FMLA Grievance Template Citations

1) **The second paragraph of the Introduction to the JCAM** says in part,
   The JCAM represents the parties' effort to inform labor and management in the field of these areas of agreement and encourage consistency and compliance with the issues treated. The narrative explanation of the Collective Bargaining Agreement contained in the JCAM should be considered dispositive of the joint understanding of the parties at the national level. (exhibit 1)

2) **The second paragraph of the Preface to the JCAM** says in part,
   At each step of the grievance/arbitration procedure the parties are required to jointly review the JCAM in order to facilitate resolution of disputes. (exhibit 2)

3) **Article 1.1 of the National Agreement** says,
   Section 1. Union
   The Employer recognizes the National Association of Letter Carriers, AFL-CIO as the exclusive bargaining representative of all employees in the bargaining unit for which it has been recognized and certified at the national level—City Letter Carriers. (exhibit 3)

4) **The first paragraph on page 3-1 of the JCAM** says in part,
   While postal management has the right to "manage" the Postal Service, it must act in accordance with applicable laws, regulations, contract provisions, arbitration awards, letters of agreement, and memoranda. Consequently, many of the management rights enumerated in Article 3 are limited by negotiated contract provisions. (exhibit 4)

5) **The first paragraph on page 5-1 of the JCAM** says in part,
   Article 5 prohibits management taking any unilateral action inconsistent with the terms of the existing agreement or with its obligations under law. Section 8(d) of the National Labor Relations Act prohibits an employer from making unilateral changes in wages, hours or working conditions during the term of a collective bargaining agreement. (exhibit 5)

6) **The fifth paragraph on page 10-14 of the JCAM** says,
   Leave Under the Family and Medical Leave Act
   The Family and Medical Leave Act of 1993 (FMLA) applies to Postal Employees. The Postal Service regulations implementing the Act are found in ELM Section 515. The law entitles eligible employees to take up to 12 workweeks of job-protected absence during any 12 month period for one or more of the following reasons:
   • The birth of an employee's child and to care for that child during the first year after birth; circumstances may require that FMLA leave begin before the actual date of birth of a child, i.e. before the birth of a child for prenatal care or if the mother's condition prevents her from performing the functions of her position.
   • The placement of a child with the employee for adoption or foster care; the employee may be entitled to FMLA leave before the actual placement or adoption of a child when, for example, the employee is required to attend counseling sessions, appear in court, or consult with attorneys or doctors representing the birth parent prior to placement. FMLA coverage expires one year after the date of the placement. Because of a serious health condition that makes the employee unable to perform the functions of the employee's job. An employee is "unable to perform the functions of the position" when the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position.

• To care for the employee's spouse, son, daughter, or parent with a serious health condition, this requires medical certification that an employee is "needed to care for" a family member and encompasses both physical and psychological care. For the purpose of the FMLA the following definitions apply. (exhibit 6)

7) **The second paragraph on page 10-16 of the JCAM** says,

Because of a serious health condition that makes the employee unable to perform the functions of the employee's job. An employee is "unable to perform the functions of the position" when the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position.

• To care for the employee's spouse, son, daughter, or parent with a serious health condition, this requires medical certification that an employee is "needed to care for" a family member and encompasses both physical and psychological care. For the purpose of the FMLA the following definitions apply. (exhibit 7)

8) **The second paragraph on page 10-18 of the JCAM** says,

Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions. Likewise, FMLA- covered absences may not be used towards any disciplinary actions. (exhibit 8)

9) **The fourth paragraph on page 10-20 of the JCAM** says,

FMLA Designation. *When an employee requests leave the manager or supervisor must determine whether the employee is an eligible employee for FMLA purposes; the absence is covered under FMLA; or whether additional documentation is required in order to designate the leave as FMLA.*

The employee may, but need not, ask for the absence to be covered by FMLA, rather, it is the supervisor's responsibility to designate the leave based on information provided by the employee.

The supervisor should provide the employee a copy of the employee's PS Form 3971 designating the leave and indicating whether additional documentation is necessary along with Publication 71. Documentation to substantiate FMLA is acceptable in any format, including a form created by the union, as long as it provides the information indicated in Publication 71. (exhibit 9)

10) **The first paragraph on page 19-1 of the JCAM** says,

Article 19 provides that those postal handbook and manual provisions directly relating to wages, hours, or working conditions are enforceable as though they were part of the National Agreement. (exhibit 10)

11) **Section 512.412 of the ELM** says,

Emergencies

An exception to the advance approval requirement is made for emergencies; however, in these situations, the employee must notify appropriate postal authorities of the emergency and the expected duration of the absence as soon as possible.

When sufficient information is provided to the supervisor to determine that the absence may be covered by the Family and Medical Leave Act (FMLA), ***the supervisor completes a PS Form 3971 and mails it to the employee's address of record along with a Publication 71****, Notice for Employees Requesting Leave for Conditions Covered by Family and Medical Leave Policies.* (exhibit 11)

12) **Section 513.332 of the ELM** says,

Unexpected Illness or Injury

An exception to the advance approval requirement is made for unexpected illness or injuries; however, in these situations the employee must notify appropriate postal authorities of their illness or injury and expected duration of absence as soon as possible. When sufficient information is provided to the supervisor to determine that the absence is to be covered by FMLA, the supervisor completes PS Form 3971 and mails it to the employee's address of record along with a Publication 71. (exhibit 12)

13) **Section 515.1 of the ELM** says in part,

Purpose

Section 515 provides policies to comply with the Family and Medical Leave Act of 1993 (FMLA). (exhibit 13)

14) **Section 515.2 of the ELM** provides the definitions to be used when considering Section 515. (exhibit 14)

15) **Section 515.3 of the ELM** says,

Eligibility

For an absence to be covered by the FMLA, the employee must have been employed by the Postal Service for an accumulated total of 12 months and must have worked a minimum of 1,250 hours during the 12-month period before the date leave begins. (exhibit 15)

16) **Section 515.41 of the ELM** says,

Conditions

Eligible employees must be allowed an total of up to 12 workweeks of leave within a Postal Service leave year for one or more of the following:

a. Because of the birth of a son or daughter of the employee and in order to care for such son or daughter. Entitlement to be absent for this condition expires 1 year after the birth.

b. Because of the placement of a son or daughter with the employee for adoption or foster care. Entitlement to be absent for this condition expires 1 year after the placement.

c. In order to care for the spouse, son, daughter, or parent of the employee if the spouse, son, daughter, or parent has a serious health condition.

d. Because of a serious health condition that makes the employee unable to perform the functions of the employee's position. (exhibit 16)

17) **Section 515.51 of the ELM** says in part,

General

An employee must provide a supervisor a PS Form 3971 together with documentation supporting the request, at least 30 days before the absence if the need for the leave is foreseeable. If 30 days notice is not practicable, the employee must give notice as soon as practicable. Ordinarily the employee should give at least verbal notification within 1 or 2 business days of the time the need for leave becomes known. A copy of the completed PS Form 3971 is returned to the employee along with a copy of Publication 71, which details the specific expectations and obligations and the consequences of a failure to meet these obligations. (exhibit 17)

18) **29 CFR §825.102** says in part,

When was the Act effective?

(a) The Act became effective on August 5, 1993, for most employers. If a collective bargaining agreement was in effect on that date, the Act's effective date was delayed until February 5, 1994, or the date the agreement expired, whichever date occurred sooner. This delayed effective date was applicable only to employees covered by a collective bargaining agreement that was in effect on August 5, 1993, and not, for example, to employees outside the bargaining unit. Application of FMLA to collective bargaining agreements is discussed further in § 825.700. (exhibit 18)

19) **29 CFR §825.109** says in part,

Are Federal agencies covered by these regulations?

(a) Most employees of the government of the United States, if they are covered by the FMLA, are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the United States Code) which is administered by the U.S. Office of Personnel Management (OPM). OPM has separate regulations at 5 CFR Part 630, Subpart L. In addition, employees of the Senate and House of Representatives are covered by Title V of the FMLA.

(b) The Federal Executive Branch employees within the jurisdiction of these regulations include:

(1) Employees of the Postal Service; (exhibit 19)

20) **29 CFR §825.110** says in part,

Which employees are ''eligible'' to take leave under FMLA?

(a) An ''eligible employee'' is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12- month period immediately preceding the commencement of the leave, and. . .(exhibit 20)

21) **29 CFR §825.112** says in part,

Under what kinds of circumstances are employers required to grant family or medical leave?

(a) Employers covered by FMLA are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child;

(2) For placement with the employee of a son or daughter for adoption or foster care;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job. (exhibit 21)

22) **29 CFR §825.114** says in part,

What is a ''serious health condition'' entitling an employee to FMLA leave?

(a) For purposes of FMLA, ''serious health condition'' entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(2) Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider. (exhibit 22)

23) **29 CFR §825.118** says in part,

What is a ''health care provider''?

(a) The Act defines ''health care provider'' as:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(2) Any other person determined by the Secretary to be capable of providing health care services.

(b) Others ''capable of providing health care services'' include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nursemidwives and clinical social workers who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law; (exhibit 23)

24) **29 CFR §825.208** says in part,

Under what circumstances may an employer designate leave, paid or unpaid, as FMLA leave and, as a result, count it against the employee's total FMLA leave entitlement?

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA qualifying. (exhibit 24)

25) **29 CFR §825.220** says in part,

How are employees protected who request leave or otherwise assert FMLA rights?

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act. (exhibit 25)

26) **29 CFR §825.303** says in part,

What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable?

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile (''fax'') machine or other electronic means. Notice may be given by the employee's spokesperson (e.g., spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation. (exhibit 26)

27) **29 CFR §825.305** says in part,

When must an employee provide medical certification to support FMLA leave?

(a) An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by § 825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to doso despite the employee's diligent, good faith efforts.

(c) In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

(d) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

(e) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (see § 825.207), only the employer's less stringent sick leave certification requirements may be imposed. (exhibit 27)

28) **29 CFR §825.308** says in part,

Under what circumstances may an employer request subsequent recertifications of medical conditions?

(a) For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider (as defined in § 825.114(a)(2)(ii), (iii) or (iv)), an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:

(1) Circumstances described by the previous certification have changed significantly (e.g., the duration or frequency of absences, the severity of the condition, complications); or

(2) The employer receives information that casts doubt upon the employee's stated reason for the absence.

(b) (1) If the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, the employer may not request recertification until that minimum duration has passed unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(2) For FMLA leave taken intermittently or on a reduced leave schedule basis, the employer may not request recertification in less than the minimum period specified on the certification as necessary for such leave (including treatment) unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(c) For circumstances not covered by paragraphs (a) or (b) of this section, an employer may request recertification at any reasonable interval, but not more often than every 30 days, unless:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications); or

(3) The employer receives information that casts doubt upon the continuing validity of the certification.

(d) The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts. (exhibit 28)

29) **29 CFR §825.400** says in part,
What can employees do who believe that their rights under FMLA have been violated?
(a) The employee has the choice of:
(1) Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor, or
(2) Filing a private lawsuit pursuant to section 107 of FMLA (exhibit 29)

30) **C-18477, F90N-4F-D 95063343, Arbitrator Ames, June 25, 1998** states in the second paragraph on page 18,
Notwithstanding the Union's argument that the Postal Service violated the Rehabilitation Act, Family Medical Leave Act and Americans with Disabilities Act in its treatment of the Grievant, it is suffice that all of these federal statutes are binding upon the Employer and benefit postal employees, as incorporated by reference in the National Agreement pursuant to Article 19 (Handbooks and Manuals). (exhibit 30)

31) **C-14107, H90N-4H-D94068273, Arbitrator Lurie, November 8, 1994** states in the first paragraph on page seven,
Family leave need not be expressly requested by the employee, either on the Form 3971 or verbally. However, to obtain the protection of the FMLA, the employee must disclose the cause of her absence, and that cause must be one which Management reasonably concludes is covered by the FMLA . If Management does so conclude, then Management is obligated to treat the leave as FMLA leave. (exhibit 31)

32) **C-14107, H90N-4H-D94068273, Arbitrator Lurie, November 8, 1994** states in the first paragraph on page nine,
Once the employee makes it known that her absence pertains to a covered condition, Management is required to inform the employee that she may take the leave under the auspices of the FMLA , by furnishing the employee with a written notice of her rights and obligations under the Act. (exhibit 31)

33) **C-14107, H90N-4H-D94068273, Arbitrator Lurie, November 8, 1994** states in the second paragraph on page thirteen,
Under the FMLA, the Grievant was not required to request FMLA leave, but rather to timely advise her supervisor, Ms . Norman , of her medical condition . It was then the obligation of Supervisor Norman [1] to determine whether that condition was a "serious health condition " covered by the Act and, if so, [2] to note the fact on the Grievant's Form 3971, [3] to furnish the Grievant with written notification of her rights and responsibilities under the Act, and [4] to advise the Grievant as to any medical documentation that would be required. (exhibit 31)

34) **C-23583, E98N-4E-D 02091274, Arbitrator Downing, August 10, 2002** states in the third paragraph on page seventeen,
Under section 825 .303 of the rules and regulations , the employer is "expected to obtain any additional required information through informal means ." (exhibit 32)

35) **C-23583, E98N-4E-D 02091274, Arbitrator Downing, August 10, 2002** states in the last paragraph on page nineteen,
As the grievant never received notice from the employer concerning his rights and responsibilities under the FMLA, he was not required to label his requests for leave as FMLA leave. (exhibit 32)

36) **C-23261, Q98N-4Q-001090839, Arbitrator Nolan, April 28, 2002** states in the second paragraph on page seven,
. . .Publication 71 goes to employees rather than just to their supervisors . It thus cannot be a simple "internal management communication ." Finally, Publication 71 contains specific directions that employees must follow in order to obtain FMLA leave. (exhibit 33)

37) **C-23261, Q98N-4Q-001090839, Arbitrator Nolan, April 28, 2002** states in the third paragraph on page seven,
. . .Publication 71 clearly meets the normal definition of a regulation and is therefore subject to an Article 19 appeal. (exhibit 33)

38) **The Step 4, M-01281, F90N-4F-D 95043198, February 26, 1997** states,
We further agreed that the provisions of ELM Section 515, "Absence for Family Care or Serious Health Condition of Employee" are enforceable through the grievance arbitration procedure. (exhibit 34)

39) **The Step 4, M-01378, November 22, 1995** states in the next to last paragraph on page one,
Therefore, to address the union's concern, the Postal Service reviewed and approved APWU and NALC FMLA forms that, when properly filled out by health care providers, provide enough information is provided to certify that the absence qualifies as a covered condition under the FMLA.
Employees do not need to use the WH-380 or the union forms, they only need to provide the required information as listed on Publication 71. (exhibit 35)

40) **The Step 4, M-01474, December 9, 2002,** states in the third paragraph,
When an employee uses leave due to a condition already supported by an FMLA certification, the employee is not required to provide another certification in order for the absence to be FMLA protected. (exhibit 36)

41) **No. 03-3294, United States Court of Appeals for the Sixth Circuit, July 27, 2004** states in the third paragraph on page six,
The goal of a make-whole award is to put the employee in the same position that she would have been in had her employer not engaged in the unlawful conduct; this includes giving the employee credit towards the FMLA's hours-of-service requirement for hours that the employee would have worked but for her unlawful termination. (exhibit 37)

42) **No. 03-4204, United States Court of Appeals For the Seventh Circuit, May 4, 2006** states in the second paragraph on page seven,
The district court then concluded that the postal handbooks and manuals are part of the National Agreement. It further determined that, because the postal regulations had the force of a valid collective bargaining agreement, those regulations, and not the FMLA's provisions, controlled Mr. Harrell's right to reinstatement. (exhibit 38)

43) **No. 03-4204, United States Court of Appeals For the Seventh Circuit, May 4, 2006** states in the second paragraph on page eight,
The district court pointed to Mr. Harrell's "deposition testimony in which he admits that he was aware of the USPS regulations concerning returning to work following an absence of more than 21 days." (exhibit 38)

44) **No. 03-4204, United States Court of Appeals For the Seventh Circuit, May 4, 2006** states in the last paragraph on page twenty-seven,
Because the Department of Labor's regulations reasonably interpret § 2614(a)(4) to allow a CBA to impose stricter return-to-work restrictions than those otherwise incorporated into the FMLA, we defer to that interpretation and hold that the Postal Service did not violate the FMLA when it required Mr. Harrell to comply with the return-to-work provisions set forth in the handbooks and manuals incorporated into the National Agreement. (exhibit 38)

45) **No. 05-2297, United States Court of Appeals For the Eighth Circuit, May 9, 2006** states in the second paragraph on page seven,
"The FMLA provides eligible employees up to 12 workweeks of unpaid leave during any 12-month period." Darby v. Bratch, 287 F.3d 673, 679 (8th Cir. 2002) (citing 29 U.S.C. § 2612). It prohibits employers from discriminating or "retaliating" against an employee for asserting her rights under the Act. Id. (citing 29 U.S.C. § 2612(a)(2)). Therefore, an employer may not consider "an employee's use of FMLA leave as a negative factor in an employment action." Id. "Basing an adverse employment action on an employee's use of leave, or in other words, retaliation for exercise of Leave Act rights, is therefore actionable." Smith v. Allen Health Sys., Inc., 302 F.3d 827, 832 (8th Cir. 2002). (exhibit 39)

46) **No. 05-2297, United States Court of Appeals For the Eighth Circuit, May 9, 2006** states in the last paragraph on page seven,
An employee can prove retaliation through circumstantial evidence, using the McDonnell Douglas burden-shifting analysis. Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973)). First, the employee must establish a prima facie case of retaliatory discrimination by showing that "she exercised rights afforded by the Act, that she suffered an adverse employment action, and that there was a causal connection between her exercise of rights and the adverse employment action." Id. Second, once the employee establishes a prima facie case, the burden shifts to the employer to article a legitimate, nondiscriminatory reason for its actions. Id. at 833. Finally, the burden shifts back to the employee to demonstrate that the "employer's proffered reason is pretextual." Id. The employee must present evidence that "(1) creates a question of fact regarding whether [the defendant's] reason was pretextual and (2) creates a reasonable inference that [the defendant] acted in retaliation." Id. (exhibit 39)

47) **No. 05-2297, United States Court of Appeals For the Eighth Circuit, May 9, 2006** states in the last paragraph on page eight,
To establish a causal link between the employee's exercise of FMLA rights and her termination, the employee must prove "that an employer's 'retaliatory motive played a part in the adverse employment action.'" Kipp, 280 F.3d at 897 (quoting Sumner v. United States Postal Serv., 899 F.2d 203, 208–09 (2d Cir. 1990)). "[E]vidence that gives rise to 'an inference of a retaliatory motive' on the part of the employer is sufficient to establish a causal link." Id. (quoting Rath v. Selection Research, Inc., 978 F.2d 1087, 1090 (8th Cir. 1992); Couty v. Dole, 886 F.2d 147, 148 (8th Cir. 1989)).

