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National Arbitration Panel

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)
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 and)
)
 National Association of)
 Letter Carriers - Intervenor)

Case No.
Q06C-4Q-C 07141697

Before: Shyam Das

Appearances:

For the Postal Service: John W. Dockins, Esq.
Dedra S. Curteman, Esq.

For the APWU: Melinda K. Holmes, Esq.
Darryl J. Anderson, Esq. (Brief)

For the NALC: Keith E. Secular, Esq.

Place of Hearing: Washington, D.C.

Dates of Hearing: November 1, 2007

Date of Award: January 31, 2009

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NALC HEADQUARTERS

Relevant Contract Provision: Article 19
Contract Year: 2006-2010
Type of Grievance: Contract Interpretation

Award Summary

The Union's challenge to the revision of ELM 665 adding ELM 665.17 is denied.



Shyam Das, Arbitrator

BACKGROUND

Q06C-4Q-C 07141697

This is an Article 19 dispute appealed to arbitration by the American Postal Workers Union. The National Association of Letter Carriers is an intervenor in this matter. At issue is the Postal Service's revision of Section 665 of the Employee and Labor Relations Manual (ELM) adding a new Section 665.17 *Reporting Requirements for Sex Offenders*.

Article 19 of the APWU Collective Bargaining Agreement provides as follows:

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable....

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Union at the national level at least sixty (60) days prior to issuance. The Employer shall furnish the Union with the following information about each proposed change: a narrative explanation of the purpose and impact on employees and any documentation concerning the proposed change from the manager(s) who requested the change addressing its purpose and effect. Proposed changes will be furnished to the Union by hard copy or, if available, by electronic file. At the request of the Union, the parties shall meet concerning such changes. If the Union requests a meeting concerning

proposed changes, the meeting will be attended by manager(s) who are knowledgeable about the purpose of the proposed change and its impact on employees. If the Union, after the meeting, believes the proposed changes violate the National Agreement (including this Article), it may then submit the issue to arbitration in accordance with the arbitration procedure within ninety (90) days after receipt of the notice of proposed change. Within fifteen (15) days after the issue has been submitted to arbitration, each party shall provide the other with a statement in writing of its understanding of the precise issues involved, and the facts giving rise to such issues....

* * *

On February 13, 2007 the Postal Service notified the APWU of its proposed revision of ELM 665 to include the following new provision as 665.17:¹

665.17 Reporting Requirements for Sex Offenders

An employee who is required by the law of any jurisdiction to register as a sex offender must report in writing that he or she is subject to this requirement, as follows:

- a. Any employee who is not an Area or Headquarters employee must make their report to their District Manager of Human Resources; Area employees must make their report to their Area Manager of Human Resources; and Headquarters

¹ An earlier version of ELM 665.17 was presented to the Union on August 24, 2006, but subsequently was withdrawn following discussion with the Union.

employees must make their report to the Headquarters Manager, Corporate Personnel.

- b. An employee who first registers as a sex offender on or after [insert effective date of ELM revision] must make this report to management within 10 calendar days after the employee first registers as a sex offender.
- c. An employee who registered as a sex offender at any time before [insert effective date of ELM revision] must make this report to management no later than [insert desired date].
- d. If, after making his or her first report to management, the employee is required to register as a sex offender in a different jurisdiction, or to register anywhere because the employee has committed an additional sexual offense, the employee must inform management within 10 calendar days after so registering.

The Postal Service also provided the following statement of the purpose and effect of ELM 665.17:

The language contained in ELM, Section 665.17, *Reporting Requirements for Sex Offenders*, was established to identify current postal employees required by any jurisdiction to report their status as a sex offender. This language creates the requirement that any postal employee required to register as a sex offender with any governmental entity must notify the appropriate Postal Service management official as described. The purpose of this requirement is to assist the Postal Service

in protecting its brand, the public and its workforce. Each report will be analyzed on a case-by-case basis to determine the appropriate action, if any, to take.

