27777

EASTERN AREA REGULAR ARBITRATION PANEL

In the Matter of the Arbitration	**Grievant: Darrell Hamilton**
between	**Post Office: Lorain, Ohio**
UNITED STATES POSTAL SERVICE	**USPS Case No. C01N-4C-C 08063831**
	NALC Case No. 20071217
and	
NATIONAL ASSOCIATION OF LETTER CARRIERS	

Before:	Jonathan I. Klein, Arbitrator
Appearances:	
For the Postal Service:	Kathleen Pollock Labor Relations Specialist
For the Union:	David Ditchey NALC Advocate
Place of Hearing:	Lorain, Ohio
Date of Hearing:	May 16, 2008
Date of Award	September 9, 2008
Last Brief Received	August 18, 2008
Relevant Contract Provisions:	Article 19
Contract Year:	2001-2006
Type of Grievance:	Contract

USPS Case No. C01N-4C-C08063831
NALC Case No. 20071217

AWARD SUMMARY

The Postal Service violated the National Agreement when it failed to provide the grievant with copies of the documents which were presented to his physician as part of its inquiry into information regarding the grievant's medical condition, and his ability to return to full or limited duty. Further, management was required to provided the grievant with a copy of his physician's response when it was received. Accordingly, the grievance is sustained and the Postal Service is ordered to cease and desist from said conduct in the future.

Jonathan I. Klein

STATEMENT OF FACTS

In March 2007, special agent Don Catanzarito of the Office of Inspector General (OIG) was contacted by Melvin Davis, the OIC at the Lorain, Ohio post office, regarding an allegation of workers' compensation fraud by the grievant, letter carrier Darrell Hamilton. Thereafter, special agent Catanzarito began an investigation into the grievant's activities. During the course of his investigation, special agent Catanzarito personally contacted the grievant's physician and provided him with a letter and a Form CA-17, Duty Status Report regarding the grievant's work restrictions.

On December 17, 2007, a meeting was held between the grievant and two OIG special agents, one of whom was special agent Catanzarito. The grievant was informed that there was no evidence that he had engaged in any fraudulent activities, and agent Catanzarito then presented

the grievant with a limited duty job offer from the Postal Service. The grievant questioned how the information for the job offer was obtained and indicated that he would discuss the matter with his physician.

On December 24, 2007, the Union filed a grievance which provides, in part, as follows: "Did OIG and the USPS violate the rights of the Grievant by not notifying the Grievant they had communications with his doctor about his personal medical records on 10/2007, if so what is the appropriate remedy?" (Joint Ex. 2, at 28). The parties subsequently held a formal Step A meeting on December 31, 2007. The initial denial of the grievance issued by the Postal Service on December 31, 2007, provides, in pertinent part, as follows:

> The NALC contends the Officer [sic] of the Inspector General (OIG) recently visited the office of Dr. Schikandantz [sic] to discuss and review medical records of you without obtain[ing] any written medical release. This inappropriate action by the OIG violates the Privacy Act of 1993 according to the NALC.
>
> Postal Management and the Office of the Inspector General were only seeking information concerning the availability and mobility of you performing job tasks within your medical restrictions without causing a further degree of injury. There was no review of medical records or inquiries concerning prognosis, diagnosis or prescriptions given to you. The proposed job tasks were only presented to Dr. Schikandantz [sic] for his review and approval before making a limited duty job offer to you.
>
> Postal Management and the Officer [sic] of the Inspector General operated within the law and with just cause. Attached are two documents dated 10-25-07 and 10-26-07 prepared by Officer of the Inspector General and sent to Dr. Schikandantz [sic] supporting their actions.

* * *

(Joint Ex. 2, at 27).

The grievance was progressed to Step B on January 10, 2008. On January 16, 2008, the Step B Dispute Resolution Team reached an impasse in this matter and the parties proceeded to arbitration. At the arbitration hearing, the Union withdrew its claims pertaining to Health Insurance Portability and Accountability Act (HIPPA) and Privacy Act violations by the Postal Service. The parties also stipulated that the issue presented in this case is set forth in the Step B decision. (Joint Ex. 2, at 2).

Vivian Mittleman, a staff attorney with the OIG for approximately five and one-half years, discussed her legal background and duties with the OIG. Mittleman testified that the OIG investigates claims of fraud and has statutory authority to obtain various documents. According to Mittleman, the OIG may obtain records from physicians without subpoenas. She further indicated that the OIG is not an "employing agency" under 20 CFR §10.506. Specifically, the OIG acts as an investigative agency and not an employer.

Mittleman reiterated on cross-examination that the OIG is not considered to be an employer when it is investigating allegations of fraud and abuse. She also acknowledged that "getting an employee back to work is not within the authority of the OIG." The function of the OIG is purely investigative, although it also performs audits at the request of the Postal Service. Mittleman stated that the OIG answers to the Board of Governors, not to the Postmaster General.

