

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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 :
 NATIONAL ASSOCIATION OF LETTER :
 CARRIERS, AFL-CIO and AMERICAN POSTAL :
 WORKERS UNION, AFL-CIO, :
 :
 Plaintiffs, :
 :
 - v. - :
 :
 UNITED STATES POSTAL SERVICE and :
 UNITED STATES POSTAL SERVICE OFFICE :
 OF INSPECTOR GENERAL, :
 :
 Defendants. :
 :
 -----X

Case No. 08-CV-00458 (DC)

SETTLEMENT AGREEMENT

Plaintiffs National Association of Letter Carriers, AFL-CIO (“NALC”) and American Postal Workers Union, AFL-CIO (“APWU”) (together, “Plaintiffs”) hereby enter into this agreement (“Agreement”) with Defendants United States Postal Service (“USPS”) and United States Postal Service Office of Inspector General (“OIG”) (together, “Defendants”) in settlement of the above-captioned matter.

WHEREAS, Plaintiffs, on behalf of their individual members, filed a Complaint alleging that Defendants, in requesting health care related information when investigating suspected workers’ compensation fraud or leave benefits abuse by Postal Service employees, have engaged in *ultra vires* conduct that exceeds Defendants’ statutory authority in violation of the public policy set forth in the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) and the Privacy Act of 1974, and also have violated employees’ constitutional right to privacy as well as their Fourth Amendment rights, such Complaint being NALC and APWU v. USPS and

USPS-OIG, Case No. 08-CV-00458, which is pending in the United States District Court for the Southern District of New York (“Action”); and

WHEREAS, Defendants expressly deny the claims set forth in the Action; and

WHEREAS, Plaintiffs and Defendants (collectively referred to as the “Parties”) desire to fully and finally settle any and all disputes and claims raised in the Action, including all claims and counterclaims which were or may have been brought in any subsequent or threatened litigation or administrative proceeding relating to the Action or otherwise;

NOW THEREFORE, in consideration of the mutual promises set forth herein, the Parties hereby agree as follows:

I. Definitions

- A. “Employee” means an individual employed by USPS or listed on the employment rolls of USPS in either the NALC-represented bargaining unit or in a bargaining unit represented by APWU.
- B. “Health Care Provider” means any physician, dentist, surgeon, podiatrist, chiropractor, optometrist, nurse practitioner/clinical specialist, psychologist, psychotherapist, clinical social worker, physician assistant or any other individual who has provided medical or health care services, therapy, surgery or treatment to an Employee.
- C. “Health Information” means any “protected health information” as that term is defined in 45 C.F.R. § 160.103.
- D. “Agent” means any personnel of the OIG or the United States Postal Inspection Service (“USPIS”) designated to investigate criminal matters pursuant to 18 U.S.C. § 3061. This definition includes Special Agents and Postal Inspectors, and/or other personnel of the OIG or the USPIS involved in an investigation of suspected fraud or other misconduct by an Employee.
- E. “HIPAA Letter” means either the letter set forth in Exhibit A or the letter set forth in Exhibit B to this Agreement.
- F. “Acknowledgment Form” means the document set forth in Exhibit C to this Agreement, and which is made a part of the HIPAA Letter.

II. Obligation to Provide HIPAA Letter

- A. If an Agent conducts a face-to-face interview with an Employee's Health Care Provider as part of an investigation of suspected fraud or other misconduct by the Employee, the Agent shall present the Health Care Provider with a copy of the HIPAA Letter and give the Health Care Provider an opportunity to read it, prior to or during the interview, before asking the Health Care Provider to disclose any of the Employee's Health Information or before asking the Health Care Provider's opinions or assessments of observed conduct by the Employee.
- B. During the face-to-face interview, before asking the Health Care Provider to disclose any of the Employee's Health Information or asking the Health Care Provider's opinions or assessments of observed conduct by the Employee, the Agent shall present the Health Care Provider with a copy of the Acknowledgment Form and ask the Health Care Provider to sign it.
- C. If the Health Care Provider is unable or declines to sign the Acknowledgment Form, the Agent will document that fact on the Acknowledgment Form.
- D. The obligation to comply with this section of the Agreement shall commence no later than sixty (60) days after the parties' execution of this Agreement, which shall be the date when all parties or their counsel have affixed their signatures.

III. Training

- A. Defendants shall modify their training methods and materials so that Agents are trained and/or instructed to (1) comply with the terms of this Agreement and (2) seek only such Health Information about an Employee that is directly related to the health or medical condition at issue in the investigation and that is relevant and necessary to the investigation. Specifically, Defendants shall train and/or instruct their Agents as follows:
 - (1) Agents shall confirm in their report of the investigation and/or their memorandum of interview with the Health Care Provider that they provided a copy of the HIPAA Letter and Acknowledgment Form to the Health Care Provider during any face-to-face interviews before they asked him/her to disclose any of the Employee's Health Information or to provide opinions or assessments of observed conduct by the Employee.
 - (2) Agents shall maintain a copy of the HIPAA Letter and a copy of the Acknowledgment Form that were presented to the Health Care Provider in the investigatory case file.
 - (3) Agents shall refrain from engaging in any written or oral communications with the Health Care Provider which are materially inconsistent with the HIPAA Letter.