An employee can establish a causal link between her protected activity and the adverse employment action through "the timing of the two events." Eliserio v. United Steelworkers of Am., 398 F.3d 1071, 1079 (8th Cir. 2005). "A pattern of adverse actions that occur just after protected activity can supply the extra quantum of evidence to satisfy the causation requirement." Smith, 302 F.3d at 832. The mere coincidence of timing, however, is rarely sufficient to establish the causation element. Haas v. Kelly Serv., Inc., 409 F.3d 1030, 1037 (8th Cir. 2005). Cases in which we have determined that temporal proximity alone was sufficient to create an inference of the causal link "have uniformly held that the temporal proximity must be "very close."" Wallace v. Sparks Health Sys., 415 F.3d 853, 859 (8th Cir. 2005).

Even if temporal proximity alone is insufficient to establish causation, the employee may attempt to prove causation by providing evidence of the employer's discriminatory comments. See Watson v. O'Neill, 365 F.3d 609, 613 (8th Cir. 2004) (exhibit 39)

48) **No. 05-2297, United States Court of Appeals For the Eighth Circuit, May 9, 2006** states in the third paragraph on page eleven,

"If the employer comes forward with evidence of a legitimate, nondiscriminatory reason for its treatment of the employee, the employee must then point to some evidence that the employer's proffered reason is pretextual." Smith, 302 F.3d at 833. The employee shows pretext by establishing that the employer's "justification for the [adverse action] was unworthy of credence." Id. at 833–34.

An employee can prove pretext in several ways. First, the employee can show that the employer's proffered explanation has no basis in fact. (exhibit 39)

49) **No. 05-2297, United States Court of Appeals For the Eighth Circuit, May 9, 2006** states in the first paragraph on page twelve,

Also, the employee can prove pretext by showing that the employer varied from its normal policy or practice to address the employee's situation. (exhibit 39)

50) **194C-41-C 97033793, Arbitrator Goldstein, April 30, 1999** states in the last paragraph on page sixteen,

I agree with the Union that the Service improperly when it sent Grievant home on her own time on September 26 and instructed her that she could not return until she had her light duty forms completed. I find that once the Service allowed Grievant to work for 6 days under the auspices of the September 20 FMLA forms, it was inappropriate for the Service to then change the rules" and now require Grievant to get additional information on her own time. . .When it allowed Grievant to work under these forms for 6 days, the Service waived its right to have Grievant obtain the light duty forms "on her own time" for the reasons detailed below. (exhibit 40)

51) **194C-41-C 97033793, Arbitrator Goldstein, April 30, 1999** states in the last paragraph on page twenty-one,

The Grievant should have been sent home on September 26 and given administrative leave to obtain the light duty form, I hold, because it was the Service who requested this light duty form 6 days earlier when Schaaf first received Grievant's FMLA certification form. While it certainly would have been acceptable to ask Grievant for a light duty form on September 20 on her own time, it was not acceptable to do so 6 days later, because of her own initial error. For all intents and purposes, Schaaf gave final approval to Grievant's FMLA request when she accepted the form, I hold. The Service accepted the initial FMLA certification form without question and allowed the Grievant to work, without incident for 6 days. Once it did this, it was unreasonable to ask Grievant to obtain a light duty form on her own time, I rule. (exhibit 40)

52) **C94C-4C-C98040114, Arbitrator Zobrak, May 18, 2000** states in the third paragraph on page four,

The Postal Service failed to immediately recall the Grievant and return him to work despite receipt of the medical documents. The undersigned, however, accepts the argument that the Postal Service needed to verify the information contained in those documents. The extended delay, however, resulted in the Grievant's losing the opportunity to earn wages while performing duties for the Postal Service. While the Step 2 response indicates that the Akron Medical Center had difficulties in contacting the Grievant's physician, the extent of the delay in returning the Grievant to work has not been justified. (exhibit 41)

53) **D94C-4D-C 98114980, Arbitrator Wolf, April 27, 1999** states in the first paragraph on page ten,

In this case, the Postal Service contended that EL-311 required the Grievant to provide medical certification prior to return to work. As soon as Management made its position known, the Union had the right to contest this interpretation of the Handbook. (exhibit 42)

54) **D94C-4D-C 98114980, Arbitrator Wolf, April 27, 1999** states in the second paragraph on page twelve,

As quoted above, section 513.361 permits, but does not require, supervisors to demand documentation from employees who are absent for medical reasons for three days or less. The documentation referred to in that section is proof that the employee was incapacitated during the absence. It is not documentation of the employee's ability to work after the cessation of the illness or injury. (exhibit 42)

55) **D94C-4D-C 98114980, Arbitrator Wolf, April 27, 1999** states in the last paragraph on page seventeen,

I would be remiss if I did not point out to the parties that sections 825.310(g) and 825.203 arguably preclude the use of a return-to-duty certification in cases of intermittent absences relating to FMLA-covered conditions. (exhibit 42)

56) **E98C-IE-C 01183509, Arbitrator Winston, September 28, 2001** states in the second paragraph on page nine,

. . .unless and until Mr. Sullivan exceeds his maximum FMLA leave allowance offive (5) days per month, an allotment duly accepted by the Service and so certified, the pattern, by itself, is meaningless. To hold otherwise would ignore and permit the Service to ignore, the FMLA certification.. . . (exhibit 43)

57) **E98C-IE-C 01183509, Arbitrator Winston, September 28, 2001** states in the third paragraph on page nine,

Since Mr. Sullivan has FMLA certification for a maximum of five (5) days leave per month, the Service cannot interfere with, restrain, or deny the exercise ofor the attempt to exercise such duly certified leave under the guise of enforcing its sick leave policies. 29 U.S.C. § 2615(a)(1). (exhibit 43)

58) **H94C-1H-C 98094229, Arbitrator Plant, January 8, 1999** states in the second paragraph on page five,

Management violated the Federal Law by not accepting the grievant's APWU Form #1. (exhibit 44)

59) **H94C-1H-C 98094229, Arbitrator Plant, January 8, 1999** states in the last paragraph on page eight,

The Service has questioned the adequacy of the medical certification offered by the Grievant on August 29, 1996. The Federal Register as enumerated provides the procedures outlining what the Service as an employer may do when it questions the adequacy of a medical certification. This Arbitrator has reviewed the rules and regulations, the evidence and testimony and finds that none of those procedures were followed by the Service in the instant case. (exhibit 44)

60) **H98C-IH-C 00245483, Arbitrator Hoffman, October 25, 2002** states in the third paragraph on page four,

On one hand the law provides that employees may obtain certification from a health care provider for absences caused by a serious health condition. This certification, according to DOL regulations, serves as documentation for a period or periods of "incapacity" including "recurring episodes of a single underlying condition." 19 CFR 825.114, 305, 306. The absences can take many different forms, such as permanent, partial or intermittent. Intermittent leaves may be covered as a serious health condition if they are described in the certification. 19 CFR 825.306.

Management's own medical documentation rules have been in place long before FMLA. There is documentation required for establishing an FMLA serious health condition under ELM 515.5. Here management contends that even though the grievant has a certification on file for incapacity, it has the absolute right under ELM 513.362 to require employees to submit documentation if they are absent in excess of three days. . .The last three words state the purpose for this evidence - "incapacity to work." It is documentation that is clearly meant to be evidence that the employee did not have the capacity to work during the absence. It is not for the purpose of proving that the employee is fit to return to work. The wording of the rule makes no mention of fitness or being able to return to work. (exhibit 45)

61) **H98C-IH-C 00245483, Arbitrator Hoffman, October 25, 2002** states in the third paragraph on page five,

ELM 513.362 on its face thus requires no more or less than what this grievant already provided in her FMLA serious health condition certification from her physician. (exhibit 45)

62) **H98C-IH-C 00245483, Arbitrator Hoffman, October 25, 2002** states in the second paragraph on page seven,

It is true that management does not have to give reasons for requiring medical documentation under ELM 513.362. It is a strict requirement for absences over three days. But to the extent that this rule imposes a requirement that is already met, its enforcement would be improper. ELM 513.362 is derived from a pre-FMLA period when there was no such document as an FMLA certification for pre-existing serious medical conditions that spelled out the duration of time needed for incapacity. The requirement for incapacity information before FMLA was a necessity; there was no other evidence on file for the absence showing any type of medical documentation. (exhibit 45)

63) **H98C-IH-C 99248329, Arbitrator Hardin, May 9, 2002** states in the third paragraph on page five, *Why the documentation provisions for "Extended Illness" should be applied to a FMLA certified absence from a partial tour, the Postal Service did not explain. And, most likely, it could not have done so. A requirement that employees like Ms. Carnevale provide for each such absence an explicit, evaluative, prognosis from a physician, supplying in detail the information required of an employee returning from extended leave for serious illness, and in a form acceptable to a Postal Service medical unit, would effectively nullify the FMLA right to use such intermittent leave.* (exhibit 46)

64) **H98-C-IH-C 00055962 Arbitrator Hoffman, November 17, 2000** states in the third paragraph on page three,
Implicit in the handbooks and National agreement is the concept that management not unreasonably delay the return to work of an employee who is fit for duty. (exhibit 47)

65) **H98-C-IH-C 00055962 Arbitrator Hoffman, November 17, 2000** states in the last paragraph on page four, *In the often-cited National pre-arbitration settlement in HIC-NA-C 65 (1984), it was concluded that the Service's medical officer must avoid undue delay by reviewing documentation and making a decision the same day it is submitted.* (exhibit 47)

FMLA Cites

Exhibit 1 Second Paragraph - Introduction to the JCAM
Exhibit 2 Second Paragraph - Preface to the JCAM
Exhibit 3 Article 1.1
Exhibit 4 First Paragraph - JCAM page 3-1
Exhibit 5 First Paragraph - JCAM page 5-1
Exhibit 6 Fifth Paragraph - JCAM page 10-14
Exhibit 7 Second Paragraph - JCAM page 10-16
Exhibit 8 Third Paragraph - JCAM page 10-18
Exhibit 9 Fourth Paragraph - JCAM page 10-20
Exhibit 10 First Paragraph - JCAM page 19-1
Exhibit 11 ELM Section 512.412
Exhibit 12 ELM Section 513.332
Exhibit 13 ELM Section 515.1
Exhibit 14 ELM Section 515.2
Exhibit 15 ELM Section 515.3
Exhibit 16 ELM Section 515.41
Exhibit 17 ELM Section 515.51
Exhibit 18 29 CFR 825.102
Exhibit 19 29 CFR 825.109
Exhibit 20 29 CFR 825.110
Exhibit 21 29 CFR 825.112
Exhibit 22 29 CFR 825.114
Exhibit 23 29 CFR 825.118
Exhibit 24 29 CFR 825.208
Exhibit 25 29 CFR 825.220
Exhibit 26 29 CFR 825.303
Exhibit 27 29 CFR 825.305
Exhibit 28 29 CFR 825.308
Exhibit 29 29 CFR 825.400
Exhibit 30 C-18477 - F90N-4F-D 95063343 - Arbitrator Ames - June 25, 1998
Exhibit 31 C-14107 - H90N-4H-D94068273 - Arbitrator Lurie - November 8, 1994
Exhibit 32 C-23583 - E98N-4E-D 02091274 - Arbitrator Downing - August 10, 2002
Exhibit 33 C-23261 - Q98N-4Q-001090839 - Arbitrator Nolan - April 28, 2002
Exhibit 34 Step 4 - M-01281 - F90N-4F-D 95043198 - February 26, 1997
Exhibit 35 Step 4 - M-01378 - November 22, 1995
Exhibit 36 Step 4 - M-01474 - December 9, 2002
Exhibit 37 No. 03-3294 -United States Court of Appeals for the Sixth Circuit - July 27, 2004
Exhibit 38 No. 03-4204 - United States Court of Appeals For the Seventh Circuit, - May 4, 2006
Exhibit 39 No. 05-2297 - United States Court of Appeals For the Eighth Circuit - May 9, 2006
Exhibit 40 194C-41-C 97033793 - Arbitrator Goldstein - April 30, 1999
Exhibit 41 C94C-4C-C98040114 - Arbitrator Zobrak - May 18, 2000
Exhibit 42 D94C-4D-C 98114980 - Arbitrator Wolf - April 27, 1999
Exhibit 43 E98C-IE-C 01183509 - Arbitrator Winston - September 28, 2001
Exhibit 44 H94C-1H-C 98094229, Arbitrator Plant, January 8, 1999
Exhibit 45 H98C-IH-C 00245483, Arbitrator Hoffman, October 25, 2002
Exhibit 46 H98C-IH-C 99248329, Arbitrator Hardin, May 9, 2002
Exhibit 47 H98-C-IH-C 00055962 Arbitrator Hoffman, November 17, 2000

Introduction

This jointly prepared USPS/NALC *Joint Contract Administration Manual* (JCAM) supercedes all previous editions. Publication of the JCAM was undertaken in good faith in order to educate the local parties and facilitate the resolution of disputes concerning issues on which the national parties are in agreement.

While the parties at the national level still dispute the proper application of some portions of the Collective Bargaining Agreement, there are significant areas of agreement. The JCAM represents the parties' effort to inform labor and management in the field of these areas of agreement and encourage consistency and compliance with the issues treated. The narrative explanation of the Collective Bargaining Agreement contained in the JCAM should be considered dispositive of the joint understanding of the parties at the national level. Some sections of the contract do not have a narrative explanation. No inference should be drawn from the lack of explanatory language.

The actual language contained in the Collective Bargaining Agreement is shaded in blue.

Preface

The JCAM is self-explanatory and speaks for itself. It is not intended to, nor does it, increase or decrease the rights, responsibilities, or benefits of the parties under the Collective Bargaining Agreement. It neither adds to, nor modifies in any respect, the current Collective Bargaining Agreement.

At each step of the grievance/arbitration procedure the parties are required to jointly review the JCAM in order to facilitate resolution of disputes. The JCAM may be introduced in arbitration as dispositive of those issues covered by the manual. If introduced as evidence in arbitration, the document shall speak for itself. Without exception, no testimony shall be permitted in support of the content, background, history or any other aspect of the JCAM's narrative.

The parties at the national level will update the JCAM at least once each calendar year. The parties at the local level should exercise caution to insure that they are working from the most current issue of the JCAM and apply any revisions or modifications prospectively from the date of revision.