Don Catanzarito, a special agent with the OIG since September 2006 and a federal law enforcement agent since 1983, testified that his position involves the investigation of allegations concerning fraud and criminal activity. However, he is not considered to be an employer. In the instant case, the grievant allegedly exceeded his work restrictions in connection with off-duty, dart throwing activities while he was receiving workers' compensation benefits. Additionally, the grievant allegedly worked for a company related to the dart throwing industry in violation of his work restrictions.

Catanzarito testified that he was not obligated to notify the grievant that he would be contacting his physician as part of the investigation. He indicated that he interviewed both the grievant's physician and the grievant in order to complete a fair, impartial and independent investigation regarding the allegations against the grievant.

On cross-examination, Catanzarito confirmed that he began his investigation of the grievant in March 2007. Furthermore, the investigation was closed pending a final decision by the Department of Labor (DOL) shortly after the meeting with the grievant on December 17, 2007. He acknowledged that no OIG report was issued to management in this case. Additionally, he determined that the grievant had neither exceeded his work restrictions nor engaged in outside employment. Catanzarito admitted that the formulation of a limited duty job offer is not part of his job description.

Catanzarito further stated on redirect examination that he interviewed the grievant's physician on October 25, 2007, in the presence of the physician's attorney. He did not request

the grievant's physician to provide him with a limited duty job offer, however, he did question the physician whether the grievant could perform limited duty work. Catanzarito also testified that management made no request that he ask the grievant's physician any specific questions. However, he requested that the grievant's physician complete a form CA-17 as part of his investigation because the physician was familiar with the form. Catanzarito noted that the limited duty job offer was signed by Davis. He reiterated that the purpose of meeting with the grievant's physician was not to assist Davis with providing the grievant with a limited duty job offer. Catanzarito also confirmed that management was not present when he interviewed the grievant on December 17, 2007, and he did not issue a report regarding his investigation because it was not necessary for management to take any action with regard to the grievant.

On recross-examination, Catanzarito indicated that while he only spoke to the grievant's physician once, he had several conversations with Davis throughout the investigation process. He reiterated that he presented the limited duty job offer to the grievant on December 17, 2007, after it had been provided to him by Davis. According to Catanzarito, he offered to give the limited duty job offer to the grievant because he would be interviewing him. However, he admitted that providing limited duty job offers to employees was not part of his job, and he could not recall the number of job offers that he had previously presented to employees. Catanzarito claimed that he had not made a determination whether the grievant had engaged in any fraudulent activities at the time he presented the limited duty job offer to him. He also asserted that he did

not attempt to "strong arm" the grievant when he presented him with the job offer. Catanzarito further indicated that Davis was aware that he would present the job offer to the grievant.

Catanzarito maintained that it was not improper for him to present the job offer to the grievant and he did so as a favor to Davis. He also asserted that part of his investigation was served by presenting the job offer to the grievant. Catanzarito reiterated that he requested the grievant's physician to execute the forms at the conclusion of their meeting. He acknowledged that he did not provide the CA-17 form to the grievant, and he stated that there are a lot of "grey areas as a criminal investigator."

On recall, Catanzarito was unable to state the reason why Postal Service Exhibit 3, the October 25, 2007 letter to the grievant's physician, did not contain the OIG logo. He testified that he may have borrowed or obtained the form from Shared Services, and the OIG utilizes different types of investigative tools. Therefore, "he wouldn't read too much into who sent it." Catanzarito confirmed that he handed the letter to the grievant's physician along with form CA-17 without management assistance. He further stated that he did not inform the grievant during their meeting that the purpose of talking to his physician was to obtain information for a limited job offer.

Daniel Toth, a regional administrative assistant with the Union, testified that he accompanied the grievant to the meeting with the OIG agents on December 17, 2007. At the meeting, Catanzarito informed them of the allegation that the grievant was working a second job. However, Catanzarito stated that the grievant was not compensated and "there was nothing to

that charge." According to Toth, he believed that the investigation of the grievant had concluded. Toth further testified that Catanzarito stated that he "sat down with the grievant's doctor trying to find a job offer the grievant might be able to do . . . within his medical restrictions." Thus, the OIG had shifted its attention to getting the grievant back to work. Catanzarito then presented the grievant with a limited duty job offer. (Joint Ex. 3). Although Catanzarito wanted the grievant to sign the job offer at the meeting, he was professional and did not attempt to "strong arm" the grievant.

According to Toth, Article 19 of the National Agreement and the ELM was violated when agent Catanzarito discussed the grievant's medical information and a job offer with the grievant's physician without the knowledge of the grievant after the OIG had concluded its investigation. Toth pointed out that 20 CFR §10.506 is mirrored in the ELM. He also noted that this is not the first time that the grievant's physician has been contacted without the grievant's knowledge. Toth indicated that a previous incident resulted in a pre-arbitration settlement. (Union Ex. 3). In the instant case, both the Postal Service and the OIG were involved in an attempt to get the grievant back to work.

