employee is back at work. The Postal Service does not need to know or make a decision concerning a fitness-for-duty exam when an employee calls in absent. Notably, the IVR system makes no such inquiry.

Intervenor NALC stresses that ELM 513.332 -- the meaning of which is the crux of this case -- provides that the employee's obligation is to "notify appropriate postal authorities of their illness or injury...." (Emphasis added.) Unlike an employee's immediate supervisor, ACS's taking call-ins under the RMD system cannot be characterized as "appropriate postal authorities" for purposes of receiving information as to the nature of an employee's illness. They have no authority to make decisions for which the nature of illness information may be relevant, such as whether the employee is entitled to sick leave, whether a fitness-for-duty exam is warranted or whether the employee's condition is covered by FMLA. Moreover, Intervenor NPMHU points out, the information provided by the absent employee, without the underlying medical diagnosis, would be insufficient to permit the ACS to make such determinations, and asking the nature of the illness during the initial call to an ACS impermissibly intrudes on employee privacy.

Employer Position

The Postal Service contends that it is necessary and appropriate for the Postal Service to inquire as to the nature of an employee's illness or injury during call-ins reporting an unexpected absence. Such inquiry is necessary to enforcement of Postal Service policies, including FMLA, which require certain determinations to be made prior to the employee's return to work.

The Postal Service is required to make a determination as to whether the condition is covered under the FMLA, for which it needs to know the reasons for the absence, as the APWU has acknowledged in item 21 of the Joint APWU and USPS Family and Medical Leave Act Questions and Answers. The Postal Service also cites the February 2003 USPS-NALC Joint Contract Administration Manual (JCAM) on this point.

The Postal Service maintains that the nature of the illness/injury inquiry is crucial to its ability to timely schedule an employee for a fitness-for-duty examination, ELM 513.38, and to enforce the return to work provisions in ELM 865. ELM 513.38 provides:

When the reason for an employee's sick leave is of such a nature as to raise justifiable doubt concerning the employee's ability to satisfactorily and/or safely perform duties, a *fitness-for-duty medical examination* is requested through appropriate authority. A

complete report of the facts, medical and otherwise, should support the request.

ELM 865.2 provides:

Employees returning to duty after an absence for communicable or contagious diseases, mental and nervous conditions, diabetes, cardiovascular diseases, or seizure disorders or following hospitalization must submit a physician's statement doing one of the following:

- a. Stating unequivocally that the employee is fit for full duties without hazard to him- or herself or others.
- b. Indicating the restrictions that should be considered for accommodation before return to duty.

* * *

The Memorandum of Understanding on Sick Leave for Dependent Care, included in Appendix B of the National Agreement, states:

The parties agree that, during the term of the 2000 National Agreement, sick leave may be used by an employee to give care or otherwise attend to a family member having an illness, injury or other condition which, if an employee had such condition, would justify the use of sick leave by that employee....

The Postal Service stresses that without knowing the nature of the condition for which sick leave is requested, it has no basis

for making a determination as to whether the employee's request falls within this MOU's coverage.

The Postal Service asserts that with the implementation of the IVR system, it continues to obtain the same information previously obtained by asking employees about the nature of their illness/injury, albeit in a different format.

The Postal Service argues that the plain language of ELM 513.332 supports its position that such an inquiry is permitted. That provision states that an employee "must notify appropriate postal authorities....of their illness or injury," which the Postal Service reasonably interprets to mean more than a mere statement that an employee is ill or injured. While ELM 513.364 specifies that when medical documentation is required to be submitted to the Postal Service it "should provide an explanation of the nature of the employee's illness or injury", that does not mean that such an inquiry may not be made during the call-in. On the contrary, if the Postal Service was precluded from making such an inquiry, a supervisor would not have the information needed to apply that portion of ELM 513.364 which states: "Supervisors may accept substantiation other than medical documentation if they believe it supports approval of the sick leave request." Likewise, clearly a supervisor needs more information than just a simple statement that the employee is "ill" in order to decide whether to require medical documentation for absences of three days or less "for the protection of the Postal Service" pursuant to ELM 513.361.

The Postal Service stresses that the practice of inquiring as to the nature of an employee's illness/injury has existed for decades and was not initiated in the context of RMD. This was established by the testimony of Postal Service witness Savoie, and is confirmed by numerous regional arbitration awards which show that the Postal Service routinely asked for and was often provided with "nature of illness/injury" information. Union evidence of agreements in two offices (Philadelphia and San Antonio) that employees would not be asked the nature of their illness when they call in does not contradict the existence of the practice, but rather confirms that it existed at those offices before the local parties agreed otherwise.