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ARTICLE 1 UNION RECOGNITION

Preamble

PREAMBLE

This Agreement (referred to as the **2001** National Agreement) is entered into by and between the United States Postal Service (hereinafter referred to as the "Employer") and the National Association of Letter Carriers, AFL-CIO (hereinafter referred to as the "Union"). **The** Agreement is effective as of **November 21, 2001** unless otherwise provided.

This National Agreement, which was signed by the parties on June 26, 2002, is effective as of November 21, 2001 unless otherwise provided. The national parties have agreed to an effective date other than November 21, 2001 for some of its provisions. For example, certain provisions of Article 15 did not become effective until July 8, 2002. Some memorandums of understanding negotiated as part of this Agreement have an effective date other than November 21, 2001. In such cases the implementation date and implementation procedures are explained under the applicable contract provision.

ARTICLE 1. UNION RECOGNITION

1.1 **Section 1. Union**

The Employer recognizes the National Association of Letter Carriers, AFL-CIO as the exclusive bargaining representative of all employees in the bargaining unit for which it has been recognized and certified at the national level—City Letter Carriers.

The Postal Reorganization Act of 1970 (PRA) transformed the Post Office Department into an independent establishment of the government of the United States, "The United States Postal Service." The PRA also gave postal employees the right to bargain collectively over their wages, hours and working conditions. The law states that the Postal Service "shall accord exclusive recognition to a labor organization when the organization has been selected by a majority of the employees in an appropriate unit as their representative." This PRA mandate followed the concept of "exclusive recognition" that had long served as the basis for collective bargaining in the private sector. The doctrine holds that only one labor organization can represent "all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment..." (Labor-Management Relations Act, Section 9(a).)

NALC is the exclusive bargaining agent representing city delivery carriers. Although NALC membership is not limited to members of the city letter carrier craft, NALC is the exclusive representative of all city letter carriers—the *only* organization entitled to represent letter carriers in their

ARTICLE 3 MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of official duties;

B. To hire, promote, transfer, assign, and retain employees in positions within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

C. To maintain the efficiency of the operations entrusted to it;

D. To determine the methods, means, and personnel by which such operations are to be conducted;

E. To prescribe a uniform dress to be worn by letter carriers and other designated employees; and

F. To take whatever actions may be necessary to carry out its mission in emergency situations, i.e., an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

(The preceding Article, Article 3, shall apply to Transitional Employees.)

The Postal Service's "exclusive rights" under Article 3 are basically the same as its statutory rights under the Postal Reorganization Act, 39 U.S.C. Section 1001(e). While postal management has the right to "manage" the Postal Service, it must act in accordance with applicable laws, regulations, contract provisions, arbitration awards, letters of agreement, and memoranda. Consequently, many of the management rights enumerated in Article 3 are limited by negotiated contract provisions. For example, the Postal Service's Article 3 right to "suspend, demote, discharge, or take other disciplinary action against" employees is subject to the provisions of Articles 15 and 16.

Article 3.F Emergencies. This provision gives management the right to take whatever actions may be necessary to carry out its mission in emergency situations. An emergency is defined as "an unforeseen circumstance or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature."

Emergencies—Local Implementation Under Article 30. Article 30.B.3 provides that a Local Memorandum of Understanding (LMOU) may include, among other items, "Guidelines for the curtailment or termination of postal operations to conform to orders of local authorities or as local conditions warrant because of emergency conditions."

ARTICLE 5 PROHIBITION OF UNILATERAL ACTION

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

(The preceding Article, Article 5, shall apply to Transitional Employees.)

Prohibition on Unilateral Changes. Article 5 prohibits management taking any unilateral action inconsistent with the terms of the existing agreement or with its obligations under law. Section 8(d) of the National Labor Relations Act prohibits an employer from making unilateral changes in wages, hours or working conditions during the term of a collective bargaining agreement.

In H1N-5G-C 14964, March 11, 1987 (C-06858) National Arbitrator Bernstein wrote concerning Article 5:

> The only purpose the Article can serve is to incorporate all the Service's "obligations under law" into the Agreement, so as to give the Service's legal obligations the additional status of contractual obligations as well. This incorporation has significance primarily in terms of enforcement mechanism—it enables the signatory unions to utilize the contractual vehicle of arbitration to enforce all of the Service's legal obligations. Moreover, the specific reference to the National Labor Relations Act is persuasive evidence that the parties were especially interested in utilizing the grievance and arbitration procedure spelled out in Article 15 to enforce the Service's NLRB commitments.

Not all unilateral actions are prohibited by the language in Article 5—only those affecting wages, hours or working conditions as defined in Section 8(d) of the National Labor Relations Act. Additionally, certain management decisions concerning the operation of the business are specifically reserved in Article 3 unless otherwise restricted by a specific contractual provision.

Past Practice

The following explanation represents the national parties' general agreement on the subject of past practice. The explanation is not exhaustive, and is intended to provide the local parties general guidance on the subject. The local parties must insure that the facts surrounding a dispute in which past practice plays a part are surfaced and thoroughly developed so an informed decision can be made.

more than 30 days, the application must contain a written statement giving the reason for the requested LWOP absence (ELM Section 514.51).

As a general rule, management may grant LWOP as a matter of administration discretion. There are certain exceptions concerning disabled veterans, military reservists and members of the National Guard. See ELM Section 514.22 for more information.

A national Memorandum of Understanding establishes that an employee need not exhaust annual leave and/or sick leave before requesting leave without pay. ELM Exhibit 514.4(d). Furthermore, the parties have agreed that if requested, an employee may use LWOP for an FMLA-covered absence.

Administrative Leave is governed by the provisions of Section 519 of the *Employee and Labor Relations Manual (ELM)*. It is defined as absence from duty authorized by appropriate postal officials without charge to annual or sick leave and without loss of pay. The ELM authorizes administrative leave under certain circumstances for various reasons such as civil disorders, state and local civil defense programs, voting or registering to vote, blood donations, attending funeral services for certain veterans, relocation, examination or treatment for on-the-job illness or injury and absence from duty due to "Acts of God". National Arbitrator Parkinson ruled in case J90M-1J-C 95047374 (C-23564) that the term "without loss of pay" in the definition of administrative leave means that employees should also receive night differential while on such leave if they would have otherwise earned it.

Leave Under the Family and Medical Leave Act

The Family and Medical Leave Act of 1993 (FMLA) applies to Postal Employees. The Postal Service regulations implementing the Act are found in ELM Section 515. The law entitles eligible employees to take up to 12 workweeks of job-protected absence during any 12 month period for one or more of the following reasons:

- The birth of an employee's child and to care for that child during the first year after birth; circumstances may require that FMLA leave begin before the actual date of birth of a child, i.e. before the birth of a child for prenatal care or if the mother's condition prevents her from performing the functions of her position.
- The placement of a child with the employee for adoption or foster care; the employee may be entitled to FMLA leave before the actual placement or adoption of a child when, for example, the employee is required to attend counseling sessions, appear in court, or consult with attorneys or doctors representing the birth parent prior to placement. FMLA coverage expires one year after the date of the placement.

- Because of a serious health condition that makes the employee unable to perform the functions of the employee's job. An employee is "unable to perform the functions of the position" when the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position.

- To care for the employee's spouse, son, daughter, or parent with a serious health condition, this requires medical certification that an employee is "needed to care for" a family member and encompasses both physical and psychological care. For the purpose of the FMLA the following definitions apply.

  A parent is defined as a biological parent or an *in loco parentis*. *In loco parentis* is a person who acts as a parent toward a son or daughter, with day to day responsibilities to care for and financially support a child, or a person who had such responsibility for the employee when the employee was a child.

  A spouse is defined as a husband or wife as defined or recognized under State law. The law of the State where the employee resides governs the determination whether a person is a spouse. This includes common law marriages recognized by the state of residence. However, the Defense of Marriage Act provides that same-gender marriages are not recognized.

  A son or daughter is defined as biological, adopted, foster, *in loco parentis* (defined above under definition of parent), legal ward or step child under the age of 18; or a child 18 or over who has a disability as defined under the Rehabilitation Act and the disability makes the person incapable of self care.

  Disability under the Rehabilitation Act is defined as an impairment which substantially limits a major life activity. A major life activity, does not include things like cooking or cleaning, but are instead, the more fundamental and basic activities central to a person's life: e.g., seeing, breathing, hearing, eating, walking, standing, speaking, learning. Substantially limits means a significant restriction as compared to the average person in the general population. This includes consideration of the nature and severity of the impairment, its duration, and permanent or long term impact of the impairment.

  Incapable of self-care is the need for assistance or supervision to provide daily care in 3 or more "activities of daily living": grooming, bathing, eating, hygiene, cooking, cleaning, paying bills, using a phone, or post office, shopping.

There is no "laundry list" of serious health conditions. Other than pregnancy, the circumstances determine whether a condition is serious, not the diagnosis. Therefore, every request for FMLA leave must be consid-

ered on a case-by-case basis, applying the definitions of a serious health condition, as defined by the statute and regulations, to the information provided by the employee and the employee's health care provider. Management is within its rights to ask employees about the circumstances of their condition in order to determine whether absences may be protected under the FMLA and/or whether absences are for a condition which requires the ELM 865 return to work procedures.

Eligibility Requirements. Any career or non-career employees who meet the eligibility requirements may take FMLA if they meet the eligibility requirements at the time the leave starts; that is, they have been employed by the Postal Service for at least 12 months (this time does not have to be consecutive) and they have completed at least 1,250 workhours during the 12-month period immediately preceding the date the leave starts. The 1250 workhours includes overtime, but excludes any paid or unpaid absence, except for absences due to military service. LWOP, including union LWOP, does not count toward the 1250 workhour eligibility requirement.

Military Service. The Postal Service will credit any period of military service as follows:

- Each month served performing military service counts as a month actively employed by the employer for the purpose of determining the 12 months of employment requirement.

- The hours that would have been worked for the employer, based on the employees work schedule prior to the military service, are added to any hours actually worked during the previous 12 month period to determine if the em-ployee meets the 1250 work hour requirement. The hours the employee would have worked will be calculated in the same manner as back pay calculation, found in Section 436 of the *Employee and Labor Relations Manual* (ELM).

Calculating the 1250 Per Condition, Per Leave Year. The 1250 work hour eligibility test is applied only once, at the beginning of a series of intermittent absences, if all absences are for the same FMLA-qualifying condition during the same 12-month leave year. The employee remains eligible throughout that leave year even if subsequent absences bring the employee below the 1250 work hour requirement.

The employer defines the FMLA leave year. In the Postal Service, FMLA leave is calculated on the basis of the postal leave year.

If an employee has a different serious health condition during the leave year, the employee must meet the 1250 work hour eligibility test at the commencement of the leave for the second condition. If the employee does so, he/she is eligible for FMLA protection of absences for both conditions for the remainder of the leave year, or until the 12 week entitlement has been exhausted.

for the placement for adoption or foster care, or to care for a child during the 12 months following the date of birth or placement.

On return from an FMLA absence, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment.

Employer Responsibilities. The employer is prohibited from interfering with, restraining, or denying the exercise of any rights provided by the Act. Employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions, or disciplinary actions. Likewise, FMLA- covered absences may not be used towards any disciplinary actions. Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA.

Employers must post and keep posted Wage and Hour Publication 1420, Your Rights under the Family and Medical Leave Act of 1993. The employer is also required to notify the employee within 2 business days of learning of the employee's need for leave, that the absence is designated as FMLA leave, the type of leave charged (annual, sick, LWOP), and/or any additional documentation the employee needs to furnish. In the Postal Service, this notification notice is met by providing the employee a copy of the PS Form 3971 accompanied by a copy of Publication 71, Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act.

Under FMLA, the employee may request or the employer may require the substitution of paid leave for the 12 workweeks (12 times the employee's normal scheduled hours per week, up to 40 hours) of unpaid absence per year in accordance with normal leave policies and bargaining unit agreements. However, under Postal Service policy an employee may use LWOP for an FMLA-covered absence.

Employee Responsibilities. The following are the employee's responsibilities when a request for FMLA leave is submitted:

- When the need for leave is foreseeable (e.g., pregnancy) notify management of the need for leave and provide appropriate supporting documentation at least 30 days before the absence is to begin.
- When the need for leave is not foreseeable, notify management as soon as practicable, i.e., within two business days, after learning of the need for leave.
- Provide the documentation required for FMLA-covered absences within a reasonable period of time, i.e., 15 days from the time the employer requests documentation.
- For medical emergencies, the employee or his spokesperson may give oral notice of the need for leave, or notice may be given by phone, telegraph, fax, or other means.

If the original and second opinions differ, the original opinion is binding. However, the Postal Service has the option of requiring a third opinion. It is the Postal Service's responsibility to determine whether a third opinion is required. While a third opinion health care provider is jointly designated or approved by management and the employee, the Postal Service pays for the third opinion. The third medical opinion is final (ELM 515.54 and National Arbitrator Das Q00C-4Q-C-03126482, January 28, 2005, C-25724).

Return to Work After an FMLA Absence. If the FMLA absence is for less than 21 days and not for a condition in ELM 865, the employee may submit a simple statement from his health care provider substantiating the employee's ability to return to work.

If an employee's absence is 21 calendar days or more, or involves hospitalization, or is due to a contagious disease, a mental or nervous condition, diabetes, cardiovascular disease, or epilepsy, the employee must submit acceptable medical evidence of his ability to return to work with or without limitations and without hazard to himself or others, in accordance with ELM 865 and Publication 71.

FMLA Designation. When an employee requests leave the manager or supervisor must determine whether the employee is an eligible employee for FMLA purposes; the absence is covered under FMLA; or whether additional documentation is required in order to designate the leave as FMLA.

The employee may, but need not, ask for the absence to be covered by FMLA, rather, it is the supervisor's responsibility to designate the leave based on information provided by the employee.

The supervisor should provide the employee a copy of the employee's PS Form 3971 designating the leave and indicating whether additional documentation is necessary along with Publication 71. Documentation to substantiate FMLA is acceptable in any format, including a form created by the union, as long as it provides the information indicated in Publication 71.

This is a simplified overview of the FMLA and there is no intent to change any Department of Labor rules or regulations or Postal policies.

MEMORANDUM OF UNDERSTANDING
BETWEEN THE
UNITED STATES POSTAL SERVICE
AND THE
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

Re: Sick Leave for Dependent Care

The parties agree that, during the term of the **2001** National Agreement, sick leave may be used by an employee to give care or otherwise attend to a family member with an illness, injury or other condition which, if an employee had such condition, would justify the use

ARTICLE 19 HANDBOOKS AND MANUALS

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. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

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. At the request of the Union, the parties shall meet concerning such changes. 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 sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Union upon issuance.

Article 19 shall apply in that those parts of all handbooks, manuals and published regulations of the Postal Service, which directly relate to wages, hours or working conditions shall apply to transitional employees only to the extent consistent with other rights and characteristics of transitional employees negotiated in this Agreement and otherwise as they apply to the supplemental work force. The Employer shall have the right to make changes to handbooks, manuals and published regulations as they relate to transitional employees pursuant to the same standards and procedures found in Article 19 of this Agreement.

Handbooks and Manuals. Article 19 provides that those postal handbook and manual provisions directly relating to wages, hours, or working conditions are enforceable as though they were part of the National Agreement. Changes to handbook and manual provisions directly relating to wages, hours, or working conditions may be made by management at the national level and may not be inconsistent with the National Agreement. A challenge that such changes are inconsistent with the National Agreement or are not fair, reasonable, or equitable may be made only by the NALC at the national level.

A memorandum negotiated as part of the 2001 National Agreement establishes a process for the parties to communicate with each other at the national level regarding changes to handbooks, manuals and published regulations that directly relate to wages hours or working conditions. The purpose of the memorandum is to provide the national parties with a better understanding of their respective positions in an effort to eliminate unnecessary appeals to arbitration and clearly identify and narrow the issue(s) in cases that are appealed to arbitration under Article 19.

512.32 Maximum Carryover

512.321 Maximum Carryover Amounts

The maximum carryover amount, i.e., the maximum amount of previously accumulated annual leave with which an employee may be credited at the beginning of a year, is as follows:

a. *Bargaining Unit Employees.* The maximum leave carryover for bargaining unit employees is 55 days (440 hours).

b. *Executive and Administrative Schedule (EAS) Employees.* The maximum carryover amount for EAS employees is 70 days (560 hours).

c. *Employees Affected by Public Law 102.* For employees who, on January 1, 1953 (prior to the passage of Public Law 102), (1) had more accumulated leave to their credit than the amounts provided above, and (2) who have maintained balances in excess of those amounts, the maximum carryover amount is the balances they have maintained.

512.322 Nonbargaining Unit to Bargaining Unit

When a nonbargaining unit employee is permanently assigned to a bargaining unit position, the employee's annual leave carryover ceiling is reduced to the carryover ceiling for that bargaining unit. The employee is permitted to use the excess annual leave over the bargaining unit ceiling during the leave year in which the permanent assignment is effective.