As set forth in the Postal Service's pre-arbitration 15-day statement of position:

In May 2006, Dallas television station Fox 4 ran a series of news reports indicating that three current postal employees (2 bargaining unit, 1 EAS) in the North Texas Postal District had sex offense convictions. Based on public questions concerning the existence and adequacy of USPS policy on employees who are sex offenders, management review was initiated at the HQ level.

Evidently, all states require some form of registration by sex offenders which is accessible to the public. In July 2006, the Adam Walsh Child Protection and Safety Act was signed into law. This federal statute requires that all states and other jurisdictions within the United States maintain a public sex offender registry that conforms to the requirements of the Act or face a reduction in federal funding. Among the requirements are that an offender provide the identity of his or her place of employment and the license plate number and a description of any vehicle operated by the offender.

Mangala Gandhi, Manager of Selection, Evaluation and Recognition, headed the task force that was charged with developing a policy to ensure that the Postal Service was not again caught unaware regarding sex offenders in its employment. The task force determined that it was absolutely necessary that

the Postal Service know which of its employees were registered sex offenders before this was raised by the media or other employees, so that the Postal Service could take proactive steps and be able to say: "We are aware of this, we have handled it, and we have dealt with this situation." There was also concern regarding potential liability if the Postal Service did not act to find out about employees who were registered offenders and then take appropriate steps to protect the public and its employees.

The Postal Service instituted a computer matching program to match employees on its payroll and sex offender registrants on publicly available sex offender registry websites. A Postal Service Inspector testified, however, that each state's website is different, and information on these websites is not always complete or up to date. As of the arbitration hearing in November 2007, he stated, the Postal Service had been able to download entire registries in 10 states, the District of Columbia and Guam, and it had entered into computer matching agreements with 20 other states, as provided for in the Adam Walsh Act. It had not been successful in working out similar arrangements with the remaining states and jurisdictions, which means that it can only check for matches by using the state's public website and individually entering the name of each of the Postal Service's some 700,000 employees, which is not practical.

The Postal Inspector testified that there is a National Sex Offender Public Registry (NSOPR), but he noted that the information put into the NSOPR by each state varies. Some

states only put in the most egregious offenders. For example, he stated, there are some 3,000 sex offenders registered in New Jersey, but fewer than 100 are on the NSOPR. The NSOPR includes a total of 400,000-450,000 offenders, but, according to the U.S. Department of Justice, there are over 600,000 registered offenders nationwide.²

Manager Gandhi testified that her task force considered doing periodic background checks on all employees, similar to the checks it performs before it hires a new employee. The cost of doing this (\$114 per check), however, would be prohibitive. Ultimately, the task force decided that the best way to ensure that the Postal Service would know when one of its employees was on a sex offender registry was to require the employee to self-report this as provided for in ELM 665.17. Gandhi also testified that when this occurs, the Postal Service will investigate, as it would if it had obtained the information from some other source, and determine what, if any, action should be taken. She stressed that there is no automatic discipline for being a registered sex offender, and that there has been no change in the applicable just cause and due process standards for imposition of any discipline. Employees who fail to self-report as provided for in ELM 665.17 are subject to

² The witness also referred to the National Sex Offender Registry (NSOR) maintained by the FBI for use by law enforcement agencies. He said the Postal Service decided not to have the FBI run checks on its employees because that would require providing information to the FBI regarding its employees, including date of birth and Social Security number, which raises substantial privacy concerns.

possible discipline, and such discipline has been issued in at least one case.