B. Within a reasonable period of time after the Parties' execution of this Agreement, in no event to exceed six (6) months, Defendants shall provide an affidavit to Plaintiffs attesting to their compliance with the requirements of Section III(A) above. If, after receipt of the affidavit, Plaintiffs believe Defendants have failed to comply with Section III(A) they shall confer with Defendants in a good faith effort to resolve any dispute regarding whether Plaintiffs have complied. If such dispute is not resolved, Plaintiffs shall have the right to reactivate the Action solely for the purpose of seeking a determination from the Court regarding the dispute. Should the Court determine that Defendants failed to comply with Section III(A), Plaintiffs shall have the right to declare the Agreement null and void and to continue to pursue the Action.

IV. Enforcement

- A. Subject to Section V of this Agreement, Health Information about an Employee obtained in an interview of a Health Care Provider may not be used by USPS for any purpose, including discipline or discharge of an Employee if the interview was conducted in a manner that violates Sections II(A) or (B) of this Agreement.
- B. Health Information about an Employee obtained in an interview of a Health Care Provider shall be inadmissible in any grievance-arbitration proceeding concerning the discipline or discharge of an Employee if the interview was conducted in a manner that violates Sections II(A) or (B) of the Agreement. In the event of a dispute over whether a violation occurred, such dispute shall be resolved by the arbitrator or other decision-making body authorized under the collective bargaining agreement to resolve the grievance concerning the discipline or discharge. The sole remedy for non-compliance with this Agreement in any particular case will be that any protected health information obtained in an interview in violation of Sections II(A) or (B) will not be admissible in the grievance-arbitration proceeding relating to the underlying discipline or discharge of the Employee. This Agreement does not create any new or independent right to arbitrate whether or not the Agreement was complied with.
- C. The enforcement methods and sanctions set forth herein shall be the exclusive methods for enforcing the Agreement in any particular case and shall constitute the exclusive sanctions for violation of the Agreement in any particular case.
- D. Only the parties to this Agreement and/or their authorized agents may enforce this Agreement.

V. Dismissal of Action and Release

- A. Effective upon execution of this Agreement, Plaintiffs agree to execute any and all stipulations, orders or pleadings which may be required in order to dismiss the Action with prejudice subject to the right to reactivate the Action pursuant to the terms set forth in Section III(B) of the Agreement. Each party shall be responsible for its own costs and attorneys' fees in having litigated the Action.

- B. Effective upon the dismissal of the Action, Plaintiffs hereby release any claims of any type that they asserted or could have asserted based on the allegations set forth in the complaint in this Action. Plaintiffs further agree to withdraw and/or dismiss, with prejudice, any and all pending grievances or administrative proceedings seeking monetary compensation, or a cease-and-desist order, or a similar remedy based on a claim or argument that Defendants improperly obtained Health Information from an Employee's Health Care Provider. Plaintiffs are not required to withdraw any pending grievances involving the proposed discipline or discharge of an Employee. In any such discipline or discharge grievance arising before the effective date of this Agreement, the arbitrator may rule on any objection made to the admissibility of Health Information from an Employee's Health Care Provider obtained by the Defendants. Any decision by the arbitrator on such an objection shall be non-precedential with respect to the issue of the admissibility of the Employee's Health Information and may not be cited in any other case with respect to that issue. However, Plaintiffs may not cite to this Agreement in any pending grievance involving the proposed discipline or discharge of an Employee arising before the effective date of the Agreement.
- C. Nothing in this Agreement limits the Defendants' statutory authority to seek, obtain or use any information, including in connection with duly issued administrative subpoenas, search warrants or grand jury subpoenas. Further, any criminal proceeding involving an Employee that arises out of an investigation conducted by a Defendant is outside the scope of this Agreement. The Agreement shall have no force or effect on any criminal prosecution or proceeding.
- D. Nothing in this Agreement shall limit or interfere in any way with USPS's ability to obtain or use health information in accordance with the Federal Employees' Compensation Act or the Family and Medical Leave Act.

VI. Execution of the Agreement


Upon execution of the Agreement, the Parties shall submit a stipulation to the Court requesting that the Action be dismissed with prejudice subject to Plaintiffs' right to reactivate the case as described in Section III(B) of the Agreement. The Agreement shall become effective and binding upon dismissal of the Action.