512.4 Authorizing Annual Leave

512.41 Requests for Annual Leave

512.411 General

Except for emergencies, annual leave for all employees except postmasters must be requested on PS Form 3971 and approved in advance by the appropriate supervisor. Leave requests from rural carriers must be approved in accordance with Article 10 of the USPS-NRLCA National Agreement.

512.412 Emergencies

An exception to the advance approval requirement is made for emergencies; however, in these situations, the employee must notify appropriate postal authorities of the emergency and the expected duration of the absence as soon as possible.

When sufficient information is provided to the supervisor to determine that the absence may be covered by the Family and Medical Leave Act (FMLA), the supervisor completes a PS Form 3971 and mails it to the employee's address of record along with a Publication 71, *Notice for Employees Requesting Leave for Conditions Covered by Family and Medical Leave Policies.*

When the supervisor is not provided enough information in advance of the absence to determine that the absence is covered by FMLA, the employee must submit PS Form 3971 and applicable medical or other certification upon returning to duty and explain the reason for the emergency to his or her supervisor.

Conditions	
Medical, dental, or optical examination or treatment.	If absence is necessary during the employee's regular scheduled tour.
For eligible employees (as indicated in 513.1), care for a family member (as defined in 515.2).	Up to 80 hours of accrued sick leave per leave year if the illness, injury, or other condition is one that, if an employee had such a condition, would justify the use of sick leave.
Contagious disease. A contagious disease is a disease ruled as requiring isolation, quarantine, or restriction of movement of the patient for a particular period by the health authorities having jurisdiction.	If the employee (1) must care for a family member afflicted with a contagious disease, (2) has been exposed to a contagious disease and would jeopardize the health of others, or (3) has evidence supplied by the local health authorities or a certificate signed by a physician certifying the need for the period of isolation or restriction.
Medical treatment for disabled veterans.	If the employee (1) presents a statement from a duly authorized medical authority that treatment is required, and (2) when possible, gives prior notice of the definite number of days and hours of absence. (Such information is needed for work scheduling purposes.)

* Sick leave, annual leave, or LWOP is granted as may be necessary for any of these conditions in accordance with normal leave policies and collective bargaining agreements. (See also 513.6 and 514.22.)

513.33 Requests for Sick Leave

513.331 General

Except for unexpected illness or injury situations, sick leave must be requested on PS Form 3971 and approved in advance by the appropriate supervisor.

513.332 Unexpected Illness or Injury

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

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

514.5 Forms Required

514.51 PS Form 3971

A request for LWOP is submitted by the employee on PS Form 3971. If the request for leave indicates that the LWOP will extend over 30 days, a written justification and statement of reason for the desired absence is required.

514.52 PS Form 50

PS Form 50, *Notification of Personnel Action*, is prepared when LWOP is in excess of 30 days (see Handbook EL-301, *Guidelines for Processing Personnel Actions*).

515 Absence for Family Care or Serious Health Condition of Employee

515.1 Purpose

Section 515 provides policies to comply with the Family and Medical Leave Act of 1993 (FMLA). Nothing in this section is intended to limit employees' rights or benefits available under other current policies (see 511, 512, 513, 514) or collective bargaining agreements. Likewise, nothing increases the amount of paid leave beyond what is provided for under current leave policies or in any collective bargaining agreement. The conditions for authorizing the use of annual leave, sick leave, or LWOP are modified only to the extent described in this section.

515.2 Definitions

The following definitions apply for the purposes of 515:

a. *Son or daughter* — biological, adopted, or foster child, stepchild, legal ward, or child who stands in the position of a son or daughter to the employee, who is under 18 years of age or who is 18 or older and incapable of self-care because of mental or physical disability.

b. *Parent* — biological parent or individual who stood in that position to the employee when the employee was a child.

c. *Spouse* — husband or wife.

d. *Serious health condition* — illness, injury, impairment, or physical or mental condition that involves any of the following:

(1) *Hospital care* — inpatient care (i.e., an overnight stay) in a hospital or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or subsequent to such inpatient care.

(2) *Absence plus treatment* — a period of incapacity of more than 3 consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition) that also involves either one of the following:

(a) Treatment two or more times by a health care provider.

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A request for LWOP is submitted by the employee on PS Form 3971. If the request for leave indicates that the LWOP will extend over 30 days, a written justification and statement of reason for the desired absence is required.

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515.2 Definitions

The following definitions apply for the purposes of 515:

a. *Son or daughter* — biological, adopted, or foster child, stepchild, legal ward, or child who stands in the position of a son or daughter to the employee, who is under 18 years of age or who is 18 or older and incapable of self-care because of mental or physical disability.

b. *Parent* — biological parent or individual who stood in that position to the employee when the employee was a child.

c. *Spouse* — husband or wife.

d. *Serious health condition* — illness, injury, impairment, or physical or mental condition that involves any of the following:

(1) *Hospital care* — inpatient care (i.e., an overnight stay) in a hospital or residential medical care facility, including any period of incapacity or subsequent treatment in connection with or subsequent to such inpatient care.

(2) *Absence plus treatment* — a period of incapacity of more than 3 consecutive calendar days (including any subsequent treatment or period of incapacity relating to the same condition) that also involves either one of the following:

(a) Treatment two or more times by a health care provider.

(b) Treatment by a health care provider on at least one occasion that results in a regimen of continuing treatment under the supervision of the health care provider.

(3) *Pregnancy* — any period of incapacity due to pregnancy or for prenatal care.

(4) *Chronic condition requiring treatments* — a chronic condition that meets all of the three following conditions:

(a) Requires periodic visits for treatment by a health care provider or by a nurse or physician's assistant under direct supervision of a health care provider.

(b) Continues over an extended period of time (including recurring episodes of a single underlying condition).

(c) May cause episodic, rather than a continuing period of, incapacity. Examples of such conditions include diabetes, asthma, and epilepsy.

(5) *Permanent or long-term condition requiring supervision* — a period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples of such conditions include Alzheimer's, a severe stroke, and the terminal stages of a disease.

(6) *Condition requiring multiple treatments (nonchronic condition)* — any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than 3 consecutive calendar days in the absence of medical intervention or treatment. Examples of such conditions include cancer (which may require chemotherapy, radiation, etc.), severe arthritis (which may require physical therapy), and kidney disease (which may require dialysis).

Note: Cosmetic treatments (such as most treatments for orthodontia or acne) are not "serious health conditions" unless complications occur. Restorative dental surgery after an accident or removal of cancerous growths is a serious health condition provided all the other conditions are met. Allergies, mental illness resulting from stress, and treatments for substance abuse are protected only if all the conditions are met. Routine preventative physical examinations are excluded. Also excluded as a regimen of continuing treatments are treatments that involve only over-the-counter medicine or activities such as bed rest that can be initiated without a visit to a health care provider.

e. *Health care provider* — doctor of medicine or osteopathy; Christian Science practitioner listed with the First Church of Christ, Scientist, in Boston, MA; physician; or other attending practitioner who is performing within the scope of his or her practice.

515.3 Eligibility

For an absence to be covered by the FMLA, the employee must have been employed by the Postal Service for an accumulated total of 12 months and must have worked a minimum of 1,250 hours during the 12-month period before the date leave begins.

515.4 Leave Requirements

515.41 Conditions

Eligible employees *must* be allowed an total of up to 12 workweeks of leave within a Postal Service leave year for one or more of the following:

a. Because of the birth of a son or daughter of the employee and in order to care for such son or daughter. Entitlement to be absent for this condition expires 1 year after the birth.

b. Because of the placement of a son or daughter with the employee for adoption or foster care. Entitlement to be absent for this condition expires 1 year after the placement.

c. In order to care for the spouse, son, daughter, or parent of the employee if the spouse, son, daughter, or parent has a serious health condition.

d. Because of a serious health condition that makes the employee unable to perform the functions of the employee's position.

515.42 Leave Type

Absences that qualify as FMLA leave may be charged as annual leave, sick leave, continuation of pay, or leave without pay, or a combination of these. Leave is charged consistent with current leave policies and applicable collective bargaining agreements.

515.43 Authorized Hours

Eligible employees are entitled to 12 workweeks per leave year of FMLA-protected absences. This amount is twelve times the hours normally, or regularly, scheduled in the employee's workweek. Occasional or sporadic overtime hours are excluded. Thus:

a. Full-time employees who normally work 40 hours per week are entitled to up to 480 hours of FMLA-covered absences within a leave year.

b. Part-time employees who have regular weekly schedules are entitled to 12 times the number of hours normally scheduled in their workweek. For example, a part-time employee with a normal schedule of 30 hours a week is entitled to 360 hours (12 weeks times 30 hours).

c. Part-time employees who do not have normal weekly schedules are entitled to the total number of hours worked in the previous 12 weeks, not including occasional or sporadic overtime hours.

Absences in addition to the 12 workweeks of FMLA leave may be granted in accordance with other leave policies or collective bargaining agreements (see 511, 512, 513, 514).

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c. In order to care for the spouse, son, daughter, or parent of the employee if the spouse, son, daughter, or parent has a serious health condition.

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Absences in addition to the 12 workweeks of FMLA leave may be granted in accordance with other leave policies or collective bargaining agreements (see 511, 512, 513, 514).

515.5 Documentation

515.51 General

An employee must provide a supervisor a PS Form 3971 together with documentation supporting the request, at least 30 days before the absence if the need for the leave is foreseeable. If 30 days notice is not practicable, the employee must give notice as soon as practicable. Ordinarily the employee should give at least verbal notification within 1 or 2 business days of the time the need for leave becomes known. A copy of the completed PS Form 3971 is returned to the employee along with a copy of Publication 71, which details the specific expectations and obligations and the consequences of a failure to meet these obligations.

Additional documentation may be requested of the employee, and this must be provided within 15 days or as soon as practicable considering the particular facts and circumstances.

During an absence, the employee must keep his or her supervisor informed of intentions to return to work and of status changes that could affect his or her ability to return to work. Failure to provide documentation can result in the denial of FMLA protection.

515.52 New Son or Daughter

An employee requesting time off because of the birth of the employee's son or daughter and to care for the son or daughter, or because of the placement of a son or daughter with the employee for adoption or foster care, may be required to substantiate the relationship and provide the birth or placement date.

515.53 Care of Others for Medical Reasons

An employee requesting time off to care for a spouse, parent, son, or daughter who has a serious health condition may be required to substantiate the relationship and to provide documentation from the health care provider stating the date the serious health condition began, probable duration of the illness, appropriate medical facts, nature of the need to care for, and when the employee will be needed to provide such care or psychological support.

The medical certification provision that an employee is "needed to care for" a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport him- or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance that would be beneficial to a child, spouse, or parent with a serious health condition who is receiving inpatient or home care.

515.54 Additional Medical Opinions

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

maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employer may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's immediate family member, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

(d) The employer has a right to 30 days advance notice from the employee where practicable. In addition, the employer may require an employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or the employee's immediate family member. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (*see* § 825.311(c)). The employer may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

§ 825.101 What is the purpose of the Act?

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The enactment of FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

§ 825.102 When was the Act effective?

(a) The Act became effective on August 5, 1993, for most employers. If a collective bargaining agreement was in effect on that date, the Act's effective date was delayed until February 5, 1994, or the date the agreement expired, whichever date occurred sooner. This delayed effective date was applicable only to employees covered by a collective bargaining agreement that was in effect on August 5, 1993, and not, for example, to employees outside the bargaining unit. Application of FMLA to collective bargaining agreements is discussed further in § 825.700(c).

(b) The period prior to the Act's effective date must be considered in determining employer coverage and employee eligibility. For example, as discussed further below, an employer with no collective bargaining agreements in effect as of August 5, 1993, must count employees/workweeks for calendar year 1992 and calendar year 1993. If 50 or more employees were employed during 20 or more workweeks in *either* 1992 or 1993(through August 5, 1993), the employer was covered under FMLA on August 5, 1993. If not, the employer was not covered on August 5, 1993, but must continue to monitor employment levels each workweek remaining in 1993 and thereafter to determine if and when it might become covered.

§ 825.103 How did the Act affect leave in progress on, or taken before, the effective date of the Act?

(a) An eligible employee's right to take FMLA leave began on the date that the Act went into effect for the employer (*see* the discussion of differing effective dates for collective bargaining agreements in §§ 825.102(a) and 825.700(c)). Any leave taken prior to the Act's effective date may not be counted for purposes of FMLA. If leave qualifying as FMLA leave was underway prior to the effective date of the Act and continued after the Act's effective date, only that portion of leave taken on or after the Act's effective date may be counted against the employee's leave entitlement under the FMLA.

(b) If an employer-approved leave was underway when the Act took effect, no further notice would be required of the employee unless the employee requested an extension of the leave. For leave which commenced on the effective date or shortly thereafter, such notice must have been given which was practicable, considering the foreseeability of the need for leave and the effective date of the statute.

(c) Starting on the Act's effective date, an employee is entitled to FMLA leave if the reason for the leave is qualifying under the Act, even if the event occasioning the need for leave (e.g., the birth of a child) occurred before the effective date (so long as any other requirements are satisfied).

§ 825.104 What employers are covered by the Act?

(a) An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed. (See § 825.600.)

(b) The terms ''commerce'' and ''industry affecting commerce'' are

will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the ''primary'' employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer.

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a leasing or temporary help agency and 40 permanent workers is covered by FMLA. An employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer.

(e) Job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary or leasing agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its temporary/leased employees, whether or not the secondary employer is covered by FMLA (*see* § 825.220(a)). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary employer will be responsible for compliance with *all* the provisions of the FMLA with respect to its regular, permanent workforce.

§ 825.107 What is meant by ''successor in interest''?

(a) For purposes of FMLA, in determining whether an employer is covered because it is a ''successor in interest'' to a covered employer, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Adjustment Act will be considered. However, unlike Title VII, whether the successor has notice of the employee's claim is not a consideration. Notice may be relevant, however, in determining successor liability for violations of the predecessor. The factors to be considered include:

(1) Substantial continuity of the same business operations;
(2) Use of the same plant;
(3) Continuity of the work force;
(4) Similarity of jobs and working conditions;
(5) Similarity of supervisory personnel;
(6) Similarity in machinery, equipment, and production methods;
(7) Similarity of products or services; and
(8) The ability of the predecessor to provide relief.

(b) A determination of whether or not a ''successor in interest'' exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality.

(c) When an employer is a ''successor in interest,'' employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer. For example, the successor, whether or not it meets FMLA coverage criteria, must grant leave for eligible employees who had provided appropriate notice to the predecessor, or continue leave begun while employed by the predecessor, including maintenance of group health benefits during the leave and job restoration at the conclusion of the leave. A successor which meets FMLA's coverage criteria must count periods of employment and hours worked for the predecessor for purposes of determining employee eligibility for FMLA leave.

§ 825.108 What is a ''public agency''?

(a) An ''employer'' under FMLA includes any ''public agency,'' as defined in section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x). Section 3(x) of the FLSA defines ''public agency'' as the government of the United States; the government of a State or political subdivision of a State; or an agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency. ''State'' is further defined in Section 3(c) of the FLSA to include any State of the United States, the District of Columbia, or any Territory or possession of the United States.

(b) The determination of whether an entity is a ''public'' agency, as distinguished from a private employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, etc., is elected by the voters-at-large or their appointment is subject to approval by an elected official.

(c)(1) A State or a political subdivision of a State constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility. For example, a State is a single employer; a county is a single employer; a city or town is a single employer. Where there is any question about whether a public entity is a public agency, as distinguished from a part of another public agency, the U.S. Bureau of the Census' ''Census of Governments'' will be determinative, except for new entities formed since the most recent publication of the ''Census.'' For new entities, the criteria used by the Bureau of Census will be used to determine whether an entity is a public agency or a part of another agency, including existence as an organized entity, governmental character, and substantial autonomy of the entity.

(2) The Census Bureau takes a census of governments at 5-year intervals. Volume I, Government Organization, contains the official counts of the number of State and local governments. It includes tabulations of governments by State, type of government, size, and county location. Also produced is a universe list of governmental units, classified according to type of government. Copies of Volume I, Government Organization, and subsequent volumes are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C., 20402, U.S. Department of Commerce District Offices, or can be found in Regional and selective depository libraries. For a list of all depository libraries, write to the Government Printing Office, 710 N. Capitol St., NW, Washington, D.C. 20402.

(d) All public agencies are covered by FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (*e.g.,* State) employ 50 employees at the worksite or within 75 miles.

§ 825.109 Are Federal agencies covered by these regulations?