FMLA Second and Third Opinion Process

The Family and Medical Leave Act (FMLA) includes the following provisions, at 29 USC §2613(c) and (d):

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided [by the employee's health care provider to support a request for FMLA leave]... the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer....

* * *

(d) Resolution of conflicting opinions

(1) In general

In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification..., the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee....

(2) Finality

The opinion of the third health care provider...shall be considered to be final and shall be binding on the employer and the employee.

Regulations issued by the United States Department of Labor (DOL) under the FMLA further provide, at 29 CFR §825.307(c):

...The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be

failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith.

In conjunction with implementation of RMD, the Postal Service developed a series of sample or form letters to be utilized in the field to facilitate consistency and compliance with the FMLA nationwide. (These letters were discussed with the APWU and revisions were made based on APWU input, but they are not negotiated letters.) One of these letters, which are to be used even where RMD is not implemented, is a letter sent to an employee after the Postal Service has obtained a second medical opinion which differs from the initial certification provided by the employee's health care provider. This sample letter reads, in relevant part, as follows:

In reference to your request for FMLA Leave protection, the USPS medical unit has received the results of the 2nd opinion medical evaluation from Dr. «Name».

As explained in the attached letter from the USPS medical unit, Dr. «Name» has determined that the condition for which leave is requested does not warrant FMLA protected leave. If you accept the result of this 2nd opinion evaluation, then this decision will stand.

If you do not accept these results, you must notify me «name» @ «Phone Number» within 5 calendar days of receiving this letter, and a 3rd opinion appointment will be scheduled.

You should leave a message, if «name» is not in the office, to ensure that you have made contact within 5 days. A health care provider for the third opinion will be jointly agreed upon by you and the Postal Service.

If the employee has not contacted me within the 5 days, the 2nd opinion will go on record as the final decision.

The Postal Service notes that some offices have elected to provide employees more than five days to respond, and that, in any event, employees can request additional time in which to do so.

Union Position

The Unions contend that by placing the responsibility on the employee to demand a third doctor's opinion, the Postal Service has abrogated the responsibilities the FMLA expressly places on the employer and nullified the purpose of the third doctor's opinion option. The FMLA expressly provides that only the employer can require a third doctor's opinion. The Unions' objection to the process established by the Postal Service is that it not only puts the responsibility for deciding whether to get a third doctor's opinion on the employee, but it creates a new default rule under which an employee who does not take the initiative to request a third doctor's opinion is deemed to have affirmatively accepted the Postal Service's second doctor's opinion as final. This is not only inconsistent with the FMLA, the Unions stress, it is patently unfair.

The Unions point out that while the employer is not required under the FMLA to request a third medical opinion, it is the employer's option whether to do so. If the employer chooses not to seek a third opinion, the employee is not bound by the second opinion. The employer in that situation may not be legally required to accept the employee's request for FMLA leave, as a number of courts have held, but, if the employer does not do so, the question of whether the absence was FMLA-covered falls to the ultimate factfinder, either in arbitration or litigation.

In practice, Intervenor NPMHU asserts, the FMLA puts the ball in the employer's court to weigh the potential difficulties of disproving the employee's medical certification in arbitration or at trial against both the expense of the third doctor's exam and the risk the third doctor will side with the employee. The Postal Service, however, is attempting to have it both ways by avoiding the risk and expense of a third opinion, while foreclosing the employee's opportunity to challenge the Postal Service's denial through arbitration or a lawsuit. This is not what the FMLA or National Agreement contemplate. Intervenor NPMHU contends that the Postal Service's policy is unfair, in violation of ELM 511.1, and impermissibly limits employees' FMLA rights in violation of ELM 515.1 and the FMLA.

The Unions also reject the Postal Service's assertion that its process is consistent with the FMLA because the Postal Service considers an employee's failure to demand a third doctor's opinion within a certain time period to be an act of

noncooperation binding the employee to the second opinion. The FMLA regulations state that if an employee fails to attempt in good faith to reach agreement on whom to select for the third opinion provider, the employee will be bound by the first certification. Those regulations make no reference to an employee's failure to cooperate in initiating the third doctor's opinion process because the law and regulations do not give employees a responsibility or duty to make that decision.³

The Unions contend that Article 5 of the National Agreement prohibits the Postal Service from taking any action affecting terms and conditions of employment that would violate the National Agreement or otherwise be inconsistent with the Postal Service's obligations under law. Because the third doctor's opinion process concerns the conditions under which a postal employee is granted or denied the protection of the FMLA, the propriety of that process, which was unilaterally established by the Postal Service, is properly reviewable by the Arbitrator. The Unions insist that the Arbitrator is fully empowered to interpret the FMLA and its regulations in addressing this issue, citing the decision of Arbitrator Nolan in USPS and NALC and NPMHU, Case No. Q98N-4Q-C 010190839 (2002).