On cross-examination, Toth stated that he had no knowledge of the allegations against the grievant until meeting with OIG agents on December 17, 2007. He pointed out that agent Catanzarito informed them that there was no evidence of fraud by the grievant. He asserted that the entire intent of the OIG was to get the grievant back to work.

Toth testified on redirect examination that there was no reason that the limited duty job offer could not have been mailed to the grievant. He reiterated that Catanzarito denied receiving any medical information regarding the grievant, although he did discuss the grievant's medical restrictions with his physician. According to Toth, only written contact with the grievant's physician is permitted under the contract and such contact must be shared with the grievant. Therefore, it would have been acceptable if Postal Service Exhibit 3 was mailed to the grievant's physician and a copy provided to the grievant. Under the circumstances presented in this case, the OIG worked in conjunction with the Postal Service in the capacity of its agent.

The grievant testified that he has been employed by the Postal Service since May 1984, and he has been active in various positions with the Union. The grievant discussed a previous grievance which he filed in 2005 involving the failure of Shared Services to send him a copy of a letter which was provided to his physician. In the instant case, the grievant indicated that an OIG agent contacted his daughter at his residence on or about November 16, 2007. He subsequently contacted the OIG at the end of November 2007 and scheduled a meeting on December 17, 2007. At the meeting, the grievant was notified of his rights and informed by special agent Catanzarito he had been investigated concerning workers' compensation fraud and working a part-time job in violation of his work restrictions. However, special agent Catanzarito also informed him that the accusations against him were false based upon the results of the investigation. Nonetheless, the grievant expressed the belief that he is still being investigated to this day.

During the December 17 meeting, Catanzarito questioned the grievant why he had refused previous job offers, and indicated that he spoke to the grievant's physician regarding his medical condition and job restrictions. The grievant testified that Catanzarito provided him with a job offer at that time. Catanzarito also informed him that he wanted the job offer to be signed so he could close his case. The grievant indicated that he was upset and refused to sign the job offer until he had discussed the matter with his physician. The grievant subsequently met with Davis to discuss the grievance and expressed the opinion that he was "violated by going to his doctor and he was not [involved] in the process." The grievant indicated that he wants the Postal Service to cease and desist from engaging in the improper conduct described above, and to follow the correct procedures for obtaining information from his physician. He also stated that he would like to receive $26,000.00 as part of the remedy.

The grievant testified on cross-examination that OIG agent Catanzarito informed him that he was attempting to get him back to work. The grievant reiterated that OIG agents met with his physician. Additionally, the grievant did not obtain any information regarding the investigation until December 17, 2007. He confirmed that his rights were explained to him at his meeting with the OIG agents.

Melvin Davis, the current manager of the Lakewood, Ohio post office and OIC at the Lorain, Ohio post office during the period at issue in this case, testified that he received information that the grievant was either organizing or participating in dart tournaments in violation of his work restrictions. As a result, he contacted the OIG in compliance with his duty

to report allegations of fraud. He was subsequently contacted by the OIG and questioned regarding any information concerning the grievant's involvement with such dart tournaments. However, Davis stated that he did not tell the OIG agents how to perform their investigation. Furthermore, he did not ask the OIG agents to meet with the grievant's doctor, nor did he request that they prepare a limited duty job offer for the grievant. Davis also testified that he did not attempt to meet with the grievant's doctor, nor did he attempt to call him or send him a fax. He specifically stated that he did not send the letter dated October 25, 2007, to the grievant's physician, and he became aware of the letter for the first time when it was subsequently presented to him along with a CA-17 form by special agent Catanzarito. (Joint Ex. 3). However, he did prepare the job offer which was provided to the grievant.

Davis further asserted that he did not ask the OIG to initiate an investigation solely to get the grievant back to work. He simply thought that the OWCP should be made aware of the purported fraudulent activity by the grievant. In regard to his Step 2 response to the grievance, Davis stated that "he was not seeking information but included himself as to the referral to the OIG." Davis further testified that he did not receive a report from the OIG following its investigation of the grievant. He confirmed that no discipline was assessed the grievant as a result of the investigation and the grievant's status has remained unchanged.

On cross-examination, Davis reiterated that he initially contacted the OIG regarding the grievant. He admitted that the third paragraph contained in his Step 2 response to the grievance "makes it look like he was working with the OIG" and "he sees how it may be misleading."

However, the purpose of that paragraph was only to indicate his referral to the OIG. In regard to Joint Ex. 3, Davis confirmed that he received pages two and three from the OIG and he prepared the limited duty job offer on page four which was then provided to the OIG as requested. He did not know why the OIG requested the job offer, and he did not know what agent Catanzarito was going to do with it. He also acknowledged that the correspondence to the grievant's physician was on Postal Service letterhead. Davis reiterated that he is not privy to the manner in which the OIG conducts its investigations.