The Union raised an objection at the hearing to the Postal Service presenting evidence and/or relying on the alleged inadequacy of computer matching to justify its self-reporting requirement because this was not cited in its 15-day statement of position or any other document provided to the Union before arbitration. According to Union counsel, "that would be news to us...we haven't heard any complaints from the Postal Service about the [computer matching] processes that have been going on." Postal Service witnesses testified, however, that at three face-to-face meetings with APWU representatives at which this self-reporting requirement was discussed, the Postal Service pointed out these inadequacies when the Union's representative questioned why the Postal Service needed to impose this requirement because the necessary information is available on public websites. The Postal Service's witnesses stressed that the Union did not follow up by requesting any further information or proof to support the Postal Service's assertions, nor did the Union dispute those assertions. It was only when the Postal Service received the Union's 15-day statement of position (in exchange for its own) that it became aware that the Union was challenging the need for the self-reporting requirement on that basis.

UNION POSITION

The Union contends that the promulgation of ELM 665.17 violated Articles 19, 16 (Discipline Procedure) and 5 (Prohibition of Unilateral Action) of the CBA and is not fair, reasonable, and equitable as required by Article 19.³

The Union maintains that public safety and worker safety provide no justification for the self-reporting requirement. Other provisions of the ELM prohibit immoral and illegal conduct of various kinds, including off-duty conduct prejudicial to the Postal Service. There is no evidence in this record concerning any possible threat that postal employees posted on sex offender registries may pose to fellow workers or to the public. The Postal Service has acknowledged that it is not aware of any sexual offense against the public or against any postal worker committed by a postal employee who is on a sex offender registry. There is no evidence that sex offenders pose any risk on the job or a greater risk than any other types of people who have been guilty of other criminal offenses and who are not required to self-report.

The Union insists that the only evidence that provides any support for the self-reporting requirement is evidence that the Postal Service was once embarrassed by a Fox News report from Dallas, but that sort of news report does not make the self-reporting requirement fair, reasonable, and equitable. The

³ The APWU set forth its position in this case in a post-hearing brief. Intervenor NALC fully supports the position espoused by the APWU.

Union points out that there is no evidence about how many people saw the program in question, no evidence of any public reaction to it, no tabulation of calls, letters or emails calling for sex offenders to be stricken from the rolls of postal employees and no indication of any dip in the public's approval of the Postal Service.

The Union asserts that given the computer matching programs available to the Postal Service, and given the favorable reaction of the news media to the fact that the Postal Service was planning to use all available computer matching programs, there is no evident need for the Postal Service to insist on self-reporting. It further argues that if the Postal Service intends to avoid embarrassment by Fox News, it also will have to try to find Postal Workers who fight dogs, smoke marijuana, etc., all of whom have been or may be the subject of news reports.

The Union also contends that the Postal Service can obtain the requested information without requiring self-reporting. At the arbitration hearing the Postal Service sought to justify its self-reporting requirement on the ground that a number of states do not have any effective means of permitting computer matching with Postal Service employment rolls. But that argument was not made by the Postal Service in its 15-day statement of position, and it should be given no weight in this case. Although Postal Service witnesses testified to the effect that the Postal Service had mentioned problems with matching programs during meetings with APWU representatives, that is just the sort of testimony Article 19 is designed to avoid. The

Union insists that the parties should not be permitted, much less required, to quarrel in testimony about what their respective positions were during the Article 19 process. Article 19 requires that the parties "shall" provide each other with statements "of the precise issues involved, and the facts giving rise to such issues." In any event, the Union states, the Postal Service acknowledged that it could perform individual background checks to obtain the information, albeit at substantial cost. It also would be possible to assign staff employees to make comparisons of postal employment rolls to sex offender registries in those states where computer matching is not possible. In any event, these means of obtaining the information would not violate the CBA and would not be unfair to postal employees.

Indeed, the Union argues, the cited deficiencies in state registries and in computer matching programs render the matching program and the self-reporting program arbitrary and unfair. Moreover, there is no showing that the information collected from self-reporting or computer matching will be useful. Given the wide variety of offenses included in the various registries it is far from certain that being registered would even plausibly be material to an employee's fitness for duty. This is illustrated by the case of one of the letter carriers identified in the Fox News broadcast that led to the ELM provision in question. That employee was fired by the Postal Service and subsequently reinstated by an arbitrator. In the case of employees without contact with the public, it would be extremely unlikely that being listed on the registry would signify a situation that would subject the employee to removal.