³ Intervenor NPMHU further argues that the Postal Service's requirement that an employee respond in five days is inconsistent with the much more lenient "good faith negotiation" requirement which is all that federal law allows.

Employer Position

The Postal Service contends that neither FMLA regulations, nor the ELM provisions implementing the FMLA, contain a clearly delineated process regarding how the third opinion health care provider is to be selected. The Postal Service insists that the process it established in conjunction with the RMD process is fair, reasonable and consistent with the FMLA, specifically, with Section 825.307 of the applicable DOL regulations. That provision requires that if the employer requires the employee to obtain a third medical opinion, "the third health care provider must be designated or approved jointly by the employer and the employee". The regulation does not specify the process which will bring the parties together to select a third opinion health care provider.

Under the process established by the Postal Service, employees are informed that they can accept the second opinion or can call within the specified time-frame to arrange for a jointly agreed-upon health care provider to provide a third opinion. If the employee does not call within the designated period, the Postal Service infers that the employee has elected to forego the third opinion and agrees instead to abide by the second opinion. Put another way, the Postal Service asserts, the employee's election not to call is considered a failure to cooperate, pursuant to Section 825.307(c) of the DOL regulations, and the second opinion becomes binding. Contrary to the Unions' allegation that the process improperly shifts responsibility for demanding a third opinion from the employer

to the employee, this process gives an employee the option of asking for a third opinion or accepting the second opinion.

The Postal Service asserts that in establishing this process it took into account that a third medical exam intrudes on employees' time (as it is off the clock) and necessarily forces them to relinquish some privacy interests by subjecting them to examination by an additional health care provider. Allowing employees to elect whether or not they want a third opinion, the Postal Service argues, is a good compromise because employees still can get the benefit of what the statute intended -- the right to a third and final tiebreaker -- but they also get the right to say "no" to a third exam if they are willing to live with the results of the second opinion, which in many cases may not be very different from the first opinion.

The Postal Service also maintains that the arbitrator lacks the authority to decide the dispute concerning second and third opinions because at its essence it is a dispute about the meaning and intent of FMLA provisions and DOL regulations and not the collective bargaining agreement. In support of this position, it cites decisions by Arbitrator Bloch in *USPS v Federation of Postal Police Officers*, Case No. FPSP-Nat-81-006 (1983), Arbitrator Nolan in *USPS and NALC and NPMHU*, Case No. Q98N-4Q-C010190839 (2002), and Arbitrator Allen in *USPS v. APWU*, Case No. E98C-4E-C 00235731 (2003).

FMLA Paid Leave Documentation

Subchapter 513 of the ELM covers sick leave. ELM 513.362 provides as follows:

For absences in excess of 3 days, employees are required to submit medical documentation or other acceptable evidence of incapacity for work or of need to care for a family member and, if requested, substantiation of the family relationship.

At issue is the Postal Service's policy of requiring medical documentation under ELM 513.362 in situations where an employee, who has previously provided FMLA certification of a serious health condition indicating the need for intermittent leave, requests paid leave for an absence which falls between the certification and a recertification. The FMLA limits the circumstances, including frequency, under which the employer can require recertification for purposes of FMLA protected leave. The Postal Service, however, requires an employee to provide medical documentation for all absences in excess of three days, if the employee requests paid leave, even if no such documentation could be required for FMLA leave.

The APWU claims it was not aware of this policy until after the Postal Service began to implement RMD. APWU Industrial Relations Director Bell stated that, to his recollection, this was not an issue in contention in 1993 when the FMLA went into effect. He also pointed out that the documentation requirements in ELM 513.362 apply not only to an

employee requesting paid sick leave, but also to an employee requesting annual leave or leave without pay under the applicable ELM provisions governing such leaves. The purpose of the documentation, he stressed, is to substantiate the employee's incapacity for work. The APWU insists this is unjustified in cases where the employee already has provided FMLA certification of the need for intermittent leave, which necessarily establishes the employee's incapacity for work.

Postal Service Labor Relations Specialist Savoie insisted that the documentation requirements for paid leave -- sick leave or annual leave in lieu of sick leave -- have not changed, and are the same as before the FMLA. The Postal Service, however, does not require documentation for leave without pay if the leave is protected under FMLA.