(a) Most employees of the government of the United States, if they are covered by the FMLA, are covered under Title II of the FMLA (incorporated in Title V,

Chapter 63, Subchapter 5 of the United States Code) which is administered by the U.S. Office of Personnel Management (OPM). OPM has separate regulations at 5 CFR Part 630, Subpart L. In addition, employees of the Senate and House of Representatives are covered by Title V of the FMLA.

(b) The Federal Executive Branch employees within the jurisdiction of these regulations include:

(1) Employees of the Postal Service;

(2) Employees of the Postal Rate Commission;

(3) A part-time employee who does not have an established regular tour of duty during the administrative workweek; and,

(4) An employee serving under an intermittent appointment or temporary appointment with a time limitation of one year or less.

(c) Employees of other Federal executive agencies are also covered by these regulations if they are not covered by Title II of FMLA.

(d) Employees of the legislative or judicial branch of the United States are covered by these regulations only if they are employed in a unit which has employees in the competitive service. Examples include employees of the Government Printing Office and the U.S. Tax Court.

(e) For employees covered by these regulations, the U.S. Government constitutes a single employer for purposes of determining employee eligibility. These employees must meet all of the requirements for eligibility, including the requirement that the Federal Government employ 50 employees at the worksite or within 75 miles.

§ 825.110 Which employees are ''eligible'' to take leave under FMLA?

(a) An ''eligible employee'' is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. (*See* § 825.105(a) regarding employees who work outside the U.S.)

(b) The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.*, workers' compensation, group health plan benefits, *etc.*), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as ''at least 12 months,'' 52 weeks is deemed to be equal to 12 months.

(c) Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work (see 29 CFR Part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used. In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (*e.g.*, bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR Part 541), the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden the employee is deemed to have met this test. See also § 825.500(e). For this purpose, full-time teachers (see § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not ''eligible'' for FMLA leave.

(d) The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences. If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (*i.e.*, two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise. If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

(e) The period prior to the FMLA's effective date must be considered in determining employee's eligibility.

(f) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

§ 825.111 In determining if an employee is ''eligible'' under FMLA, how is the determination made whether the employer employs 50 employees within 75 miles of the worksite where the employee needing leave is employed?

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site

Chapter 63, Subchapter 5 of the United States Code) which is administered by the U.S. Office of Personnel Management (OPM). OPM has separate regulations at 5 CFR Part 630, Subpart L. In addition, employees of the Senate and House of Representatives are covered by Title V of the FMLA.

(b) The Federal Executive Branch employees within the jurisdiction of these regulations include:

(1) Employees of the Postal Service;

(2) Employees of the Postal Rate Commission;

(3) A part-time employee who does not have an established regular tour of duty during the administrative workweek; and,

(4) An employee serving under an intermittent appointment or temporary appointment with a time limitation of one year or less.

(c) Employees of other Federal executive agencies are also covered by these regulations if they are not covered by Title II of FMLA.

(d) Employees of the legislative or judicial branch of the United States are covered by these regulations only if they are employed in a unit which has employees in the competitive service. Examples include employees of the Government Printing Office and the U.S. Tax Court.

(e) For employees covered by these regulations, the U.S. Government constitutes a single employer for purposes of determining employee eligibility. These employees must meet all of the requirements for eligibility, including the requirement that the Federal Government employ 50 employees at the worksite or within 75 miles.

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(b) The 12 months an employee must have been employed by the employer need not be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.*, workers' compensation, group health plan benefits, *etc.*), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as ''at least 12 months,'' 52 weeks is deemed to be equal to 12 months.

(c) Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work (see 29 CFR Part 785). The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used. In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (*e.g.*, bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR Part 541), the employer has the burden of showing that the employee has not worked the requisite hours. In the event the employer is unable to meet this burden the employee is deemed to have met this test. See also § 825.500(e). For this purpose, full-time teachers (see § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution are deemed to meet the 1,250 hour test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not ''eligible'' for FMLA leave.

(d) The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences. If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met. If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (*i.e.*, two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise. If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

(e) The period prior to the FMLA's effective date must be considered in determining employee's eligibility.

(f) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

§ 825.111 In determining if an employee is ''eligible'' under FMLA, how is the determination made whether the employer employs 50 employees within 75 miles of the worksite where the employee needing leave is employed?

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site

of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

(1) Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

(2) For employees with no fixed worksite, *e.g.*, construction workers, transportation workers (*e.g.*, truck drivers, seamen, pilots), salespersons, etc., the ''worksite'' is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, etc. If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, etc., from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their ''worksite.'' The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey. For transportation employees, their worksite is the terminal to which they are assigned, report for work, depart, and return after completion of a work assignment. For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty and originates or begins flights from the company's facilities located in an airport in Chicago and returns to Chicago at the completion of one or more flights to go off duty. The pilot's worksite is the facility in Chicago. An employee's personal residence is not a worksite in the case of employees such as salespersons who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the new concept of flexiplace. Rather, their worksite is the office to which the report and from which assignments are made.

(3) For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (*see* § 825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.

(b) The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (*e.g.*, airline miles).

(c) The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are ''maintained on the payroll'' during any portion of the year when school is not in session. *See* § 825.105(b).

§ 825.112 Under what kinds of circumstances are employers required to grant family or medical leave?

(a) Employers covered by FMLA are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child;

(2) For placement with the employee of a son or daughter for adoption or foster care;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job.

(b) The right to take leave under FMLA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption or foster care of a child.

(c) Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave pursuant to paragraph (a)(4) of this section before the birth of the child for prenatal care or if her condition makes her unable to work.

(d) Employers covered by FMLA are required to grant FMLA leave pursuant to paragraph (a)(2) of this section before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counselling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, or submit to a physical examination. The source of an adopted child (*e.g.*, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(e) Foster care is 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody.

(f) In situations where the employer/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

(g) FMLA leave is available for treatment for substance abuse provided the conditions of § 825.114 are met. However, treatment for substance abuse does not prevent an employer from taking employment action against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for

substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for an immediate family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for an immediate family member receiving treatment for substance abuse.

§ 825.113 What do ''spouse,'' ''parent,'' and ''son or daughter'' mean for purposes of an employee qualifying to take FMLA leave?

(a) Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

(b) Parent means a biological parent or an individual who stands or stood in loco parentis to an employee when the employee was a son or daughter as defined in (c) below. This term does not include parents ''in law''.

(c) Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability.''

(1) ''Incapable of self-care'' means that the individual requires active assistance or supervision to provide daily self-care in three or more of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

(2) ''Physical or mental disability'' means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR § 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, define these terms.

(3) Persons who are ''in loco parentis'' include those with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(d) For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, *etc.* The employer is entitled to examine documentation such as a birth certificate, *etc.*, but the employee is entitled to the return of the official document submitted for this purpose.

§ 825.114 What is a ''serious health condition'' entitling an employee to FMLA leave?

(a) For purposes of FMLA, ''serious health condition'' entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:

(1) *Inpatient care* (*i.e.*, an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of *incapacity* (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(2) *Continuing treatment* by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(i) A period of *incapacity* (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii) Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A) Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider;

(B) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(iv) A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(v) Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(b) Treatment for purposes of paragraph (a) of this section includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations, or dental examinations. Under paragraph (a)(2)(i)(B), a regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(c) Conditions for which cosmetic treatments are administered (such as

most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress or allergies may be serious health conditions, but only if all the conditions of this section are met.

(d) Substance abuse may be a serious health condition if the conditions of this section are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(e) Absences attributable to incapacity under paragraphs (a)(2) (ii) or (iii) qualify for FMLA leave even though the employee or the immediate family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

§ 825.115 What does it mean that ''the employee is unable to perform the functions of the position of the employee''?

An employee is ''unable to perform the functions of the position'' where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.*, and the regulations at 29 CFR § 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment. An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier.

§ 825.116 What does it mean that an employee is ''needed to care for'' a family member?

(a) The medical certification provision that an employee is ''needed to care for'' a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party.

§ 825.117 For an employee seeking intermittent FMLA leave or leave on a reduced leave schedule, what is meant by ''the medical necessity for'' such leave?

For intermittent leave or leave on a reduced leave schedule, there must be a medical need for leave (as distinguished from voluntary treatments and procedures) and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition (see § 825.306) meets the requirement for certification of the medical necessity of intermittent leave or leave on a reduced leave schedule. Employees needing intermittent FMLA leave or leave on a reduced leave schedule must attempt to schedule their leave so as not to disrupt the employer's operations. In addition, an employer may assign an employee to an alternative position with equivalent pay and benefits that better accommodates the employee's intermittent or reduced leave schedule.

§ 825.118 What is a ''health care provider''?

(a) The Act defines ''health care provider'' as:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(2) Any other person determined by the Secretary to be capable of providing health care services.

(b) Others ''capable of providing health care services'' include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives and clinical social workers who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(4) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be

employer's leave plan allows use of family leave to care for a child but not for a parent, the employer is not required to allow accrued family leave to be substituted for FMLA leave used to care for a parent.

(c) Substitution of paid accrued vacation, personal, or medical/sick leave may be made for any (otherwise) unpaid FMLA leave needed to care for a family member or the employee's own serious health condition. Substitution of paid sick/medical leave may be elected to the extent the circumstances meet the employer's usual requirements for the use of sick/medical leave. An employer is not required to allow substitution of paid sick or medical leave for unpaid FMLA leave ''in any situation'' where the employer's uniform policy would not normally allow such paid leave. An employee, therefore, has a right to substitute paid medical/sick leave to care for a seriously ill family member only if the employer's leave plan allows paid leave to be used for that purpose. Similarly, an employee does not have a right to substitute paid medical/sick leave for a serious health condition which is not covered by the employer's leave plan.

(d)(1) Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. If the requirements to qualify for payments pursuant to the employer's temporary disability plan are more stringent than those of FMLA, the employee must meet the more stringent requirements of the plan, or may choose not to meet the requirements of the plan and instead receive no payments from the plan and use unpaid FMLA leave or substitute available accrued paid leave.

(2) The Act provides that a serious health condition may result from injury to the employee ''on or off'' the job. Either the employee or the employer may choose to have the employee's FMLA 12-week leave entitlement run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition. As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable. However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a ''light duty job'' but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a ''light duty job''. As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave. *See* also §§ 825.210(f), 825.216(d), 825.220(d), 825.307(a)(1) and 825.702(d) (1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(e) Paid vacation or personal leave, including leave earned or accrued under plans allowing ''paid time off,'' may be substituted, at either the employee's or the employer's option, for any qualified FMLA leave. No limitations may be placed by the employer on substitution of paid vacation or personal leave for these purposes.

(f) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

(g) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the 12 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.

(h) When an employee or employer elects to substitute paid leave (of any type) for unpaid FMLA leave under circumstances permitted by these regulations, and the employer's procedural requirements for taking that kind of leave are less stringent than the requirements of FMLA (*e.g.*, notice or certification requirements), only the less stringent requirements may be imposed. An employee who complies with an employer's less stringent leave plan requirements in such cases may not have leave for an FMLA purpose delayed or denied on the grounds that the employee has not complied with stricter requirements of FMLA. However, where accrued paid vacation or personal leave is substituted for unpaid FMLA leave for a serious health condition, an employee may be required to comply with any less stringent medical certification requirements of the employer's sick leave program. *See* §§ 825.302(g), 825.305(e) and 825.306(c).

(i) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. There are limits to the amounts of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). Compensatory time off is not a form of accrued paid leave that an employer may require the employee to substitute for unpaid FMLA leave. The employee may request to use his/her balance of compensatory time for an FMLA reason. If the employer permits the accrual to be used in compliance with regulations, 29 CFR 553.25, the absence which is paid from the employee's accrued compensatory time ''account'' may not be counted against the employee's FMLA leave entitlement.

§ 825.208 Under what circumstances may an employer designate leave, paid or unpaid, as FMLA leave and, as a result, count it against the employee's total FMLA leave entitlement?

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (*e.g.*, if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying.

(1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If

the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave.

(2) As noted in § 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave—consistent with the employer's established policy or practice—and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(b)(1) Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(2) The employer's notice to the employee that the leave has been designated as FMLA leave may be orally or in writing. If the notice is oral, it shall be confirmed in writing, no later than the following payday (unless the payday is less than one week after the oral notice, in which case the notice must be no later than the subsequent payday). The written notice may be in any form, including a notation on the employee's pay stub.

(c) If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this decision must be made by the employer within two business days of the time the employee gives notice of the need for leave, or, where the employer does not initially have sufficient information to make a determination, when the employer determines that the leave qualifies as FMLA leave if this happens later. The employer's designation must be made before the leave starts, unless the employer does not have sufficient information as to the employee's reason for taking the leave until after the leave commenced. If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively, and may designate only prospectively as of the date of notification to the employee of the designation. In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement.

(d) If the employer learns that leave is for an FMLA purpose after leave has begun, such as when an employee gives notice of the need for an extension of the paid leave with unpaid FMLA leave, the entire or some portion of the paid leave period may be retroactively counted as FMLA leave, to the extent that the leave period qualified as FMLA leave. For example, an employee is granted two weeks paid vacation leave for a skiing trip. In mid-week of the second week, the employee contacts the employer for an extension of leave as unpaid leave and advises that at the beginning of the second week of paid vacation leave the employee suffered a severe accident requiring hospitalization. The employer may notify the employee that both the extension and the second week of paid vacation leave (from the date of the injury) is designated as FMLA leave. On the other hand, when the employee takes sick leave that turns into a serious health condition (*e.g.*, bronchitis that turns into bronchial pneumonia) and the employee gives notice of the need for an extension of leave, the entire period of the serious health condition may be counted as FMLA leave.

(e) Employers may not designate leave as FMLA leave after the employee has returned to work with two exceptions:

(1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (*e.g.*, where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason and has not been so designated by the employer, but the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work that the leave was for an FMLA reason. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence.

(2) If the employer knows the reason for the leave but has not been able to confirm that the leave qualifies under FMLA, or where the employer has requested medical certification which has not yet been received or the parties are in the process of obtaining a second or third medical opinion, the employer should make a preliminary designation, and so notify the employee, at the time leave begins, or as soon as the reason for the leave becomes known. Upon receipt of the requisite information from the employee or of the medical certification which confirms the leave is for an FMLA reason, the preliminary designation becomes final. If the medical certifications fail to confirm that the reason for the absence was an FMLA reason, the employer must withdraw the designation (with written notice to the employee).

§ 825.209 Is an employee entitled to benefits while using FMLA leave?

(a) During any FMLA leave, an employer must maintain the employee's coverage under any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employers covered by FMLA, including public

§ 825.217 What is a ''key employee''?

(a) A ''key employee'' is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite.

(b) The term ''salaried'' means ''paid on a salary basis,'' as defined in 29 CFR 541.118. This is the Department of Labor regulation defining employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA as executive, administrative, and professional employees.

(c) A ''key employee'' must be ''among the highest paid 10 percent'' of all the employees—both salaried and non-salaried, eligible and ineligible—who are employed by the employer within 75 miles of the worksite.

(1) In determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, *e.g.*, stock options, or benefits or perquisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employer's employees within 75 miles of the worksite may be ''key employees.''

§ 825.218 What does ''substantial and grievous economic injury'' mean?

(a) In order to deny restoration to a key employee, an employer must determine that the restoration of the employee to employment will cause ''substantial and grievous economic injury'' to the operations of the employer, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employer may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the company of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a ''key employee'' threatens the economic viability of the firm, that would constitute ''substantial and grievous economic injury.'' A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute ''substantial and grievous economic injury.''

(d) FMLA's ''substantial and grievous economic injury'' standard is different from and more stringent than the ''undue hardship'' test under the ADA (see, also § 825.702).

§ 825.219 What are the rights of a key employee?

(a) An employer who believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employer who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employer will ordinarily be able to give such notice prior to the employee starting leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

(c) If an employee on leave does not return to work in response to the employer's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employer may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employer's notice. The employer must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

§ 825.220 How are employees protected who request leave or otherwise assert FMLA rights?

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person

subject to the approval of the health care provider.

(f) In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employees' FMLA notice requirements. In addition, an employer may not require compliance with stricter FMLA notice requirements where the provisions of a collective bargaining agreement, State law, or applicable leave plan allow less advance notice to the employer. For example, if an employee (or employer) elects to substitute paid vacation leave for unpaid FMLA leave (*see* § 825.207), and the employer's paid vacation leave plan imposes no prior notification requirements for taking such vacation leave, no advance notice may be required for the FMLA leave taken in these circumstances. On the other hand, FMLA notice requirements would apply to a period of unpaid FMLA leave, unless the employer imposes lesser notice requirements on employees taking leave without pay.