The Union also points out that by definition sex offenders have been apprehended by state law enforcement authorities, brought to justice, and punished in a manner and to a degree deemed appropriate by state authorities. The Postal Service is not a law enforcement agency. Its effort to extract a further "confession" from these individuals is unfair and unreasonable and inequitable. This is no better than a witch hunt designed to mollify a public that postal management wrongly assumed would be demanding confessions.

The Union further argues that the Postal Service unilaterally changed working conditions in violation of Article 5 of the National Agreement, and, therefore, in violation of Article 19. By imposing a self-reporting requirement on Postal Service employees listed on sex offender registries, the employer has unilaterally changed working conditions. The self-reporting requirement requires employees to self-report to management off-duty conduct that has no nexus to their job or employment. This requirement provides for the discipline or removal of an employee for violating the self-reporting requirement, even though there would be no justification to discipline or remove the employee for their off-duty conduct, as shown in the case of the letter carrier in North Texas who was reinstated by an arbitrator after being discharged by the Postal Service. Thus, the self-reporting requirement circumvents and violates the principle of just cause and management's obligation to establish a nexus between any off-duty conduct and an employee's job or employment in order to justify discipline.

EMPLOYER POSITION

The Postal Service maintains that the proposed changes are inherently fair, reasonable, and equitable and in compliance with Article 19. Self-reporting is a tried and true means of maintaining an accurate and timely data base for tracking issues regarding legitimate business interests. Applying the self-reporting requirement to maintaining oversight of employees and public sex offender registries is an efficient means of exercising a pre-existing management right and obligation to determine if there is a nexus to employment and off-duty misconduct. The self-reporting requirement simply requires the employee to provide data on a one-time basis of information already in the public domain that may negatively impact the Postal Service and put other employees and customers at risk.

The Postal Service stresses that the self-reporting requirement does not change any employee rights to due process, just cause or Union representation. The only impact of the change is how postal management will learn of the employee misconduct and inclusion on sex offender registries. Once the employee misconduct is known the same pre-existing rules and regulations will apply. Instead of hearing the news through media ambushes of employees on the job, the Postal Service will now have the ability to learn of the criminal convictions from the employee in a timely manner. This will provide postal management the opportunity to make decisions on the appropriate course of action to take as a result of the employee's behavior and inclusion on a public sex offender registry. There has been

no showing of any adverse impact on any individual employee through compliance with this self-reporting requirement.

The Postal Service asserts that there is no dispute that this is information that is needed by the Postal Service in a timely manner to reasonably protect its image, consumer trust and brand in the marketplace, as well as to properly protect customers and employees. This is critical information given the unique business activities of the Postal Service in which postal employees routinely engage in unsupervised conduct with the general public in far flung neighborhoods on a regular daily basis.

The Postal Service points out that given the legal requirement to self-report to various public sex offender registries, the proposed ELM changes are *de minimis* in nature and entirely reasonable. This is especially true given that the sex offender must include employment data in the public self-reporting required by law. It would be wholly incongruous if the sex offender was required to self-report detailed employment data to the public registries, but was shielded from reporting the same data to the employer identified in such registries. It is eminently fair, reasonable, and equitable that the Postal Service also be notified that its good name is included in this public information. To do otherwise exposes the Postal Service to ambush news reports, as occurred in May 2006. The possible public perception of unsupervised sexual predators working in their neighborhoods in postal uniforms is something that the Postal Service has an interest in timely negating. The proposed self-reporting requirement allows the Postal Service to do that.