Union Position

The Unions contend the Postal Service's policy of requiring medical documentation, in addition to an approved FMLA medical certification identifying a need for intermittent leave, when an employee seeks to substitute paid sick leave for unpaid FMLA leave for an absence of four days or more is improper and impermissible under the National Agreement.

Employer Position

The Postal Service asserts that paid leave is beyond the mandate of the FMLA, and that the statute and DOL

regulations make clear that an employee seeking to substitute paid leave for unpaid protected FMLA leave must meet the employer's normal requirements for paid leave.

The Postal Service acknowledges that information contained on a FMLA medical certification may also meet the Postal Service's paid sick leave documentation requirements. This occurs, however, only with regard to the particular absence triggering certification or recertification that contains information about incapacity during the current absence sufficient to justify paid leave. For absences not triggering a request for certification or recertification, the Postal Service may separately request sick leave documentation consistent with its regulations.

FINDINGS

Nature of Illness

The term "nature of the employee's illness or injury" appears only in ELM 513.364, which provides that when employees are required to submit medical documentation:

The documentation should provide an explanation of the nature of the employee's illness or injury sufficient to indicate to management that the employee was (or will be) unable to perform his or her normal duties for the period of absence....

In cases where employees have called in absent due to unexpected illness or injury (ELM 513.332), the purpose of this medical documentation (or other acceptable evidence) is to substantiate the employee's incapacity to work when that is required pursuant to ELM 513.361 (three days or less), 513.362 (over three days) or 513.363 (extended periods).

ELM 513.332, which is the key provision in this dispute, provides that, in case of unexpected illness or injury: "the employee must notify appropriate postal authorities of their illness or injury and expected duration of absence as soon as possible." The words "of their illness or injury" are ambiguous, when read by themselves. It is reasonable, however, to conclude that they do not mean the same thing as "the nature of the employee's illness or injury" found in ELM 513.364. If they did, presumably the same wording would have been used. The distinction, moreover, is not limited to wording, the information to be provided by an employee calling in absent pursuant to ELM 513.332 serves different purposes than the information provided pursuant to ELM 513.364.

Call-ins pursuant to ELM 513.332 are not made to substantiate incapacity to work during the absence. The ACS taking the employee's call as part of the RMD process is not making a determination whether to approve or disapprove of leave for the absence. Nor is the supervisor who ultimately will make that determination going to do so on the basis of whatever the employee may or may not have told the ACS regarding the nature

of her or his illness/injury. Leaving aside for the moment FMLA leave, ELM 513.332 is quite clear:

...the employee must submit a request for sick leave on Form 3971 and applicable medical or other certification upon returning to duty and explain the reason for the emergency to his or her supervisor. Employees may be required to submit acceptable evidence of incapacity to work as outlined in the provisions of 513.36, Documentation Requirements, or noted on the reverse of Form 3971 or Publication 71, as applicable.

The supervisor approves or disapproves the leave request....

The primary purpose of the call-in is to notify the Postal Service as soon as possible that the employee is going to be absent. For that, a simple statement that "I am sick/injured" might be sufficient. But the call-in, as the Unions acknowledge, serves other purposes, and the Postal Service is entitled to more than that. This case is not about whether the employee is only required to say "I am sick/injured".

Another major purpose of the call-in is to determine whether the absence is (or may be) covered by FMLA, in which case -- as stated in ELM 513.332 -- the supervisor completes Form 3971 and mails it (or FMLA Certification of Health Care Provider Form WH-380) to the employee along with Publication 71, which explains an employee's FMLA rights and obligations. (This applies whether the absence is due to the condition of the

employee or a family member.) As stated in item 21 of the Joint APWU and USPS FMLA Qs and As:

...an employee must explain the reasons for the absence and give enough information to allow the employer to determine that the leave qualifies for FMLA protection. If the employee fails to explain the reasons, the leave may not be protected under the FMLA.

Similarly, the USPS-NALC JCAM states (at page 10-15):

Management is within its rights to ask employees about the circumstances of their condition in order to determine whether absences may be protected under the FMLA and/or whether absences are for a condition which requires the ELM 865 return to work procedures.

In order to make the necessary FMLA determination, the ACS need not ask the employee to describe his or her symptoms or to otherwise describe the specific nature of the illness. Indeed, as also stated in the USPS-NALC JCAM: "Other than pregnancy, the circumstances determine whether a [health] condition is serious, not the diagnosis." So, asking the employee questions like "What's the nature of your illness?" or "What's wrong with you?" does not really facilitate a FMLA determination. In addition to asking the employee directly whether the leave request is for a new or existing FMLA condition -- or "Is this leave FMLA?" (see ACS/RMD script obtained by APWU from the Los Angeles office) -- which the employee may well be able to answer, the ACS can ask other

questions that tie directly into the FMLA. A good example is in the IVR script, where the IVR "voice" asks:

Say yes if your leave is because you or your family member has one of the following FMLA conditions: pregnancy, birth or placement of a child, overnight hospitalization, incapacity over three days with visits to a health care provider, a condition that without treatment would incapacitate over three days or incapacity from a long term condition with multiple treatments. Is your leave related to one of these conditions, Yes or No?