VII. Miscellaneous


- A. Entire Agreement. This Agreement constitutes the entire and exclusive Agreement between the Parties concerning the resolution of the Action.
- B. Non-Admission. The Parties agree that nothing in this Agreement constitutes an admission of liability or wrongdoing of any kind by USPS or OIG. Moreover, this Agreement is not admissible in any proceeding as evidence of an admission, by either USPS or OIG, of a violation of any policies, procedures, or any local, state or federal laws or regulations. Defendants do not admit that a Health Care

Provider giving an Agent his or her opinions or assessments of observed conduct by the Employee constitutes the disclosure of protected health information within the meaning of HIPAA.

- C. Amendments. There shall be no amendment or modification of any of the terms of this Agreement unless in writing and signed by the Parties.
- D. Subsequent Legislation. This Agreement may be subject to and/or superseded by, in whole or in part, any subsequent amendments, modifications or alterations to any statute or regulation that may apply to or govern the authority or conduct of the Parties to this Action, provided, however, that USPS may not promulgate any regulations inconsistent with the terms of this Agreement except as required by a change in law.
- E. Construction. This Agreement shall be construed as a document that was drafted by all of the Parties jointly, and no uncertainty or ambiguity shall be construed against any of the Parties as the drafter.
- F. Opportunity to Consider and Confer. The Parties represent and acknowledge that they have had the opportunity to investigate this matter, consult with counsel, determine the advisability of entering into this Agreement and have entered into it freely and voluntarily.


 Fredric V. Rolando 4-29-10
 President, NALC Date

PREET BHARARA
 United States Attorney for the
 Southern District of New York
 Attorney for Defendants USPS and
 USPS Office of Inspector General


 William Burrus 5-6-10
 President, APWU Date



 NATALIE N. KUEHLER 5-20-10 Date
 LARA K. ESHKENAZI
 Assistant United States Attorneys

Exhibit A – OIG HIPAA Letter

[on OIG letterhead]

Date: [fill in date]

**HIPAA Letter – Request for
Information**

Dear Health Care Provider:

I am a federal law enforcement officer with the U.S. Postal Service Office of Inspector General (USPS OIG).¹ The Inspector General Act of 1978 (IG Act)² authorizes the USPS OIG to investigate allegations of fraud, waste and abuse in programs and operations of the U.S. Postal Service, including investigations of suspected workers' compensation and leave benefits fraud and abuse by Postal Service employees.

USPS OIG is conducting an official investigation of [fill in name of individual], who is a current or former Postal Service employee. My understanding is that he/she is or was a patient of yours.

I am requesting information from you that is relevant and material to such investigation. Please provide only that information relevant to the investigation of this individual's alleged violations of law, as indicated in the space below.

[fill in description of information sought and statement demonstrating how such information is relevant and material to a legitimate law enforcement inquiry]

Your assistance is requested in order to determine whether a violation of law has occurred. However, you are not required to speak with me regarding your current (or former) patient, and you may take as much time as you deem necessary to consider whether to discuss with me information concerning this individual. You may of course consult with whomever you wish, other than your patient, in deciding whether to discuss such information with me.

Please be advised that pursuant to the authority contained in the IG Act, USPS OIG is authorized to

have access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities under this Act.³

The Health Insurance Portability and Accountability Act (HIPAA) provides safeguards for a patient's protected health information.⁴ HIPAA does not prohibit disclosure of health information for authorized purposes. The statute states, "Nothing in [HIPAA]...shall be

¹ 18 U.S.C. § 3061.

² 5 U.S.C. app. 3 et seq.

³ 5 U.S.C. app. 3 § 6(a)(1).

⁴ 45 C.F.R. §164.502(a).

construed to diminish the authority of any Inspector General, including such authority as provided in the Inspector General Act of 1978.⁵ The HIPAA Privacy Rule⁶ permits disclosure, without patient consent, where disclosure is for a law enforcement purpose, to a law enforcement official.⁷ Disclosure of protected health information is permissible under HIPAA's law enforcement exception⁸ where: (1) the information sought is relevant and material to a legitimate law enforcement inquiry; (2) the request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is requested; and (3) health information lacking the patient's identity would have no evidentiary value.

The HIPAA Privacy Rule also permits covered entities to disclose protected health information, without patient consent, to a health oversight agency for oversight activities authorized by law.⁹ Those oversight activities include audits, and civil, administrative, or criminal investigations that are necessary for the oversight of government benefit programs for which health information is relevant to beneficiary eligibility.¹⁰ USPS OIG is a health oversight agency.¹¹

Normally, your patient would have a right to know if you have disclosed his or her protected health information. However, because alerting the individual to a disclosure would likely impede our law enforcement and/or health oversight activities, we ask that you refrain from notifying the individual of any disclosure for a period of thirty (30) days from the date of this letter, unless USPS OIG requests in writing that you refrain for a different period of time. The HIPAA Privacy Rule requires you to withhold notification under these circumstances.¹²

USPS OIG requests your cooperation in this matter. The request is made for law enforcement and/or health oversight purposes in connection with an official USPS OIG investigation of the above named individual.