STATEMENT OF ISSUES

1. Whether or not the instant grievance is arbitrable?

2. Did Management violate Article 19 of the National Agreement when the OIG had communicated with the Grievant's Doctor about his medical records? And if so, what is the appropriate remedy?

(Joint Ex. 2, at 2).

CONTENTIONS OF THE PARTIES

Management's Contentions

At the arbitration hearing, the Postal Service raised a threshold issue of substantive arbitrability based on the jurisdiction of the arbitrator. The Union challenged management's right to raise this issue for the first time at the arbitration hearing. The Postal Service points out that this issue was addressed in the Step B decision which provides, in part, that "The United

States Postal Inspection Service and the Office of the Inspector General are not covered under the . . . Collective Bargaining Agreement." (Postal Service Post-Hearing Brief, at 2 - 3). Additionally, the Postal Service relies upon an arbitration award wherein arbitrator Mittenthal held, in part, that "[t]he Postal Service is free to raise this arbitrability defense at the arbitration hearing even though it had not raised the matter earlier. For this kind of defense goes to the vary power of the arbitrator to act and cannot be waived through prior silence." (Postal Service Post-Hearing Brief, at 3).

The Postal Service asserts that the Union cannot change the scope of the grievance at the hearing. The Union leads the arbitrator to believe that after it withdrew the HIPAA issue and part of the remedy, it was only challenging management activity. The Postal Service notes that the Step B decision centered on the OIG contact with the grievant's physician, and the Union's statements centered on such contact. However, the Union's focus at the arbitration hearing shifted to what the "employer/management" did, thereby insinuating that the OIG's actions were directed by Davis. The issue at Step B clearly states "Did Management violate . . . when **OIG communicated with Grievant's Doctor**?" (Postal Service Post-Hearing Brief, at 4) (Bold in text). The issue did not state "when management communicated with Grievant's Doctor" or "when Management directed the OIG to communicate with Grievant's Doctor." (Postal Service Post-Hearing Brief, at 4). As discussed herein, management does not direct the activities of the OIG.

The instant grievance involves the activities of special agents of the OIG. Article 15 limits the jurisdiction of the arbitrator to the four corners of the contract. The Postal Service contends that the activities of the OIG are not covered by the contract. Furthermore, management does not control the activities of the OIG. It points out that the authority of the OIG is governed by the Inspector General Act of 1978 ("IG Act"). The IG Act further provides that the head of the entity for the OIG are the nine presidentially-appointed Governors of the Postal Service. Accordingly, the grievance/arbitration procedure is not the appropriate venue to challenge the activities of the OIG because it is not covered by the contract. Additionally, it would be inappropriate to decide this matter in regional arbitration because the Union has filed a complaint in federal court alleging virtually identical claims under the U.S. Constitution and federal law.

OIG special agents are federal law enforcement officers designated to investigate criminal matters related to the Postal Service. The IG Act provides broad investigatory powers necessary to investigate fraud. Although the Union stipulated at the hearing that it was no longer pursuing its HIPAA argument, the Postal Service points out that HIPAA's privacy regulations do not designate the grievance/arbitration procedure as the appropriate venue for complaints and policy enforcement. Furthermore, a private right of action does not exist under HIPAA. This further substantiates the fact that this matter is not arbitrable.

The Union alleges that Union Exhibit 1 supports its position that the Postal Service is in violation of 20 CFR § 10.506 which specifically prohibits telephone or personal contact initiated

by the employer with an employee's physician. The Postal Service notes that the issues referred to in the case cited in Union Exhibit 1 pertain to whether management violated the National Agreement when it telephonically contacted limited duty employees' physicians and whether management violated the National Agreement when it contacted limited duty employees' physicians by letter and did not send copies of the letters to the carriers. However, without seeing the entire case file for the grievance management has no way of knowing if the issues in that case are the same as the issues in the instant case.

The Union further alleges that management is not in compliance with a pre-arbitration settlement dated December 8, 2005, which cites the provisions of Union Exhibit 1 in regard to 20 CFR §10.506 and EL-505 dealing with employer contact with an employee's physician and providing the employee with copies of correspondence sent to his or her physician. (Union Ex. 3). The Postal Service asserts that the OIG is not the employing agency. Furthermore, the OIG is not management and the OIG and its agents are not the employer. The Postal Service points out that the OIG has a personnel and pay system which is separate from the Postal Service, and it has the authority to hire its own employees. Additionally, the Inspector General, who reports to nine presidentially-appointed Governors, is precluded under the IG Act from reporting to or being supervised by the Postmaster General or any other officer or employee of the Postal Service. In other words, OIG employees are not subject to Postal Service control and OIG management does not have the authority to discipline Postal Service employees. Thus, restrictions contained in both FECA and Family and Medical Leave Act (FMLA) regulations

regarding employer contacts with physicians do not apply to OIG special agents investigating fraud and abuse.