Employees who answer affirmatively, are then told they will be mailed Publication 71 and the necessary FMLA certification form to be completed by their health care provider.

Information obtained when an employee calls in absent due to illness/injury is needed for two other purposes. One is to determine whether the absence is due to an on-the-job injury, which can be asked directly. Another, which is recognized in the USPS-NALC JCAM, is to determine whether the absence is for a condition which requires return-to-work certification under ELM 865. This also can be done without asking employees to specifically describe the nature of their condition, as shown by the following portion of the IVR script:

All right one last question. Is your absence due to hospitalization, mental or nervous condition, diabetes or seizure disorders, cardiovascular diseases, communicable or contagious disease, or for

more than 21 days? Please say "yes" or "no".

YES: In order to return to work, you must provide a detailed medical report, sufficient to make a determination that you can return to work without hazard to self or others, and indicating any restrictions per local procedures.

NO:

For all of these legitimate purposes, the Postal Service says it obtains equivalent information through the IVR system as when employees are asked to describe the nature of their illness to an ACS. Actually, the IVR script may provide more pertinent information. The IVR script, in any event, shows that the Postal Service's needs can be met less intrusively without asking for the nature of the illness. So does the ACS/RMD script from the Los Angeles office, which does not include asking the nature of the employee's illness/injury.⁴ This conclusion is further supported by local agreements in Philadelphia and San Antonio that employees should not be asked the nature of their illness when they call in.⁵

⁴ The record does not indicate whether this ACS/RMD script was promulgated locally or by Postal Service headquarters. Postal Service witness Savoie testified that in implementing RMD headquarters did not "roll out anything that said ask the nature of the illness."

⁵ I do not agree with the Postal Service that the existence of these agreements confirms that a contrary practice previously existed at those locations.

The Postal Service claims it needs to ask employees for the nature of their illness/injury when they call in to be able to timely schedule an employee for a fitness-for-duty exam under ELM 513.38, which states:

When the reason for an employee's sick leave is of such a nature as to raise justifiable doubt concerning the employee's ability to satisfactorily and/or safely perform duties, a *fitness-for-duty medical examination* is requested through appropriate authority. A complete report of the facts, medical and otherwise, should support the request.

The Postal Service gave as an example an employee who calls in and says he hurt his back. For safety purposes, it says, it needs to know the employee is fit for duty before his return to work. Yet, keeping in mind that employees off work for more than three days have to provide medical documentation upon return to work (or have an FMLA certification), it seems doubtful, and there is no evidence, that supervisors request fitness-for-duty exams based on what the employee tells an ACS when he or she calls in, rather than on the basis of medical documentation, the explanation provided by the employee on return to work or other sources of information.

The Postal Service also claims that, if it is precluded from making such an inquiry, a supervisor would not have the information needed to apply that portion of ELM 513.364 which states: "Supervisors may accept substantiation other than medical documentation if they believe it supports approval of the sick leave [in excess of three days] request." Yet, there

is nothing in the record to show that such determinations are made on the basis of what employees tell an ACS on a call-in regarding the nature of their illness/injury.

Furthermore, as already noted, the ability of the Postal Service to satisfactorily administer the leave provisions of the ELM in offices such as Philadelphia and San Antonio, or using the IVR system, without asking the nature of their illness/injury when employees call in absent, is telling with respect to the Postal Services' claimed needs to request that information.

Finally, the Postal Service maintains that it needs to have employees describe the nature of their illness/injury in order to decide whether to require medical documentation for absences of three days or less under ELM 513.361, which provides:

For periods of absence of 3 days or less, supervisors may accept the employee's statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work or need to care for a family member is required only when the employee is on restricted sick leave (see 513.39) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service. Substantiation of the family relationship must be provided if requested.

Under this provision, medical documentation can be required for absences of three days or less only when the

employee is on restricted sick leave or to protect the interests of the Postal Service. The latter, insofar as the record in this case shows, applies where the supervisor who is to approve/disapprove the requested leave has some reason to suspect the employee is not really incapacitated from working, as where the employee was denied requested annual leave or has a pattern of asking for sick leave on the days after holidays. In their March 28, 2003 settlement agreement, the APWU and the Postal Service agreed that a supervisor's decision to require documentation or other evidence pursuant to ELM 513.361 "must be made on a case by case basis and may not be arbitrary, capricious or unreasonable".