Thank you for your cooperation and assistance.

Sincerely,

Special Agent _____

⁵ 42 U.S.C. § 1320a-7c(a)(5).

⁶ 45 C.F.R. Parts 160 and 164.

⁷ 45 C.F.R. § 164.512(f).

⁸ 45 C.F.R. § 164.512(f)(1)(ii)(C).

⁹ 45 C.F.R. § 164.512(d).

¹⁰ 45 C.F.R. § 164.512(d)(1)(ii).

¹¹ 45 C.F.R. § 164.501.

¹² 45 C.F.R. § 164.528(a)(2)(i).

Exhibit B -- USPIS HIPAA Letter

ON USPIS LETTERHEAD

Date: **HIPAA LETTER: REQUEST FOR INFORMATION**

Dear Health Care Provider:

I am a federal law enforcement officer with the United States Postal Inspection Service (USPIS).¹³ Postal Inspectors are charged with investigating, both criminally and civilly, matters related to the U.S. Postal Service, including investigations of suspected worker's compensation fraud and leave benefits fraud and abuse by Postal Service employees.

The USPIS is conducting an official investigation of [fill in name of individual], who is a current or former Postal Service employee. My understanding is that he/she is or was a patient of yours.

I am requesting information from you that is relevant and material to such an investigation. Please provide only that information relevant to the investigation of this individual's alleged violations of law, as indicated by the space below:

[fill in description of information sought and statement demonstrating how such information is relevant and material to a legitimate law enforcement inquiry]

Your assistance is requested in order to determine whether a violation of law has occurred. However, you are not required to speak with me regarding your current (or former) patient, and you may take as much time as you deem necessary to consider whether to discuss with me information concerning this individual. You may, of course, consult with whomever you wish, other than your patient, in deciding whether to discuss such information with me.

The Health Insurance Portability and Accountability Act (HIPAA) provides safeguards for a patient's protected health information.¹⁴ HIPAA does not prohibit the disclosure of health information for authorized purposes. In the case of a criminal/civil investigation by a federal law enforcement entity like the U.S. Postal Inspection Service, the HIPAA Privacy Rule¹⁵ permits disclosure, without patient consent, where disclosure is for a law enforcement purpose, to a law enforcement official.¹⁶ Disclosure of protected health information is permissible under HIPAA's law enforcement exception¹⁷ where:

¹³ 18 U.S.C. § 3061.

¹⁴ 45 C.F.R. § 164.502(a).

¹⁵ 45 C.F.R. Parts 160 and 164.

¹⁶ 45 C.F.R. § 164.512(f).

¹⁷ 45 C.F.R. § 164.512(f)(1)(ii)(C).

- (1) the information sought is relevant and material to a legitimate law enforcement inquiry;
- (2) the request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is requested; and
- (3) health information lacking the patient's identity would have no evidentiary value.

The HIPAA Privacy Rule also permits covered entities to disclose protected health information, without patient consent, to a health oversight agency for oversight activities authorized by law.¹⁸ Those oversight activities include audits, and civil, administrative or criminal investigations that are necessary for the oversight of government benefit programs for which health information is relevant to beneficiary eligibility.¹⁹ The USPIS is a health oversight agency.²⁰

Normally your patient would have a right to know if you have disclosed his or her protected health information. However, because alerting the individual to a disclosure would likely impede our law enforcement and/or health oversight activities, we ask that you refrain from notifying the individual of any disclosure for a period of thirty (30) days from the date of this letter unless USPIS requests in writing that you refrain for a different period of time. The HIPAA Privacy rule requires you to withhold notification under these circumstances.²¹

The USPIS requests your cooperation in this matter. The request is made for law enforcement and/or health oversight purposes in connection with an official USPIS investigation of the above named individual.

Thank you for your anticipated cooperation and assistance.

Sincerely,

U.S. Postal Inspector

¹⁸ 45 C.F.R. § 164.512(d).

¹⁹ 45 C.F.R. § 164.512 (d)(1)(ii).

²⁰ 45 C.F.R. § 164.501.

²¹ 45 C.F.R. § 164.528(a)(2)(i).

Exhibit C – Acknowledgment Form

Acknowledgment of Receipt

I acknowledge that I have received a copy of the foregoing "HIPAA Letter" and was provided with a reasonable opportunity to read it.

Signature of Health Care Provider

Print Name

Date

If signed acknowledgment is not obtained, please check reason:

HIPAA Letter Provided – Unable to Sign

HIPAA Letter Provided – Declined to Sign

[Special Agent/U.S. Postal Inspector]

Date