§ 825.303 What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable?

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile (''fax'') machine or other electronic means. Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

§ 825.304 What recourse do employers have if employees fail to provide the required notice?

(a) An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements.

(b) If an employee fails to give 30 days notice for foreseeable leave with no reasonable excuse for the delay, the employer may delay the taking of FMLA leave until at least 30 days after the date the employee provides notice to the employer of the need for FMLA leave.

(c) In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed. Furthermore, the need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient.

§ 825.305 When must an employee provide medical certification to support FMLA leave?

(a) An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by § 825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

(d) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

(e) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (*see* § 825.207), only the employer's less stringent sick leave certification requirements may be imposed.

§ 825.306 How much information may be required in medical certifications of a serious health condition?

(a) DOL has developed an optional form (Form WH–380, as revised) for employees' (or their family members') use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (See Appendix B to these regulations.) This optional form reflects certification requirements so as to permit the health care provider to furnish appropriate medical information within his or her knowledge.

subject to the approval of the health care provider.

(f) In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employees' FMLA notice requirements. In addition, an employer may not require compliance with stricter FMLA notice requirements where the provisions of a collective bargaining agreement, State law, or applicable leave plan allow less advance notice to the employer. For example, if an employee (or employer) elects to substitute paid vacation leave for unpaid FMLA leave (*see* § 825.207), and the employer's paid vacation leave plan imposes no prior notification requirements for taking such vacation leave, no advance notice may be required for the FMLA leave taken in these circumstances. On the other hand, FMLA notice requirements would apply to a period of unpaid FMLA leave, unless the employer imposes lesser notice requirements on employees taking leave without pay.

§ 825.303 What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable?

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile (''fax'') machine or other electronic means. Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

§ 825.304 What recourse do employers have if employees fail to provide the required notice?

(a) An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements.

(b) If an employee fails to give 30 days notice for foreseeable leave with no reasonable excuse for the delay, the employer may delay the taking of FMLA leave until at least 30 days after the date the employee provides notice to the employer of the need for FMLA leave.

(c) In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed. Furthermore, the need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient.

§ 825.305 When must an employee provide medical certification to support FMLA leave?

(a) An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by § 825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins. When this is not possible, the employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration.

(d) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. The employer shall advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.

(e) If the employer's sick or medical leave plan imposes medical certification requirements that are less stringent than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (*see* § 825.207), only the employer's less stringent sick leave certification requirements may be imposed.

§ 825.306 How much information may be required in medical certifications of a serious health condition?

(a) DOL has developed an optional form (Form WH–380, as revised) for employees' (or their family members') use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (See Appendix B to these regulations.) This optional form reflects certification requirements so as to permit the health care provider to furnish appropriate medical information within his or her knowledge.

employee. Requested copies are to be provided within two business days unless extenuating circumstances prevent such action.

(e) If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable ''out of pocket'' travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) In circumstances when the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country.

§ 825.308 Under what circumstances may an employer request subsequent recertifications of medical conditions?

(a) For pregnancy, chronic, or permanent/long-term conditions under continuing supervision of a health care provider (as defined in § 825.114(a)(2)(ii), (iii) or (iv)), an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee, unless:

(1) Circumstances described by the previous certification have changed significantly (*e.g.*, the duration or frequency of absences, the severity of the condition, complications); or

(2) The employer receives information that casts doubt upon the employee's stated reason for the absence.

(b)(1) If the minimum duration of the period of incapacity specified on a certification furnished by the health care provider is more than 30 days, the employer may not request recertification until that minimum duration has passed unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(2) For FMLA leave taken intermittently or on a reduced leave schedule basis, the employer may not request recertification in less than the minimum period specified on the certification as necessary for such leave (including treatment) unless one of the conditions set forth in paragraph (c)(1), (2) or (3) of this section is met.

(c) For circumstances not covered by paragraphs (a) or (b) of this section, an employer may request recertification at any reasonable interval, but not more often than every 30 days, unless:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (*e.g.*, the duration of the illness, the nature of the illness, complications); or

(3) The employer receives information that casts doubt upon the continuing validity of the certification.

(d) The employee must provide the requested recertification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

§ 825.309 What notice may an employer require regarding an employee's intent to return to work?

(a) An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employer may require that the employee provide the employer reasonable notice (*i.e.*,within two business days) of the changed circumstances where foreseeable. The employer may also obtain information on such changed circumstances through requested status reports.

§ 825.310 Under what circumstances may an employer require that an employee submit a medical certification that the employee is able (or unable) to return to work (i.e., a ''fitness-for-duty'' report)?

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.*, same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

(b) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

(d) The cost of the certification shall be borne by the employee and the employee is not entitled to be paid for

opportunity to return to work after being so notified. (See § 825.220.)

(g) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions.

(h) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (g) of this section.

Subpart D—What Enforcement Mechanisms Does FMLA Provide?

§ 825.400 What can employees do who believe that their rights under FMLA have been violated?

(a) The employee has the choice of:

(1) Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor, or

(2) Filing a private lawsuit pursuant to section 107 of FMLA.

(b) If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

(c) If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages for the employee. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equalling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

§ 825.401 Where may an employee file a complaint of FMLA violations with the Federal government?

(a) A complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. A complaint may be filed at any local office of the Wage and Hour Division; the address and telephone number of local offices may be found in telephone directories.

(b) A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation.

(c) No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.

§ 825.402 How is an employer notified of a violation of the posting requirement?

Section 825.300 describes the requirements for covered employers to post a notice for employees that explains the Act's provisions. If a representative of the Department of Labor determines that an employer has committed a willful violation of this posting requirement, and that the imposition of a civil money penalty for such violation is appropriate, the representative may issue and serve a notice of penalty on such employer in person or by certified mail. Where service by certified mail is not accepted, notice shall be deemed received on the date of attempted delivery. Where service is not accepted, the notice may be served by regular mail.

§ 825.403 How may an employer appeal the assessment of a penalty for willful violation of the posting requirement?

(a) An employer may obtain a review of the assessment of penalty from the Wage and Hour Regional Administrator for the region in which the alleged violation(s) occurred. If the employer does not seek such a review or fails to do so in a timely manner, the notice of the penalty constitutes the final ruling of the Secretary of Labor.

(b) To obtain review, an employer may file a petition with the Wage and Hour Regional Administrator for the region in which the alleged violations occurred. No particular form of petition for review is required, except that the petition must be in writing, should contain the legal and factual bases for the petition, and must be mailed to the Regional Administrator within 15 days of receipt of the notice of penalty. The employer may request an oral hearing which may be conducted by telephone.

(c) The decision of the Regional Administrator constitutes the final order of the Secretary.

§ 825.404 What are the consequences of an employer not paying the penalty assessment after a final order is issued?

The Regional Administrator may seek to recover the unpaid penalty pursuant to the Debt Collection Act (DCA), 31 U.S.C. 3711 *et seq.*, and, in addition to seeking recovery of the unpaid final order, may seek interest and penalties as provided under the DCA. The final order may also be referred to the Solicitor of Labor for collection. The Secretary may file suit in any court of competent jurisdiction to recover the monies due as a result of the unpaid final order, interest, and penalties.

Subpart E—What Records Must Be Kept to Comply With the FMLA?

§ 825.500 What records must an employer keep to comply with the FMLA?

(a) FMLA provides that covered employers shall make, keep, and preserve records pertaining to their obligations under the Act in accordance with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with these regulations. FMLA also restricts the authority of the Department of Labor to require any employer or plan, fund or program to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of the FMLA exists or the DOL is investigating a complaint. These regulations establish no requirement for the submission of any records unless specifically requested by a Departmental official.

(b) *Form of records.* No particular order or form of records is required. These regulations establish no requirement that any employer revise its computerized payroll or personnel records systems to comply. However, employers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request. The records may be maintained and preserved on microfilm or other basic source document of an automated data

C#18477

REGULAR ARBITRATION PANEL
WESTERN REGION

In the Matter of Arbitration Between UNITED STATES POSTAL SERVICE NORTHY HOLLYWOD, CALIFORNIA And NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	CASE NO: F90N-4F-D 95063343 GTS NO: 31102 GRIEVANT: GUS CALDERON DATE OF HEARING: 02/11, 12/98 DATE OF BRIEFS: 03/17/98 HEARING LOCATION: NORTH HOLLYWOOD, CALIFORNIA

ARBITRATOR'S
DECISION AND AWARD

BEFORE: CLAUDE D. AMES, ARBITRATOR

APPEARANCES:

For the Employer:
Raymond Aguillard, Senior Labor Relations Specialist
13031 W. Jefferson Boulevard
Inglewood, CA 90311

For the Union:
Manuel L. Peralta, Jr., Regional Administrative Assistant
3636 Westminster Avenue, #A
Santa Ana, CA 92703

AWARD: The Postal Service lacked just cause to remove Grievant based on inability to meet requirements of the City Carrier position. The Union's grievance is sustained with appropriate remedies contained herein.

DATE OF AWARD: June 25, 1998

Claude D. Ames

CLAUDE D. AMES, Arbitrator

I.

INTRODUCTION

This arbitration proceeding came on regularly for hearing pursuant to the then current 1990/1994 Collective Bargaining Agreement ("CBA") between the parties, UNITED STATES POSTAL SERVICE (hereinafter "Employer" or "Agency") and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, LOCAL BRANCH NO. 2902, NORTH HOLLYWOOD, CALIFORNIA (hereinafter "Union"). Western Regional Panel Member Claude D. Ames was selected to hear the above-referenced grievance. Hearings were held on February 11-12, 1998, in a conference room at the postal facility located at 7053 Laurel Canyon Boulevard, North Hollywood, CA. Raymond Aguillard, Senior Labor Relations Specialist, appeared on behalf of the United States Postal Service. Manuel L. Peralta, Jr., Regional Administrative Assistant, represented Augusto Calderon (hereinafter "Grievant") and the National Association of Letter Carriers, AFL-CIO.

In the instant case, the Union is appealing the Notice of Removal of Grievant's employment effective March 1995 based upon his alleged physical inability to meet the requirements of a City Carrier's job due t chronic asthma. The Agency's decision to terminate the Grievant for his alleged "inability to meet the requirements of the job" was based in part on a copy of a medical report by Dr. Ken C. Wong, a pulmonary specialist, who recommended that the Grievant's duties be "restricted to more sedentary work and aviod assignments which require a lot of walking and climbing of stairs." Based upon this report, the Agency concluded that the Grievant was "medically incapable of performing his full duties as a letter carrier" and issued a Notice of Removal. The Union contends that Grievant is able to perform most of his regular job assignment and could easily be accommodated by the Agency exchanging his last two hours of walking with router duties. The Union has objected

to the Agency's interpretation of Dr. Wong's medical report and maintains that the Grievant is physically able to perform the City Carrier job position with accommodations based upon his medical condition.

The arbitration hearing proceeded in an orderly manner and the parties were given a full asnd fair opportunity for the examination and cross-examination of witnesses, production of documents and arguments. All witnesses appearing for examination were duly sworn under oath by the Arbitrator. The parties stipulated that the matter was properly before the Arbitrator with no issues of procedural or substantive arbitrability to be resolved. Pursuant to the parties' Settlement Agreement Grievance, Case No. F90N-4F-C-95063354 (Option Letters); F94N-4F-C-98000942 - F94N-4F-C-96044053 (Attempts to Bid) and F94N-4F-C97046874 (Health Benefits), arising out of the Grievant's removal, are hereby incorporated by reference and consolidated in the instant case for binding and final resolution by the Arbitrator. The parties elected to present written post-hearing and responding briefs to the Arbitrator in lieu of oral closing arguments. The arbitration hearing was officially closed on 3/20/98 after receipt of the parties' initial briefs and responding brief from the Union.

II.

ISSUES PRESENTED

The parties mutually stipulated that the issue for resolution before the Arbitrator is as follows:

> Did the USPS have just cause to issue Grievant a Notice of Removal for physical inability to meet job requirements of a City Carrier position due to chronic asthma?
>
> If not, what shall the appropriate remedy be?

III.

RELEVANT CONTRACT PROVISIONS AND REGULATIONS

ARTICLE 2 - NON-DISCRIMINATION AND CIVIL RIGHTS

Section 1. Statement of Principle

...In addition, consistent with the other provisions of this Agreement, there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act.

ARTICLE 13 - ASSIGNMENT OF ILL OR INJURED REGULAR WORKFORCE EMPLOYEES

Section 4. General Policy Procedures

G. The following procedures are the exclusive procedures for resolving a disagreement between the employee's physician and physician designated by the USPS concerning the medical condition of an employee who is on light duty assignment. These procedures shall not apply to cases where the employee's medical condition arose out of an occupation illness or injury. On request of the Union, a third physician will be selected from a list of five Board Certified Specialists in the medical field for the conditioning question, the list to be supplied by the local Medical Society. The physician will be selected by the alternate striking of names from the list by the Union and the Employer. The Employer will supply the selected physician with all relevant facts including job description and occupational phusical requirements. The position of the third physician will be final as to the employee's medical condition and occupational limitations if any. Any other issues relating to the employee's entitlement to light duty assignments shall be resolved through the grievance-arbitration procedure. The cost of the service of the third physician shall be shared by the Union and the Employer.

ARTICLE 15 - GRIEVANCE-ARBITRATION PROCEDURE

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

ARTICLE 19 - HANDBOOKS AND MANUALS

> 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 contained 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. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions.

IV.

PRELIMINARY STATEMENT

This case was originally scheduled for hearing on several prior occasions before finally being heard by the Arbitrator on February 11-12, 1998. At issue is the Agency's Notice of Removal of Grievant for his alleged physical inability to perform City Carrier job duties, due to chronic asthma. Prior to taking testimony, the Agency raised an arbitrability issue objecting to the Union's substantive reliance on the Family Medical Leave Act ("FMLA"), Rehabilitation Act and Americans with Disabilities Act, as affirmative defenses to Grievant's removal. The Agency requested a preliminary ruling by the Arbitrator regarding the applicability of these federal statutes in the instant case and as affirmative defenses to the Grievant's removal. The Arbitrator ruled in relevant part as follows:

> "...The Union may argue the applicability of the Family Medical Leave Act, Rehabilitation Act and Americans with Disabilities Act, set forth in the ELM and incorporated into the Collective Bargaining Agreement pursuant to Article 19 (Handbooks and Manuals), as a bar to the Postal Service removal of the Grievant Gus Calderon on the charge of physical inability to meet the requirements of the job..."

Following the Arbitrator's preliminary ruling, the Agency declared the issue interpretative and advised both the Union and Arbitrator that the grievance was being referred to Step 4 of the parties' grievance-arbitration procedure. Thereafter, the grievance was appealed to Step 4 and denied. It was then appealed to the national arbitration level. On October 16, 1997, the national parties settled the

"interpretative dispute" in part as follows:

> "...In a disciplinary hearing involving just cause, the union may argue as an affirmative defense that management's actions were inconsistent with the Family and Medical Leave Act..."

The grievance was then subsequently remanded by the national parties for rescheduling before the Arbitrator. However, during the interim period between filing of the instant case and date of hearing, the Union filed several companion grievances arising out of Case No. F90N-4F-D95063343. The parties agreed during pre-arbitration settlement to consolidate all grievances and incorporate those issues, arguments and defenses into the instant case.

On February 11, 1998, the parties stipulated as follows:

1. In accordance with H7N-1N-C-20699, (Joint Exhibit No. 9, pages 2 and 3), the grievant requested that copies of all permanent job bids be sent to his home to bid on.

2. F90N-4F-C 95063354, as addressed in Joint Exhibit No. 3, is resolved through the March 18, 1996, pre-arbitration settlement which brings the issue into the Removal grievance currently before the arbitrator.

3. The arbitrator is requested to issue one decision under title of USPS Regional No. F90N-4F-D 95063343. Said decision shall include the arbitrator's ruling on the issues previously contained in the following regional grievances: F90N-4F-C 95063354 (Joint Exhibit No. 3); F94N-4F-C 98000942 (Joint xhibit No. 9); F94N-4F-C 96044053 (Joint Exhibit No. 9); and F94N-4F-C 97046874 (Joint Exhibit No. 12).

4. The grievant's route was posted while his Removal grievance was pending and warded to carrier William Magtos on 4/1/95, Job No. 524.

The above-referenced stipulations were entered into by USPS representative Raymond Aguillard and NALC representative Manuel Peralta, Jr.

V.