It is far from clear on this record that any description of the nature of illness/injury provided by an employee to an ACS in the RMD process actually is passed on to the supervisor who makes determinations under ELM 513.361, let alone used as the basis for requesting medical documentation. Form 3971 specifically directs that medical information not be entered thereon. In the RMD process, the ACS essentially enters the same information that previously was handwritten on a Form 3971 into a computer data system, which generates a Form 3971 to be completed by the employee and the supervisor who approves or disapproves the requested leave on the employee's return to work.⁶

⁶ While this case is not about which "supervisor" can make a decision to require medical documentation under ELM 513.361, the evidence in this record does not indicate that any supervisor is doing so on the basis of employees' descriptions of the nature of their illness/injury when they call in to an ACS as part of

The evidence as to pre-RMD application of ELM 513.332 consists of testimony by Postal Service witness Savoie and APWU witness Bell and a dozen or so regional arbitration awards, which the Postal Service asserts support its position that a consistent practice of inquiring into the nature of an employee's illness/injury on a call-in has existed for decades. Not only is this evidence limited in scope, it is far from conclusive. At best, it shows that in some offices employees either volunteered or were asked to describe the nature of their illness/injury, particularly when the call was taken by their direct supervisor. In some other locations such as Philadelphia, this was not done.⁷

the RMD process. Whether the supervisor who does make that decision under ELM 513.361 can question absent employees about the nature of their illness/injury in appropriate circumstances, as part of that decision making, is not an issue within the scope of this case.

⁷ One of the arbitration decisions cited by the Postal Service, USPS and APWU, Case No. I-90-1I-C 95039549 (Fletcher, 1996), quotes 1992 "Call-In Procedure" instructions previously in effect in the Des Moines Post Office, that the grievance sought to have reinstated. Wholly unrelated to the issue in that case, those instructions stated: "In cases where the employee calls in claiming illness, normally the general nature of the illness is provided if requested by the supervisor." The Postal Service cited another decision, USPS and APWU, Case No. 9501904 et al (McAllister, 1996), for its determination that leave regulations issued by the Pittsburgh Post Office in 1995 appropriately required detailed information on a call-in. A paragraph on reporting absences in those regulations stated: "Additionally, you will be asked if the absence is in any way related to an on-the-job injury or if you believe the absence is covered in any way by the Family Medical Leave Act." Notably, the regulations quoted in the decision do not otherwise appear to provide for asking employees the nature of their illness/injury.

Taking into account the substantial employee privacy interests stressed by the Unions and the clear distinction between the wording of ELM 513.332 and 513.364, the information regarding an employee's illness/injury which the Postal Service properly can require an employee to provide when calling in absent -- beyond "I am ill/injured" -- should not exceed the established administrative needs of the Postal Service, as discussed above.

Accordingly, I conclude that in applying ELM 513.332 in the context of the RMD process, ACS's may ask questions necessary to make FMLA determinations and to determine whether the absence is due to an on-the-job injury or for a condition which requires ELM 865 return-to-work procedures, in a manner consistent with these Findings, but may not otherwise require employees to describe the nature of their illness/injury.

FMLA Second and Third Opinion Process

Article 10.2.A of the National Agreement provides as follows:

The leave regulations in Subchapter 510 of the Employee and Labor Relations Manual, insofar as such regulations establish wages, hours and working conditions of employees covered by this Agreement, shall remain in effect for the life of this Agreement.

Article 5 of the National Agreement states:

The Employer will not take any actions affecting wages, hours and other terms and conditions of employment as defined in Section 8(d) of the National Labor Relations Act which violate the terms of this Agreement or are otherwise inconsistent with its obligations under law.

ELM 515.1 states: "Section 515 provides policies to comply with the Family and Medical Leave Act of 1993 (FMLA)." ELM 515.54 addresses "Additional Medical Opinions", in relevant part, as follows:

Additional Medical Opinions

A second medical opinion by a health care provider who is designated and paid for by the Postal Service may be required. A health care provider selected for the second opinion may not be employed by the Postal Service on a regular basis. In case of a difference between the original and second opinion, a third opinion by a health care provider may be required. The third health care provider is jointly designated or approved by management and the employee, and the third opinion is final....

(Emphasis added.)