The Union further alleges that the Postal Service is in violation of Handbook EL-505 which provides, in part, that copies of correspondence sent to an employee's physician should also be provided to the employee. However, the individuals contacting the treating physician are referred to in Section 6.3 of the EL-505 as "USPS personnel and the staff of USPS contract medical providers . . ." As previously stated, the OIG and its agents are not the employer. Furthermore, OIG agents are not contract medical providers. The Postal Service further maintains that Handbook EL-505 is a reference for injury compensation control office and control point personnel at postal facilities concerning the management of the USPS Injury Compensation Program. It notes that ELM Section 541.2 (e) - (g) sets forth the definitions of control office, control officer and control point.

At no point does Handbook EL-505 indicate that the aforementioned section applies to the OIG, nor do any of the definitions refer to the OIG. Additionally, OIG agents are not listed as designees. This is so for the following reasons: the OIG is not the employing agency; the OIG is not the employer; the OIG is not indicated as the employer in any handbook, manual or collective bargaining agreement; the terms "OIG" and "employer" are not used synonymously in any handbook, manual or collective bargaining agreement; the OIG is not management; the OIG is not indicated as management in any handbook, manual or collective bargaining agreement; the OIG is not governed by the district manager and/or installation head and it could not be

designated by the district manager and/or installation head to coordinate claim management activity; the OIG does not coordinate claim management activity; the OIG agents are not human resources specialists; the OIG agents are not Postal Service physicians or occupational health nurse administrators; the OIG agents are not Postal Service supervisors; the OIG is not the Control Office; the OIG is not the Control Officer; and the OIG is not the Control Point.

In regard to the remedy, the Postal Service maintains that a "make whole" remedy would return the grievant to *status quo ante*, or the position that he would have been in had there been no violation. Management contends that the grievant is already in this position because no discipline was assessed, the grievant lost no money and he is still off work. Any other remedy would be punitive, and punitive remedies are utilized in only the most egregious situations. However, this is not one of those situations.

Furthermore, even if this case is arbitrable, the Union cannot prove by a preponderance of the evidence that management violated the contract. The OIG and not Management contacted the grievant's physician. "Management did not dictate and cannot dictate the manner in which the doctor was contacted or the documents that were part of the communication with the doctor." (Postal Service Post-Hearing Brief, at 11). The Union's allegation that the sole purpose of the OIG contact with the grievant's physician was to try to get the grievant back to work and provide him with a job offer is not supported by the evidence. The Postal Service points out that Davis was not present during any meetings with the grievant's physician, nor was he present when the OIG agents interviewed the grievant. Additionally, at no time did Davis contact the grievant's

physician or request that the physician be contacted by the OIG. Moreover, it is absurd to think that a postal manager would contact an OIG agent just to get a job offer signed.

Special Agent Catanzarito testified that the OIG sent a letter to Dr. Schickendantz and the OIG also requested that Davis prepare a job offer for the grievant. Catanzarito testified that the aforementioned letter was a form letter that was not prepared by Davis and was not on OIG letterhead for various reasons. Catanzarito further stated that OIG agents employ various law enforcement techniques which he was not at liberty to reveal. The Postal Service asserts that Davis' testimony corroborates the testimony of Catanzarito. Specifically, Davis indicated that he was not privy to the manner in which the OIG conducted its investigation and he prepared the limited duty job offer and gave it to the OIG agent because he requested it. Even based on the grievant's testimony, it is clear that the OIG agents were simply investigating allegations of fraud.

Finally, the Postal Service asserts that the language contained in paragraphs 2 and 3 of the Step 2 denial by Davis does not establish that the OIG was acting at the direction of management. It points out that Davis testified at the hearing that his phraseology did not mean that he was dictating the actions of the OIG. The Postal Service also maintains that the grievance referred to in Union Ex. 3 is neither precedent setting nor did it involve an investigation by the OIG. Numerous arbitration awards were referenced by the Postal Service and attached to its Post-Hearing Brief in further support of its position in this case. For each of the aforementioned

reasons, the Postal Service requests a ruling that the grievance is not arbitrable, or in the alternative, that the grievance be denied in its entirety based upon the merits.

Union's Contentions

The Union contends that the Postal Service's actions in this case violated several provisions of the National Agreement and/or Handbooks and Manuals which are part of the National Agreement. It also points out that this is not the first time that the grievant's rights have been violated in this manner. The Union acknowledges that the Postal Service has a valid interest and obligation in providing productive work for injured employees. However, it must comply with the Federal Employees Compensation Act (FECA) and applicable regulations which govern the USPS Injury Compensation Program.