The Postal Service stresses that the sole argument put forth by the Union at the arbitration hearing in support of its position is that the manner in which the data is collected is unfair, unreasonable, and inequitable. The Union posits that if the information already is in the public domain then there is no need for employees to self-report. This position, the Postal Service argues, has two fatal flaws. It assumes that the data available in the public sex offender registries is complete, accurate, timely, updated, consistent and easily accessible. Even if that were the case, Article 19 does not require that the Postal Service propose fair, reasonable and equitable language of the APWU's choosing or that the changes be the most fair, reasonable, and equitable possible. It simply requires that the proposed change be fair, reasonable, and equitable. By any measure, requiring the employee to discretely report information that is by definition in the public domain, and to which there is no dispute that the Postal Service has a business need to know, is inherently fair, reasonable, and equitable.

As testified to by its witnesses, the Postal Service asserts that searching the multiple and various local state and federal sex offender registries is costly and produces inefficient, spotty and incomplete results. These problems were discussed with representatives from the Union on three occasions prior to the ELM revision taking effect. The Union never disputed these problems and accepted without objection the Postal Service's assertions. Therefore, the existence of these problems was not in dispute and was not included in the Postal Service's 15-day statement of position. For the Union to now

argue that this is new evidence because no mention of the problems with the data bases was mentioned in the Postal Service's statement is disingenuous.

FINDINGS

At the start of the arbitration hearing, APWU counsel stated:

...[W]e are not challenging in this grievance whether or not the Postal Service has a valid purpose in wanting to get this information, whether it has the authority to get this information, or what it does with the information once it obtains it, including how it is handled under the Privacy Act.

The issue here is about the manner in which it gets this information, and whether adding the self reporting requirement when -- to information that is already readily publicly available -- which it's very purpose is to be publicly available -- whether that is fair, reasonable, and equitable under the national agreement.

* * *

...[T]he postal Service never explained to the APWU why it needs employees to self-report. It's explained why it believes it needs this information. But, as I said, that is not the issue in this case. It was never explained what is gained by having employees self-report, on top of the means that the Postal Service already has at getting this information.

Similarly, in its 15-day statement of position, the APWU stated:

It is the Union's position that there is no justification to unilaterally impose the proposed requirement to self-report "off duty" conduct, and that its stated purpose is unsupported by any evidence or the facts. Postal employees already undergo a suitability screening, which includes a background check for all criminal offenses, including sex-related offenses, prior to their employment. The self-reporting requirement is not necessary and is without justification in that a state's public registry of sex offenders is already available and accessible to the Postal Service. In fact, the Postal Service already has the names of postal employees who are on a state's public registry of sex offenders, thereby allowing the Postal Service to exercise its rights on a case-by-case basis to ascertain the suitability of employees for certain positions or continued employment as it relates to their off-duty conduct, without unilaterally imposing a self-reporting requirement. Contrary to Postal Service's assertions that it is undertaking this initiative for the purposes of "protecting its brand, the public and its workforce," the union contends that the self-reporting requirement is intended to serve as a means to discipline or remove from employment employees on a public registry of sex offenders simply for failure to report their off-duty conduct -- even though the off-duty conduct would not warrant discipline or removal.

(Emphasis added.)

Against this background, and the record as a whole, the Union's argument in its post-hearing brief that the Postal

Service has failed to establish a justifiable need to know which of its employees are required by law to register on sex offender registries maintained by states or other jurisdictions is not persuasive.

The stated purpose of ELM 665.17 is "to identify current postal employees required by any jurisdiction to report their status as a sex offender." Undoubtedly, the self-reporting requirement in ELM 665.17 serves that purpose. Moreover, requiring employees to provide this information to the Postal Service, when they are legally required to self-register on public sex offender registries, including identifying their employer, on its face appears to be fair, reasonable, and equitable, given the Postal Service's legitimate purpose for obtaining this information.