In conjunction with implementation of RMD, but separate and apart from that process, the Postal Service established its current policy and process with respect to third medical opinions. There is no evidence that prior to development of the sample letter (quoted earlier in this opinion), the Postal Service had any sort of policy requiring employees to notify the Postal Service if they do not accept the

second opinion and want a third opinion. Postal Service witness Savoie testified that headquarters was trying to establish some sort of process, where none had existed before, to help its FMLA administrators comply with existing FMLA regulations.

In these circumstances, I conclude that, as an Arbitrator under the National Agreement, I have the authority to determine whether the recently adopted Postal Service process is consistent with applicable ELM leave provisions, and, in doing so, to consider applicable provisions of the FMLA which the ELM provisions are expressly intended to comply with.⁸

ELM 515.54 specifically provides that: "In the case of a difference between the original and second opinion, a third

⁸ As Arbitrator Nolan stated in a recent decision cited by both the Postal Service and the Unions, USPS and NALC and NPMHU, Case No. Q98N-4Q-C 010190839 (2002):

One obvious exception to the general rule [that the arbitrator's function is to interpret and apply the contract and not the law] is that parties who incorporate external law in their contract, either expressly or by paraphrase, necessarily expect their arbitrators to interpret and apply the incorporated law. That may sometimes require examination of implementing regulations and relevant judicial precedent.

* * *

The Postal Service's fall-back position, that an arbitrator may "apply" but may not "interpret" a law, relies on an impossible distinction. More often than not, it is necessary to interpret the law precisely in order to apply it; to put it simply, before one can apply a law, one must know what the law means.

opinion may be required." (Emphasis added.) The most, if not only, sensible reading of these words -- even without reference to the FMLA -- is that the Postal Service may require a third opinion. Moreover, this provision clearly is meant to comply with the provisions of the FMLA, as stated in ELM 515.1.

While the FMLA does not spell out a specific process for selecting the third opinion provider, it expressly places responsibility on the employer to determine whether to require that the employee obtain a third opinion. If the employer chooses to do so, the third opinion is controlling.

The Postal Service's current process, as reflected in the sample letter provided for use in the field, clearly departs from and is inconsistent with the statutory scheme. It requires the employee, rather than the employer, to make the decision whether to obtain a third opinion.

The Postal Service's current process makes the second opinion the final decision if the employee fails within a set time period to notify the Postal Service that he or she does not accept the second opinion. The Postal Service claims this is consistent with Section 825.307(c) of the DOL regulations.⁹

⁹ As part of its arbitrability argument, the Postal Service points out that some DOL regulations have come under fire as invalid extensions of the FMLA. But it does not assert that this part of the regulations has been challenged in court, and in this instance it is the Postal Service which is citing the regulations in support of its action.

There is no justifiable basis, however, for equating an employee's failure to affirmatively reject a second opinion as a failure by the employee to "act in good faith to attempt to reach agreement on whom to select for the third opinion provider", which is the only basis under the DOL regulations for making the second opinion binding on the employee.

Accordingly, I conclude that the Postal Service's current process for initiating FMLA review by a third health care provider is not consistent with the FMLA or with ELM 515.1 and 515.54, and that implementation of that process violates Articles 5 and 10.2.A of the National Agreement.

FMLA Paid Leave Documentation

Prior to the FMLA, ELM 513.362 required that employees requesting paid sick leave for an absence in excess of three days submit "medical documentation or other acceptable evidence of incapacity for work". This requirement also applied, under applicable ELM provisions, if an employee requested annual leave in lieu of sick leave or leave without pay (LWOP). The documentation had to cover the specific period of absence, whether or not due to a recurring condition.

The ELM provisions applicable to paid and unpaid leave, other than unpaid FMLA leave, have not changed. The FMLA, however, provides for medical certification of a serious health condition indicating the need for intermittent leave in the future, and this permits an eligible employee to use FMLA

leave when, and if, that occurs. The FMLA limits the circumstances, including frequency, under which the employer can request recertification. Thus, if an employee who is absent in excess of three days attributes the absence to the previously certified condition, the Postal Service may not (subject to certain exceptions) require additional documentation as a condition to granting unpaid FMLA leave.¹⁰ The Postal Service has conformed to the requirements of the FMLA by not requiring such documentation for LWOP that is protected under the FMLA.

The Postal Service continues, however, to require compliance with the documentation requirements in ELM 513.362 if the employee seeks to substitute paid sick leave (or annual leave in lieu of sick leave) for unpaid FMLA leave. This is not inconsistent with the FMLA. Section 825.207 of the DOL regulations provides:

(c) ...Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of sick/medical leave. An employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave "in any situation" where the employer's uniform policy would not normally allow such paid leave.