STATEMENT OF FACTS

On March 1, 1995, the Grievant received a third Notice of Removal for his "inability to meet the requirements of the job". The first two such notices were subsequently rescinded. The first notice of removal was issued on January 26, 1995 and rescinded on February 10, 1995 through the parties' grievance process. The second removal notice was issued on February 13, 1995, and was unilaterally rescinded by the Agency before it was grieved. The Grievant is a 10-year employee with the Postal Service employed in the position as City Carrier with bid route 524 at the North Hollywood Post Office. His date of employment is January 1985. By all accounts, the Grievant suffers from chronic asthma which was a pre-existing condition prior to his employment with the Postal Service. The testimony given indicates that although the Grievant suffers from chronic asthma, it did not affect his work ability in carrying the mail until July 1993. At that time, according to the Union whether due to poor air quality at North Hollywood and/or accumulative worsening of his condition due to working outdoors, the Grievant was restricted to light duty by his physician, Dr. Morton Merchey, Kaiser Permanente-Southern California. The Grievant was initially diagnosed as having chronic asthma which inhibited his ability to perform duties requiring extensive aerobic exercise. Due to this condition, Dr. Merchey limited the Grievant's outside work to 3 hrs. per day of business and apartment delivery and 3-5 hrs. casing mail for the last 21 months. Consistent with these medical restrictions, the Grievant was provided temporary light duty by the North Hollywood Post Office for his condition.

The Grievant's condition did not appear to improve which greatly concerned the Agency who continued to extend temporary light duty assignments to the Grievant based upon his doctor's medical

restriction. On or about 3/12/94 and 5/6/94, the Grievant was instructed to undergo a fitness-for-duty examination ("FFDE") by Dr. Aaron E. Ifekwunigwe. In a FFDE report dated 6/8/94, Dr. Ifekwunigwe determined that the Grievant was medically capable of performing all of the duties of a City Carrier position on a progressive time schedule. This report was reviewed by Dr. Ghaleb, the Agency's Van Nuys District Medical Officer. On or about 7/27/94, Gerald Klein, Manager of Post Office Operations, informed the Grievant that as a result of a FFDE and the recommendations of Dr. Ghaleb he could return to work on a full-time schedule including working 4 hrs. per day on street duties. Street duties were to be increased one hour every two days until the Grievant was back to his normal full-time duties. The dispute leading to the Grievant's removal, according to the Agency, culminated when the Grievant continued to suffer from his asthmatic condition and presented medical documentation from his treating physician, which was inconsistent with the medical FFDE results of Dr. Ifekwunigwe and the Agency's medical officer.

The Grievant was notified by Postmaster Herbert on 9/22/94 that his asthmatic condition would be considered permanent and stationary by the Postal Service. The Grievant was also informed by Postmaster Herbert that the post office had no permanent light duty work available within his medical restriction at the North Hollywood Post Office. The option letter was subsequently grieved by the Union and mutually settled by the parties at Step 2. Pursuant to the parties' settlement, the grievance was rescinded and the parties agreed to have the Grievant underego a FFDE by a Board Certified physician selected in accordance with Article 13, Section 4-G (Assignment of Ill or Injured Regular Workforce Employees). Dr. Ken C. Wong, Board Certified in Internal Medicine and Pulmonary Disease, was selected by the parties to evaluate the Grievant and issue two reports regarding his condition. The first report on 10/28/94 concluded that additional testing was necessary

but "hopefully with a comprehensive treatment program, the Grievant's asthma would be under much better control in which he could return to a fully functioning and productive life". The second report dated 1/4/95 revealed that the Grievant underwent a pulmonary function test on 12/13/94 which demonstrated he had a decrease of about 35% of his total lung capacity. Dr. Wong concluded that the patient has "mild to moderate physiological impairment which can account for his inability to carry out his duty requiring moderate exercise". Dr. Wong recommended that the Grievant's duty be "restricted to more sedentary work and avoid assignments which require a lot of walking and climbing stairs". As a result of Dr. Wong's medical report of January 1995, the Agency renewed its initial effort to remove the Grievant by a Notice of Removal dated February 27, 1995. The Agency interpreted Dr. Wong's medical report, along with the reports of Dr. Ifekwunigwe and the Grievant's physician Dr. Merchey, as confirmation that he was medically incapable of performing his full duties as a letter carrier, thus unable to physically perform the City Carrier job position.

The Union maintains that the Grievant is physically able to perform the job functions of a City Carrier within reasonable accommodations as suggested by Dr. Wong and concurred in a subsequent letter submitted to the Postal Service by the Grievant's physician Dr. Merchey. After a review of Dr. Wong's pulmonary test results, Dr. Merchey submitted a letter to the Union dated 5/3/95, in which he concludes that "Mr. Calderon may work eight hours per day, stand eight hours per day, but should be limited to no more than eight hours of outdoor work. He further states that this outdoor work should be limited to business and apartment delivery where there is minimal aerobic walking and exposure to vegetation. He has no lifting restrictions. He may perform indoor work for eight hours, if needed. This patient may stand up to eight hours a day while working."

The Agency viewed Dr. Merchey's letter with certain askance, since it was totally inconsistent

with his original diagnoses and medical restrictions for the Grievant during approximately two years of medical treatment. Former Postmaster Dale Herbert testified that Grievant was accommodated with temporary light duty assignments for approximately two (2) years. There was simply no permanent light duty work available for the Grievant at the North Hollywood station. As such, the Agency had no choice but to remove him for inability to perform the job. The Union now appeals the Grievant's removal to arbitration for final and binding resolution.

VI.

POSITION OF THE PARTIES

Employer's Position:

The Postal Service is not unsympathic towards ill or injured employees and have made every attempt to accommodate employees and afford them time to recover sufficiently and to return to work as a fully productive employee. But there comes a point when the Agency has to draw the line. At no time did the Postal Service limit the amount of time that the Grievant remained on, or could have remained on light duty. The whole purpose of the fitness-for-duty examinations was to determine if the Grievant could continue performing the full duties of his carrier position. When it was determined that he could not, the Postal Service then gave the Grievant his options which included disability retirement, in-service transfer to another post office, craft assignments, or resignation. There is nothing in the contract precluding Management from removing someone who is physically unable to perform the full duties of their position. Nor is there anything in the contract calling for Management to restructure a job in order to accommodate someone with permanent light duty.

The contract is clear. There is no postal requirement to permanently accommodate an

employee requesting light duty, where it is unavailable, which in essence is what the Union is arguing. The National Agreement, at Article 13, Section 2.C, states that the installation heads "shall show the greatest consideration" to those employees requesting permanent reassignment to a light duty position. There are numerous arbitrators supporting Management's actions and position, including Arbitrators Ordman, Case No. E7C-2N-D 17294 and Foster, Case No. S1T-3T-D 869, holding: "On settled authority, there is nothing in the National Agreement which prohibits the removal of an employee who suffers an injury and is unable to perform his or her job. There is even less justification to challenge that removal where, as here, the injury is not job related." Further, "the principle is well established that Management may justify removal on the ground of physical disability of such a kind and agree as to make the employee's continued employment in any job which he or she is qualified to fill and which is available to be assigned to him unduly hazardous to his health or detrimental to othrs." With respect to the Union's argument that the Grievant should be assigned to light duty or trained for another job, it should first be noted that the Grievant did not meet the requirements of Article 13, Section 2B.1, for permanent reassignment. Moreover, the Employer is under no expressed or implied obligation to create a job that Grievant could perform or train him for an alternative position. See Case No. S1T-3T-D 869.

The Postal Service has accommodated the Grievant for nearly two years with light duty in the hope that he would return to his full duties as a City Carrier. However, that did not occur and Management had no alternative but to remove him due to physical inability to perform his duties. Therefore, the Grievant 's removal was for just cause.

Union's Position:

The Postal Service has unilaterally altered the Grievant's terms and conditions of employment by requiring the Grievant to choose from three unacceptable choices or face removal. When the Agency issued the Grievant the options contained in his Notice of Removal, they placed him in a Catch 22 situation. The Grievant was placed on notice that he had three options open to him. He could opt for reassignment to another craft only in another city and not at the North Hollywood Post Office. He could opt for resignation from the post office. He could also opt for disability retirement. The options given to him stripped the Grievant of all rights afforded under the Collective Bargaining Agreement pursuant to Articles 13 and 2, which protects him under the National Rehabilitation Act. The Postal Service, in essence, has placed the Grievant in a no-win situation. The Service has placed him in a limited-option situation which could only result in either the Grievant working outside of the carrier craft, contrary to his wishes, or giving up his rights to protest the Employer's refusal to accommodate him in his craft at North Hollywood, CA.

By virtue of the action undertaken by the Postal Service, the Grievant has been placed in a unilateral condition of employment. Such a condition of employment was neither negotiated with the Union or agreed to, and violates Articles 5 and 19 of the National Agreement. In the instant case, had the Grievant opted to request an Article 13 reassignment to another installation, it would have severely hampered his right to challenge the Employer's refusal to continue to grant him temporary light duty in the carrier craft. The Grievant would also have hampered his ability to challenge the Employer's refusal to grant him a permanent light duty assignment in the letter carrier craft or another craft at the North Hollywood Post Office. He further would have severely hampered his ability to challenge the Employer's refusal to reasonably accommodate him in accordance with the

Rehabilitation Act of Congress. The Postal Service has clearly failed to demonstrate that it has reasonably accommodated the Grievant with a permanent position. As such, the Postal Service lacked just cause to issue the Grievant a Notice of Removal.

VII.

DECISION

There appears to be no greater area of differing contractual interpretation between the parties today than the applicability and implementation of temporary/permanent light duty assignments. By the very nature of the injuries incurred, either a pre-existing condition prior to employment or an injury incurred off the job, light duty employees occupy a unique position within the Postal Service. Unlike limited duty assignments given to postal employees who sustain on-the-job injuries while performing work-related duties, the Postal Service is not contractually obligated to do so for light duties. Although under no contractual obligation to treat these two groups of injured employees similarly, the Postal Service, nevertheless, does have the statutory responsibiity to reasonably accommodate, where reasonably possible, the employee's long-term or permanent injury. Under the Rehabilitation Act of Congress (Article 1, Section 2 of CBA), the Postal Service is required to make reasonable accommodations to known physical and mental limitations of qualified handicapped employees unless the accommodation would impose an undue hardship on postal operations to which handicapped employees are assigned.

The Postal Service has developed several factors to be considered when determining whether undue hardship exist to accommodate light duty assignments for employees. These are:

1. The overall size of the operation with respect to the number of employees, number of type of facilities and size of budget.

2. The type of operation, including composition and structure of the workforce; and

3. The nature and cost of accommodation.

There is no dispute between the parties that the Grievant's chronic asthma condition pre-existed prior to his employment with the Postal Service. The Union has acknowledged that the Grievant had this pre-existing condition ever since childhood in its post-hearing brief. What is disputed and vigorously argued by the Agency, is the Grievant's alleged failure to properly disclose his chronic asthmatic condition on Postal Service Medical Assessment Form 2485 during his pre-employment evaluation. According to the Agency's argument, Grievant falsified his answer to Question 13 on Form 2485 by answering "No" to a series of medical inquiries regarding asthma, recurring or chronic bronchitis and shortness of breath. "The falsified application was not detected by postal authorities until the Grievant had been removed and a grievance filed on his removal." To point out the seriousness of its charges, the Postal Service states in its post-hearing brief, "that the Grievant may be faced with a possibility of another removal, if returned to his position." The Union responds by stating that Grievant first "suffered from asthma in July 1993, several years after carrying mail ... and not at the time of his application for employment." The Union argues that "during the Grievant's pre-employment physical, he was examined by a medical official who did not detect any "asthmatic condition". According to the Union, "this again proves that the Employer's claim is in fact false".

The final resolution of the issues involving whether Grievant did or did not falsify Form 2485 or notify Management of his pre-existing asthmatic condition must await another time and forum. As both parties have previously acknowledged, Grievant's removal was based on his alleged physical inability to perform the City Carrier position and not falsification of Medical Assessment Form 2485.

The latter issue is ancillary to the proceeding currently before the Arbitrator and has no bearing on resolution of the instant case. As such, it is not properly before the Arbitrator and will not be addressed.

Notwithstanding whether Grievant initially notified the Postal Service of his pre-existing asthmatic condition at the time of employment or later during 1993, the undisputed facts as determined by Dr. Wong's medical report are as follows: 1) Grievant's pulmonary function test demonstrated a 35% decrease of total lung capacity; 2) the result is comparable with restrictive lung disease which is not the typical pattern of asthma; and 3) that Grievant's duty be restricted to more sedentary work and avoid assignments which require a lot of walking and climbing of stairs. Unfortunately, the medical findings submitted by Dr. Wong, a Board Certified Specialist selected by the parties pursuant to Article 13, Section 4-G of the National Agreement, are inconclusive. As stated by the Agency, "The doctor did not conclusively state that Grievant could not perform the duties ... neither did he conclusively state that he could." Similarly, the Union interpreted Dr. Wong's report as not precluding Grievant from delivering mail or being a letter carrier. In fact, both interpretations are correct as acknowledged by Dr. Wong himself during extensive examination at the hearing. However, the Union maintains that Dr. Wong was unable to determine Grievant's fittness for duty because he lacks specific knowledge of letter carrier duties. According to the Union's argument, Management who had the responsibility to submit relevant carrier job description information to Dr. Wong, failed to provide him with a letter carrier job description. At the hearing, Dr. Wong was asked to observe a carrier casing mail and router duties to determine whether the Grievant was restricted from these duties as interpreted by Management. Dr. Wong concluded that casing mail (standing) and router duties were within the Grievant's medical limitations. This was the

similar conclusion apparently arrived at by Grievant's physician Dr. Merchey, who after reviewing Dr. Wong's report, released Grievant for full duty with cautionary restrictions in a letter to the Union on 5/3/95.

Unfortunately, the Van Nuys medical director and North Hollywood postmaster chose to narrowly interpret Dr. Wong's medical findings and use it as a basis for the Grievant's instant removal. The Agency's action was problematic because Dr. Wong's medical report was inconclusive. There existed no operational necessity to immediately remove Grievant from his temporary light duty assignment, in the absence of clear medical findings of inability to perform the job. With the exception of determining that Grievant had a 35% decrease in lung capacity, Dr. Wong clearly states in his report that additional testing is required and necessary in order to determine the physical limitations of the Grievant to perform letter carrier duties. Dr. Wong's report recommended that further testing be performed on the Grievant to determine what his exact physical and medical limitations were. The evidence record is undisputed that the Grievant did not undergo further testing, as suggested by Dr. Wong, to determine the clear extent of any physical or medical limitation on his ability to perform the City Carrier job duties prior to being issued a Notice of Removal. Not only was North Hollywood's removal action in violation of Grievant's conditions of employment as set forth in the CBA, but it directly conflicts with Article 5 of the Agreement, which prohibits Management from engaging in certain unilateral acts, where clear procedural safeguards are established to prevent an employee's arbitary removal.

After a careful review and analysis of the medical reports submitted by Drs. Merchey, Ifekwunigwe and Wong, the Arbitrator finds little or no basis to justify or sustain the Agency's position that the Grievant was removed due to his physical inability to perform the City Carrier job

duties. Although the Agency relies upon Dr. Wong's medical findings in its Notice of Removal that Grievant is incapable of physically performing the duties, it is a narrow interpretation analogous to putting a round peg in a square hole, merely for the purpose of justification. The evidence record does not support this position.

The actions of the Van Nuys/North Hollywood Post Office were precipitous and initiated with great haste without regard to the consequences of its action nor lack of medical document in support of its position. It would appear, based upon the number of removal notices previously issued to the Grievant, along with the available options to the Grievant contained in the instant case and Case No. F90N-4F-C 95063354, that the Agency was in clear violation of the standards set forth in Article 13, prescribing the assignment of duties for ill or injured regular workforce employees. As a ten-year employee, the Grievant was entitled to and granted available temporary light duty assignments prior to his fitness-for-duty examinations performed by Dr. Ifekwunigwe and Dr. Wong. The Agency comes forth with insufficient evidence that light duty work was no longer available for Grievant at the North Hollywood Post Office, or that his permanent status was given "careful attention by the installation head". Although the record is unclear as to whether Grievant initiated a request for permanent light duty status, what is clear is that Management unilterally interpreted Grievant's continued temporary light duty as a request for permanent status, which it denied to justify removal. In fairness and equity to a postal employee who has been granted temporary light duty, Management is required to exercise good faith, in the absence of clear medical/physical evidence of inability to perform the job, to continue the employee in that temporary position until fully recovered or the unavailability of light duty assignments. Pursuant to the parties' Agreement as expressed in Article 13 of the National Agreement, the Postal Service is under an existing duty to exercise good faith in

determining whether or not ill or injured employees may be reassigned to temporary or permanent light duty status.