In support of its position in this case, the Union cites Handbook EL-505 and a Step IV settlement between the parties dated February 5, 1999. Included as part of the Step IV Settlement is 20 CFR §10.506, which provides as follows:

> To aid in returning an injured employee to suitable employment, the employer may also contact the employee's physician in writing concerning the work limitations imposed by the effects of the injury and possible job assignments. (However, the employer shall not contact the physician by telephone or through a personal visit). When such contact is made, the employer shall send such correspondence to OWCP and the employee, as well as a copy of the physician's response when received.[1]

1. The quoted language is taken directly from the regulation, rather than the Union's brief.

The abovementioned provision is the law, and it becomes contract language by virtue of the Step IV Settlement. Additionally, nearly identical language is contained in Section 542.52 of the ELM. The Postal Service is guilty of violating this provision in the instant case. Specifically, both the grievant and Toth testified that OIG agent Catanzarito informed them at the December 17, 2007, meeting that he had contacted Dr. Schickendantz regarding the grievant's restrictions and medical information concerning the grievant's ability to return to work. Additionally, OIG agent Catanzarito did not send the grievant copies of the documents which were provided to his physician. The Union points out that agent Catanzarito confirmed the testimony of both the grievant and Toth.

The grievant's physician was personally contacted by an agent working on behalf of the Postal Service concerning his medical restrictions and ability to return to work. Furthermore, documents sent to the grievant's physician were not provided to the grievant, nor was the grievant provided with copies of the reply by his physician. It does not matter who in the Postal Service committed the violation – it is a violation nonetheless.

The Union notes that the Postal Service may attempt to argue that the arbitrator has no jurisdiction over this case because there is an allegation of a violation of federal law and/or due to the involvement of OIG agents. For the following reasons, the Postal Service's arguments are without merit. First, the Union believes that the Postal Service has violated the provisions of FECA as set forth in 20 CFR §10.506. The Postal Service may suggest that there are provisions for appeal contained in this law, and therefore, those appeals are the only venue for an individual

to seek relief for alleged violations. However, the Union asserts that management's rights under Article 3 of the contract are ". . . subject to the provisions of this Agreement . . ." and must be exercised " . . . consistent with applicable laws and regulations." Thus, Article 3 provisions serve the Union and its members as well as Postal Service management.

Furthermore, the Postal Service's arbitrability argument fails because management's obligations under FECA have been incorporated into the EL-505, the ELM, and are part of a Step IV Settlement. The Union certainly may enforce provisions of the ELM, Handbook EL-505 and Step IV Settlements through Article 15 of the National Agreement. According to the Union, any arbitrability argument that the Postal Service may raise based upon the fact that FECA is a federal law is specious.

In regard to the involvement of the OIG, one of the thrusts of the Postal Service's case is that the OIG is an independent entity that is neither attached to, under the scrutiny of, nor working in conjunction with the Postal Service. Unfortunately for the Postal Service, its position is undermined by the evidence in this case. The Union points out that the investigation itself resulted in no action being taken by the OIG or the Postal Service. Additionally, the manner in which the investigation was conducted is not at issue in this case. Moreover, whether or not the OIG should have had access to the grievant's physician and medical information as part of the investigation is not an issue.

However, the fact is that the investigation ended at some point. Both the grievant and Toth were informed shortly into the December 17, 2007, meeting that the investigation was over.

Thus, agent Catanzarito's involvement with the grievant would have ceased when the investigation ended if he had not been working on behalf of the Postal Service. The Union asserts that "[a]nything he did concerning the grievant apart from the investigation into the alleged fraud had to have been done as a representative of the Postal Service." (Union's Post-Hearing Brief, at 11). The OIG had no interest in providing a job offer to the grievant. The Union notes that agent Catanzarito testified that initiating, processing or presenting job offers to Postal Service employees was not part of his job. Furthermore, agent Catanzarito could not explain how the limited duty job offer was connected to his investigation of the grievant.

Not only was agent Catanzarito processing and presenting the job offer to the grievant, he was doing so with the full knowledge, cooperation and assistance of postmaster Davis. At the hearing, Davis testified that he prepared the CA-17 form and gave it to agent Catanzarito so that he could present it to the grievant's physician. The two were clearly working in conjunction with each other. The Union further points out that the request for information provided to Dr. Schickendantz was on Postal Service letterhead. The aforementioned document was prepared, sent and utilized for one purpose only, *i.e.,* to identify a potential job that would accommodate the grievant's physical restrictions.

The Union also notes that the letter was sent to Dr. Schickendantz on October 25, 2007, nearly seven months after agent Catanzarito began his investigation. By the date of the letter, agent Catanzarito would have had the opportunity to carry out multiple instances of surveillance on the grievant. As such, the letter sent to Dr. Schickendantz was not pertinent to the

investigation. Rather, it was intended for the purpose of identifying a potential job for the grievant. The information obtained by the use of this document, if needed in the investigation, could have been obtained in compliance with the contract if it had been properly requested. According to the Union, the information should have been requested via mail, as per the ELM and the law, and a copy of the document sent to the grievant. The document was not part of the investigation and the information was obtained by management in a manner inconsistent with the National Agreement.