* * *

(h) When an employee or employer elects to substitute paid leave (of any type) for

¹⁰ For purposes of this section of the Findings, it is assumed that the certification meets the requirements of the FMLA and entitles the employee to use FMLA leave.

unpaid FMLA leave under circumstances permitted by these regulations, and the employer's procedural requirements for taking that kind of leave are less stringent than the requirements of FMLA (e.g., notice or certification requirements), only the less stringent requirements may be imposed. An employee who complies with an employer's less stringent leave plan requirements in such cases may not have leave for an FMLA purpose delayed or denied on the grounds that the employee has not complied with stricter requirements of FMLA. However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program.

The Unions argue that: (i) the Postal Service concedes that FMLA certifications require more information than the Postal Service requires under ELM 513.362, so that the former must satisfy the latter; (ii) the Postal Service has articulated no reason why the FMLA certification does not suffice to satisfy ELM 513.362; (iii) the Postal Service cannot require both FMLA certification and ELM documentation for absences in excess of three days; and (iv) the Postal Service's policy is inequitable in imposing different documentation requirements on two employees with identical conditions and approved FMLA certifications just because the length or pay status of leave they use is different.

Contrary to the Unions' position, the Postal Service has articulated a reason for requiring documentation under ELM

513.362 even where an employee has provided an approved FMLA certification indicating a need for intermittent leave. If the absence exceeds three days, the Postal Service seeks medical documentation that the employee actually was incapacitated from working on those specific days. Even if the earlier FMLA certification includes more information about the employee's condition and its incapacitating effect, it establishes only a need for intermittent leave in the future. It does not, and cannot, by itself certify that any particular subsequent absence actually is attributable to that condition, rather than to some other reason which may not justify granting the requested leave.

The FMLA requires the employer, subject to certain exceptions, to accept certification of the need for intermittent leave as sufficient documentation for unpaid FMLA leave. The Postal Service has complied with the FMLA in that respect. The FMLA, however, does not require the employer to accept that certification for paid leave, if -- as is the case here -- the employer's uniform policy requires different documentation for paid leave.

As I read Section 825.207 of the DOL regulations, the fact that an employee already may have provided acceptable FMLA certification that would entitle the employee to unpaid FMLA leave does not preclude the employer from requiring an employee who elects to substitute paid leave to comply with the employer's own medical certification requirements, whether they are more or less stringent than the FMLA requirements.

It is true, as the Unions assert, that two postal employees with identical conditions and approved FMLA certifications may be subject to different requirements depending on the length of their absence or their pay status during the absence. The Unions claim this is inequitable, but postal employees long have been subject to different medical documentation requirements depending on whether their absence is or is not in excess of three days, and that has not been -- and cannot be -- deemed inequitable. As to pay status, as the APWU itself pointed out, the ELM -- absent the FMLA -- imposes the documentation requirements in 513.362 on employees requesting leave without pay as well as those requesting paid leave. The FMLA precludes the Postal Service from imposing its own leave requirements that are above and beyond those in the FMLA for unpaid FMLA leave. The FMLA, however, specifically permits the Postal Service to continue to impose its own different requirements for paid leave. While the Unions can seek agreement to change those requirements, they do not violate the law, the National Agreement or existing postal regulations.

The documents presented by the APWU to supports its claim that the Postal Service's current requirement contradicts the policy it expressed to the APWU when the FMLA was first implemented (APWU Exhibits 12, 13 and 14) do not address the requirements for paid leave when the employee seeks to substitute paid leave for unpaid FMLA leave. The evidence also does not establish that the Postal Service has varied or changed the manner in which ELM 513.362 has been applied in those circumstances.

In sum, the Unions' contention that the protested Postal Service paid leave documentation policy is improper and impermissible under the National Agreement must be rejected.

AWARD

The three issues raised in this case are resolved as follows:

Nature of Illness

In applying ELM 513.332 in the context of the RMD process, ACS's may ask questions necessary to make FMLA determinations and to determine whether the absence is due to an on-the-job injury or for a condition which requires ELM 865 return-to-work procedures, in a manner consistent with the Findings in this decision, but may not otherwise require employees to describe the nature of their illness/injury.

FMLA Second and Third Opinion Process

The Postal Service's current process for initiating FMLA review by a third health care provider, at issue in this case, is not consistent with the FMLA or with ELM 515.1 and 515.54, and implementation of that process violates Articles 5 and 10.2.A of the National Agreement. The Postal Service is directed to rescind that process.

FMLA Paid Leave Documentation

The Unions' contention that the protested Postal Service paid leave documentation policy is improper and impermissible under the National Agreement is rejected.



Shyam Das, Arbitrator