The record does not support the Union's assertion that this is an effort by the Postal Service to extract a further confession from affected individuals or to engage in any kind of witch hunt. The record also does not support a finding that the Postal Service has imposed the self-reporting requirement for the purpose of being able to discipline employees who fail to do so, even when it could not discipline them for the off-duty conduct that resulted in their being required to register as sex offenders. To the extent this self-reporting requirement singles out sex offenders, that is because state and federal laws have established a special requirement for sex offenders to register on public registries, and it is this information that the Postal Service legitimately is seeking through ELM 665.17.

The Union counters, however, that the self-reporting requirement in ELM 665.17 is unnecessary because the Postal Service already has access to this information through its computer matching program and also has the ability to otherwise obtain this information by doing background checks, as it does for new hires, or by searching various websites on an individual employee basis. This is another reason, the Union argues, why 665.17 is not fair, reasonable, and equitable.

Postal Service witnesses testified that in several meetings prior to issuance of ELM 665.17, Union representatives raised this alleged lack of necessity, and that management representatives explained why the computer matching program -- while certainly very valuable -- was not sufficient to provide complete and up-to-date information. The witnesses credibly testified that the Union representatives did not challenge these explanations. The Union presented no evidence to the contrary. Under these circumstances, the Postal Service's omission of any reference to problems with relying solely on the computer matching program in its 15-day statement of position is somewhat understandable, even if it would have been preferable to have included such a reference, given that Union representatives had raised the matter in more than one discussion. Further taking into account that it is the Union that is pressing the argument that ELM 665.17 is not fair, reasonable, and equitable because the computer matching program makes it unnecessary, I am not persuaded that the Postal Service's evidence to the contrary properly should be excluded from consideration.

The cost to the Postal Service of performing periodic background checks on all its hundreds of thousands of employees clearly would be prohibitive, based on the evidence as to the cost of such checks. Moreover, it would not provide as up-to-date information as the self-reporting provided for in ELM 665.17. Likewise, checking publicly available websites by entering employee names one by one, when computer matching is unavailable -- as was the case in some 20 states, including the most populous (California) -- is not a practical alternative, taking into account the Postal Service's obligation and right to maintain the efficiency of its operations. Sole reliance on the publicly available websites also is problematic because they do not necessarily include all persons who are registered sex offenders in the particular jurisdiction, due among other things to time lags between registration and when that information is posted on the website. The NSOPR website, which covers the entire country, evidently receives its information from the various states and other jurisdictions, and the latter do not necessarily include all their registered offenders.

Under all these circumstances, I find that the revision of Section 665 of the ELM to include the self-reporting requirement in ELM 665.17 is fair, reasonable, and equitable.

The Union also argues that this new requirement violates Article 19 because it unilaterally changed working conditions in violation of Article 5 of the CBA. The Union asserts that ELM 665.17 requires employees to self-report off-duty conduct that has no nexus to their employment and provides for discipline or removal of an employee for violating the self-

reporting requirement, even though there would be no justification to discipline or remove the employee for their off-duty conduct.

The requirement in ELM 665.17 is that employees report that they are subject to a legal requirement to register as a sex offender. As already determined, the Postal Service has a justifiable right to obtain that information. There is a nexus between being publicly registered as a sex offender and employment by the Postal Service, at least for the purpose of the self-reporting requirement. Compliance with this requirement permits the Postal Service to investigate and determine what, if any, appropriate action to take. Any such action, of course, is subject to the requirements of the CBA, including just cause and due process standards. The latter have not been changed or circumvented.

ELM 665.17 does not refer to discipline. Any discipline imposed for failure to comply with the self-reporting requirement would not be for off-duty misconduct, but for failure to comply with a management directive in the ELM which has been determined to be fair, reasonable and equitable. Moreover, any such discipline is subject to management's obligation to establish just cause for that action.

Accordingly, the Union's challenge to the revision of ELM 665 adding 665.17 is without merit and is denied.

AWARD

The Union's challenge to the revision of ELM 665 adding ELM 665.17 is denied.



Shyam Das, Arbitrator