It is clear that agent Catanzarito and Davis passed documents to and from each other in a mutual attempt to devise a job offer for the grievant. The Union asserts that agent Catanzarito and Davis were working hand in hand when preparing and presenting the job offer to the grievant. However, this was not the case regarding the investigation into the alleged fraud by the grievant. Davis testified that he had no part in the investigation after he made his suspicions known to the OIG.

Vivian Mittleman, an attorney for the OIG, testified at the hearing that the OIG is not the employer when investigating fraud or abuse. She also claimed that the OIG was separate and not under the control of the Postal Service. However, she admitted that the OIG is bound by the law when performing the functions of an investigation. Furthermore, she admitted that the OIG is under the supervision of the Postmaster General, or at the very least the Deputy Postmaster General.

The Union points out that the grievant previously filed a grievance in April 2005, regarding the same issue presented in this case. In the previous grievance, the Postal Service asserted that Shared Services had committed the violation and there was nothing that it could do about it. "First they had no authority over Shared Services, now they have no authority over the OIG." (Union Post-Hearing Brief, at 17). The Postal Service cannot be permitted to avoid its contractual and legal obligations by finding surrogates to commit violations in its stead. The Union is not requesting that the arbitrator ". . . put a short leash on OIG agents which would inhibit their ability to perform the important investigations in which they are involved." (Union Post-Hearing Brief, at 18). The Union simply desires that anyone representing the Postal Service should be made aware that they are obligated to comply with the collective bargaining agreement.

In the instant case, the Union has established that agent Catanzarito while working with postmaster Davis on the grievant's limited duty job offer failed to comply with the cited contract provisions. The investigation had nothing to do with the limited duty job offer. The Union requests that the arbitrator direct the Postal Service to cease and desist from future violations of this nature. Additionally, the Union maintains that the requested monetary remedy is appropriate in this case due to the repeated violation by the Postal Service.

OPINION AND ANALYSIS

Initially, the arbitrator must determine whether or not this grievance is arbitrable. As stated by arbitrator Mittenthal in *USPS -and- APWU*, Case No. H7T-3W-C 12454, *et. al.*, "[t]he Postal Service is free to raise this arbitrability defense at the arbitration hearing even though it had not raised the matter earlier. For this kind of defense goes to the very power of the arbitrator to act and cannot be waived through prior silence." Id., at 4. However, a defense of substantive arbitrability is to be distinguished from a defense of procedural arbitrability. *USPS -and- NALC*, Case No. C98N-4C-C 02112779 (Klein, Arb.). In the instant case, the Postal Service maintains that this case is not arbitrable for the reason that neither the OIG nor its activities are governed or covered by the parties' collective bargaining agreement. As such, the arbitrator determines that the Postal Service may properly raise this issue of substantive arbitrability even if it was presented for the first time at the arbitration hearing. However, the arbitrator concludes for the following reasons that the Postal Service's arguments regarding this issue are unpersuasive, and the grievance shall be decided based upon the merits of the case.

As discussed herein, the Postal Service may not avoid its contractual obligations in connection with obtaining information from an employee's physician which is then utilized to prepare a return to work job offer by utilizing third parties. The obligations of the Postal Service in this regard essentially mirror the language contained in 20 CFR 10.506 and are set forth in Section 6.3 of the Handbook EL-505 and Section 545.52 of the ELM. Said provisions have been incorporated into the parties' contract through Article 19 of the National Agreement.

Furthermore, the issue set forth in the parties' Step B decision appropriately presents the issue to be decided in this case for it is management's actions, and not the conduct of OIG agents, which is subject to review by the arbitrator. Thus, the matter before the arbitrator is arbitrable.

The record establishes that OIG agent Catanzarito personally interviewed the grievant's physician, Dr. Schickendantz, on October 25, 2007. The arbitrator recognizes the broad authority which is granted the OIG in order to effectuate its investigation of allegations concerning fraudulent and criminal activities. Not only are OIG agents permitted to contact an employee's physician during the course of their investigation, they are permitted to do so without notifying the employee. The arbitrator notes that the Union does not take issue with either the manner in which OIG agent Catanzarito conducted his investigation or whether he should have been permitted access to the grievant's physician.

Although it is clear that the investigation of the grievant ended at some point, the arbitrator cannot determine based upon the evidence presented in this case that OIG agent Catanzarito concluded his investigation prior to the date upon which he interviewed Dr. Schickendantz. Thus, the fact that OIG agent Catanzarito met with Dr. Schickendantz does not, in and of itself, result in a violation of the contract by the Postal Service. However, it is apparent that OIG agent Catanzarito's actions both during and after his meeting with the grievant's physician served, at the very least, dual purposes including obtaining pertinent medical information, and the formulation and presentment of a limited duty job offer to the grievant by the Postal Service.

While the arbitrator recognizes that the operations of the OIG are necessary in order to investigate fraudulent and criminal activities by Postal Service employees, management may not utilize OIG agents in a manner which circumvents its own contractual obligations. Specifically, the Postal Service is required to comply with the following manual and handbook provisions in regard to contacting the grievant's physician in connection with presenting him with a limited duty job offer. Section 545.52 of the ELM provides, in pertinent part, as follows:

> To aid in returning an injured employee to suitable employment, the control office or control point may also contact the employee's physician in writing concerning the work limitations imposed by the effects of the injury and possible job assignments. However, FECA prohibits contacting the physician by telephone or through a personal visit except for administrative purposes such as determining whether a fax has been received or ascertaining the date of a medical appointment. A copy of all written correspondence to the employee's physician and any response received must be sent to the OWCP and the employee. The employee may be contacted at reasonable intervals to request periodic medical reports concerning return to work potential.

Section 6.3 of Handbook EL-505 provides, in part, as follows:

> Contact the treating physician when requesting a new CA-17, updating medical progress. Ensure that the following are accomplished:
>
> * * *
>
> Send copies of such correspondence to the employee and to the OWCP district office, and forward copies of the physician's response to both, once it is received.

In the instant case, management clearly circumvented its contractual obligations when it "piggy-backed" on the investigation conducted by OIG agent Catanzarito for the purpose of providing the grievant with a limited duty job offer. The arbitrator notes that OIG agent Catanzarito was in contact with OIC Davis throughout the course of his investigation. At the arbitration hearing, Catanzarito acknowledged that he questioned the grievant's physician as to whether the grievant could perform limited duty work and he provided the physician with a letter and a CA-17 form concerning the grievant's work restrictions. However, written copies of the documents provided to the grievant's physician were not forwarded to the grievant. The information obtained by OIG agent Catanzarito was subsequently utilized by OIC Davis to prepare a limited duty job offer for the grievant. Although OIG agent Catanzarito testified that presenting limited duty job offers to Postal Service employees was not part of his job, he nonetheless did so in this case after he had already informed the grievant that there was no evidence that he had engaged in any fraudulent activities.

Based upon the evidence of record presented in this case, the arbitrator concludes that while OIG agent Catanzarito may have been permitted to personally contact Dr. Schickendantz as part of his investigatory duties, the Postal Service had a distinct and independent obligation to provide the grievant with copies of all written correspondence and any other documents which were provided to his physician as part of *its inquiry* into information regarding the grievant's medical condition, or his ability to return to full or limited duty. This is so regardless of the fact that the same or similar documents were presented to Dr. Schickendantz by an employee of the

OIG during the course of an investigation into possible fraud. In addition, the Postal Service was required to provide the grievant with a copy of his doctor's response when it was received. To hold otherwise would allow the Postal Service to circumvent the parties' agreed upon contractual terms, and undermine the claimed independence of the Postal Service from the actions of the OIG.

The denial of the grievance issued by OIC Davis on December 31, 2007, provides further support for the arbitrator's determination that while the investigation of the grievant's purported fraudulent activities may not have been concluded prior to the date that OIG agent Catanzarito met with the grievant's physician, the meeting also served the dual purpose of obtaining information in order to provide a limited duty job offer to the grievant. Despite his attempt at the arbitration hearing to offer an alternative explanation, the following language contained in the denial of the grievance by OIC Davis clearly indicates that management's intended purpose for contacting the grievant's physician was to obtain information for his limited duty job offer:

> Postal Management and the Office of the Inspector General were only seeking information concerning the availability and mobility of you performing job tasks within your medical restrictions without causing a further degree of injury. . . The proposed job tasks were only presented to Dr. Schikandantz [sic] for his review and approval before making a limited duty job offer to you.

For each of the foregoing reasons, the arbitrator concludes that the Union has satisfied its burden of proof that the Postal Service violated Article 19 of the National Agreement in this case when it failed to provide the grievant with copies of the documents which were presented to his

physician in connection with his limited duty job offer. The Postal Service is ordered to cease and desist from engaging in such conduct which circumvents its obligations under the contract.

The arbitrator further determines that a monetary remedy is not appropriate in this case. However, the Postal Service is placed on notice that future instances of contractual violations by management involving similar circumstances may result in monetary remedies. The arbitrator notes that the pre-arbitration settlement relied upon, in part, by the Union in support of its position that a monetary remedy is appropriate in this case, is a non-precedent setting agreement which the parties agreed would not be cited in any subsequent grievance or arbitration hearing.

AWARD

The grievance is sustained as set forth above.

JONATHAN I. KLEIN, ARBITRATOR

Date of Issuance: September 9, 2008