Notwithstanding the Union's argument that the Postal Service violated the Rehabilitation Act, Family Medical Leave Act and Americans with Disabilities Act in its treatment of the Grievant, it is suffice that all of these federal statutes are binding upon the Employer and benefit postal employees, as incorporated by reference in the National Agreement pursuant to Article 19 (Handbooks and Manuals). However, the Arbitrator need not for the purposes of resolving this initial dispute, determine whether the Grievant is or is not a qualified handicap under the provisions of the Rehablitation Act, since there are other contractual violations from which to chose. Although the Grievant clearly has a medically diagnosed asthmatic condition, there is inconclusive evidence to bestow a designation of "qualified" handicapped employee based upon the fitness-for-duty reports of Dr. Wong and Dr. Ifekwunigwe as to whether his chronic condition would substantially impair one or more of the Grievant's life activities. Suffice for this proceeding is the fact that the condition can be properly managed with medication. Therefore, designation of qualified handicapped status is not necessary for resolution of the instant grievance. The evidence record clearly supports the Union's position that Management violated the Collective Bargaining Agreement when it removed the Grievant based upon inconclusive medical findings and improperly advised him of his options when, in fact, work was available at the North Hollywood Post Office for Grievant to continue his temporary light duty assignment. Therefore, for the reasons stated above, the Arbitrator finds that the Van Nuys/North Hollywood Post Office violated the Agreement by improperly issuing Grievant a Notice of Removal based upon an alleged inability to perform City Carrier job duties. The Union's grievance is sustained.

AWARD

The Postal Service lacked just cause to remove Grievant based on inability to meet requirements of the City Carrier position. The Union's grievance is sustained with appropriate remedies contained herein.

REMEDY

In determining an appropriate remedy, the focus is not on penalizing the Employer, but rather making the Grievant financially whole by placing him in the same position that he would have been in, absence his improper removal. However, at issue here is not only financial (back pay) compensation, but consolidated grievances (Case No. F90N-4F-C 95063354; F94N-4F-C 98000942; F94N-4F-C 96044053; and F94N-4F-C 97046874), involving issues of options, bids and health benefits, which the parties submitted in their stipulation as appropriate matters for the Arbitrator's determination. Accordingly, based upon the facts presented and entire evidence record, the Arbitrator rules as follows:

1. The Notice of Removal is hereby rescinded, including the "options" contained therein, and shall be removed from the Grievant's personnel files.

2. The Grievant is made whole for all lost wages, fringe benefits and seniority rights, including interest on all back pay, less the amounts of income, compensation, or benefits received during the period of removal.

3. The Grievant's health care benefits coverage is hereby restored retroactively to the date upon which the Grievant was improperly removed.

4. The Grievant is reinstated to his City Carrier position and granted permanent light duty assignment consistent with the cautionary medical limitations of Dr. Morton Merchey as contained in his letter of 5/3/95.

5. The Employer is directed to create a full-time light duty assignment to accommodate the Grievant's limitations within the Letter Carrier Craft or another craft at the North Hollywood Post Office.

6. The Arbitrator's ruling constitute a final and binding resolution of all stipulated grievances presented.

IT IS SO ORDERED.

Dated: June 25, 1998

Claude D. Ames

CLAUDE D. AMES, Arbitrator

J.3 Cover

PRE-ARBITRATION SETTLEMENT

Dale P. Hart
National Business Agent, NALC
3636 Westminster, Suite "A"
Santa Ana, CA 92703

March 11, 1996

RE: F90N-4F-C-95063354
N. HOLLYWOOD
CALDERON

Dear Mr. Hart:

This is to confirm the pre-arbitration discussions on grievance # F90N-4F-C-95063354, concerning the union's objection to the February 22, 1995, letter from the Postmaster, describing the options of resigning, seeking a transfer or applying for a disability retirement.

The undersigned mutually agree to the following pre-arbitration settlement of the above-captioned case:

> All facts, arguments and documentation in the instant case are hereby carried forward into the record of the grievance pertaining to the removal of the grievant. These facts and arguments shall be entertained by the Arbitrator in the presentation of case #F90N-4F-D-95063343.

This agreement constitutes a full and final settlement of all issues relating to the above referenced grievance.

A copy of this agreement may be submitted to any applicable agency or proceeding to prove the settlement of this grievance, but it cannot be cited by the parties or others as a precedent in other cases.

Please sign in the space provided keep a copy for your records and return the original to this office to acknowledge agreement with the settlement defined above and thereby withdrawing grievance number F90N-4F-C-95063354 from expedited/regional arbitration.

Raymond L. Aguillard

Ray Aguillard
Labor Relations Specialist
USPS Pacific Area

Date: 3/18/96

Manuel L. Peralta, Jr.
Regional Administrative
Assistant, NALC

3/11/96

cc: Pacific Area Manager, Labor Relations
District Manager Customer Services
Postmaster:
Labor Relations Executive
Regional Union Official
Date distributed: MAR 21 1996

J.9

PRE-ARBITRATION SETTLEMENT

Dale P. Hart
National Business Agent, NALC
3636 Westminster, Suite "A"
Santa Ana, CA 92703

RE: F94N-4F-D-98000942
(7TV95CLCA/GTS#44987)
F94N-4F-C-96044053
(5TV216CLCA/GTS#34390)
NORTH HOLLYWOOD
GUS CALDERON

Dear Mr. Hart:

This is to confirm the pre-arbitration discussions on grievance #F94N-4F-D-98000942 & F94N-4F-C-96044053, concerning the grievant's attempt to bid while his removal grievance is pending.

The undersigned mutually agree to the following pre-arbitration settlement of the above-captioned case:

In accordance with the October 6, 1987, Step 4 decision in case #H7N-1C-20699 (MRS#947), a letter carrier is entitled to bid while serving a suspension or while their removal grievance is pending in the grievance-arbitration procedure.

The grievant, in the above referenced cases has his removal grievance (F90N-4F-D-95063343) pending arbitration. The arguments regarding the grievant's attempt to bid and the refusal to accept the bid are referenced in the removal grievance and shall be argued there.

Regional case #F94N-4F-D-98000942 & F94N-4F-C-96044053, are therefore closed with the understanding that the arguments relating to them are to be made in the removal grievance.

This agreement constitutes a full and final settlement of all issues relating to the above referenced grievance.

Please sign in the space provided keep a copy for your records and return the original to this office to acknowledge agreement with the settlement defined above and thereby withdrawing grievance number #F94N-4F-D-98000942 & F94N-4F-C-96044053, expedited/regional arbitration.

R. L. Aguillard

Ray Aguillard
Labor Relations Specialist
USPS Pacific Area

Date: 02/06/98

Manuel L. Peralta, Jr.
Regional Administrative
Assistant, NALC

2/6/98

cc: Pacific Area Manager, Labor Relations
District Manager Customer Services
Postmaster:
Labor Relations Executive
Regional Union Official
Date distributed: ____/____/____

M-00947

UNITED STATES POSTAL SERVICE
Labor Relations Department
475 L'Enfant Plaza, SW
Washington, DC 20260-4100

Mr. Vincent R. Sombrotto
President
National Association of Letter
Carriers, AFL-CIO
100 Indiana Avenue, N.W.
Washington, DC 20001-2197

Re: Class Action
Red Bank, NJ 07701
H7N-1N-C 20699

Dear Mr. Sombrotto:

Recently, a meeting was held with the NALC Director of City Delivery, Brian Farris, to discuss the above-captioned grievance at the fourth step of our contractual grievance procedure.

The issue in this grievance is whether management violated the National Agreement by refusing to send bidding notices to employees in non-pay status.

After reviewing this matter, we mutually agreed that no national interpretive issue is fairly presented in this case. We agreed that this issue falls squarely within the purview of Article 41.1.B.1., of the National Agreement. We further agreed:

1) Article 41, Section 1.B.1 of the National Agreement applies to letter carriers who have been suspended or removed. Notices inviting bids shall be sent to such letter carriers provided they submit request per that provision.

2) During the pendency of the grievance of a letter carrier who has been suspended or removed, management shall accept and honor the bid of such letter carrier for letter carrier craft duty assignments, and to such other assignments to which a letter carrier is entitled to bid.

Accordingly, we agreed to remand this case to the parties at Step 3 for application of the above agreement.

Please sign and return the enclosed copy of this letter as your acknowledgment of agreement to remand this case.

Time limits were extended by mutual consent.

Sincerely,

Arthur S. Wilkinson
Grievance & Arbitration
Division

Vincent R. Sombrotto
President
National Association of Letter
Carriers, AFL-CIO

10-6-87
DATE

C#14107

REGULAR REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration	)	
between	)	Grievant : Carol Wentworth
	)	Case No : H90N-4H-D94068273
UNITED STATES POSTAL SERVICE	)	GTS No : 023166
and	)	POST OFFICE : Miami, Florida
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	

BEFORE : Mark I. Lurie, Arbitrator

APPEARANCES

For the U.S. Postal Service : Daniel Smith
For the Union : William Burroughs

Place of Hearing : United States Post Office G.M.F.
: Miami, Florida

Date of Hearing : November 8, 1994

AWARD

The grievance is sustained. The Grievant is to be reinstated and made whole of all wages and benefits.

November 27, 1994

Mark I. Lurie
Arbitrator

REGULAR REGIONAL ARBITRATION PANEL DECISION AND AWARD

In the Matter of the Arbitration	)	
between	)	Grievant : Carol Wentworth
	)	Case No : H90N-4H-D94068273
UNITED STATES POSTAL SERVICE	)	GTS No : 023166
and	)	POST OFFICE : Miami, Florida
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	

BEFORE : Mark I. Lurie, Arbitrator

APPEARANCES

For the U.S. Postal Service : Daniel Smith
For the Union : William Burroughs

ISSUE

The issue, as stipulated by the parties, is whether the removal of the Grievant was for just cause and, if not, what the remedy should be.

FACTS

The Grievant, Carol Wentworth, was absent due to illness on the following dates, for which she used the types of leave indicated:

Date	Duration	Leave
February 15, 1994	2.02 hours	sick leave
February 25, 1994	8.00 hours	sick leave
March 19-29, 1994	64.00 hours	sick leave/LWOP

All of the dates between the Grievant's absences on February 15th and February 25th were either nonscheduled days, a holiday, or were claimed by the Grievant as annual leave. Her absence from March 19 to 29, 1994 was due to degenerative joint disease, for which the Grievant obtained treatment from a medical doctor. The Grievant telephoned her supervisor, Ms. Christina Norman, on Saturday, March 19th, and informed her that she had displaced her hip joint, and that she would be absent for a number of days. At the time, the Grievant did not request leave under the FAMILY AND MEDICAL LEAVE ACT OF 1993. (The Act will be discussed at length below.) That same day, Supervisor Norman completed and signed a Form 3971 - Request for or Notification of Absence - pertaining to the Grievant's absence. Supervisor Norman made no entry in the "Remarks" space on the Form 3971.

Upon returning to work on March 31, 1994 (or shortly after returning), the Grievant furnished a statement from her physician which stated that the Grievant was "unable to work from 3-19-94 to 3-31-94 DX: Degenerative Joint Disease." A second document from her doctor stated "Patient may return to work on 3-31-94 to 4-9-94 Work for Four Hrs and Full Duty pm 4-11-94."

The Grievant was issued a Notice of Removal dated April 29, 1994, for failure to be regular in attendance. The Notice cited 3 prior disciplinary elements, all for failure to be regular in attendance:

April 27, 1992	Letter of Warning
November 25, 1992	14-Day Suspension (also for AWOL)
November 16, 1993	14-Day Suspension

In the Step 2 Decision, Management noted that one of the contentions raised by the Union was that the Grievant had failed to request "family leave" because the Service had failed to publish or otherwise advise the Grievant of her rights under the FAMILY AND MEDICAL LEAVE ACT OF 1993, or of the formal procedures which she was required to follow in order to avail herself of the benefits of the Act.

The FAMILY AND MEDICAL LEAVE ACT OF 1993 (hereinafter referred to as the "FMLA", or the "Act") is federal legislation which took effect in August 1993. The FMLA requires employers of more than 50 persons, such as the Postal Service, to provide eligible employees[1] with up to 12 weeks of job-protected leave in any single leave year for certain family and medical reasons, including a "serious health condition"[2] which renders the employee unable to perform the functions of her position. In the case of the Postal Service, this job-protected leave can be taken in the form of the three traditional types of leave: annual leave, sick leave, or leave without pay. The rights and restrictions on the accrual and use of the traditional forms of leave has not changed by reason of the Act; the Act simply assures (among other things) that the employee will not lose her job or her benefits of employment if she uses up to 12 weeks of leave in any year for the qualifying purposes.[3] Upon returning from FMLA leave, an employee must

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1. To be qualified, an employee must have worked for the Service for at least 1 year, and have worked for 1,250 hours over the previous 12 months.

2. Part 515 of the Employee and Labor Relations Manual (the "ELM") was amended to comport with the FMLA. Part 515.2*d* defines a "serious health condition" as (among other things) an illness, impairment, or physical or mental condition that involves...
   "Any period of incapacity requiring absence from work or regular daily activities of more than 3 calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider."

3. Part 515.42 of the ELM states
   "Absences approved under this section [the FMLA] are charged as annual leave, sick leave, or leave without pay, or a combination of these. Leave is charged consistent with current leave policies and applicable collective bargaining agreements. Approving officials should note 'FMLA' in the approval block of the Form 3971, Request for or Notification of Absence."
   [Underlining added]

generally be restored to her original (or equivalent) position, with equivalent pay, benefits and employment terms.[4] In this regard, the Act supplants the discretion which Management had previously been invested to discipline absences covered by the Act.[5]

Under Part 515.51 of the ELM, in order to claim job-protection leave under the FMLA, the employee is required to file a Form 3971, Request for or Notification of Absence, "as soon as practicable". If the Form 3971 is not submitted initially, timely verbal notification is allowed.[6]

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4. As described in a Postal Bulletin on the subject, entitled "YOUR RIGHTS under the FAMILY AND MEDICAL LEAVE ACT OF 1993",

> VI. Return to Duty
> At the end of your leave, you will be returned to the same position you held when the absence began (or a position equivalent to it), provided you are able to perform the functions of the position and would have held that position at the time you returned if you had not taken the time off.

5. In a letter to all Postal employees dated February, 1993, Postmaster Marvin Runyan stated, in part,
> "Managers in the Postal Service have had the authority to grant paid or unpaid leave for a variety of reasons, but this new bill formalizes what had been a discretionary policy regarding family leave situations. The Postal Service has supported the bill as good and sound legislation, and we will implement it vigorously."

6. Part 515.51 of the ELM states, in part
> "An employee must provide a Form 3971, *Request for or Notification of Absence*, together with documentation supporting the request... as soon as practicable. Ordinarily at least verbal notification should be given within 1 or 2 business days of when the need for leave becomes known to the employee. The employee will be provided with a notice detailing the specific expectations and obligations and consequences of a failure to meet these obligations. ..."

POSTAL SERVICE EMPLOYEES' ABSENCES UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993, QUESTIONS AND ANSWERS (Q&A)

Q. How do I apply for family leave?

A. Submit a form PS 3971, Request for or Notification of Absence, with the supporting documentation. Family leave is not a separate type of leave, so you apply for annual or sick leave or LWOP as appropriate the same as you have applied for leave before. Just as in the past, in emergency situations a phone call, telegram, etc. will suffice until it is possible for you to submit the necessary paperwork.

Memorandum dated June 22, 1994 from the Chief Field Counsel for the Law Department of the U.S.P.S. Mid-Atlantic Office, on the subject of "Questions and Answers on the Family and Medical Leave Act", (hereinafter, "***The Chief Counsel's Memorandum***").

Q. If an employee requests leave for a condition covered by FML, what information must the supervisor provide to the employee?

A. The approved PS 3971 with whether or not the leave will be considered FML noted..., any requirement for the employee to furnish additional medical certification, and a copy of Publication 71.

Family leave need not be expressly requested by the employee, either on the Form 3971 or verbally.[7] However, to obtain the protection of the FMLA, the employee must disclose the cause of her absence, and that cause must be one which Management reasonably concludes is covered by the FMLA. If Management does so conclude, then Management is obligated to treat the leave as FMLA leave.[8]

7. *POSTAL SERVICE EMPLOYEES' ABSENCES UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993, QUESTIONS AND ANSWERS (Q&A)*

Q. Do I have to request family leave if I need time off for a covered condition?

A. No, however, if you request leave without specifying that it is for a covered condition, the leave may be denied, consistent with collective bargaining agreements and policies.

The Chief Counsel's Memorandum

Q. If an employee is off with an illness... and does not request FML for the absence, is he entitled to [additional FML leave]?

A. The supervisor would have placed FMLA in the approval block of the PS 3971 whether the employee requested FMLA or not. ... [Underlining added]

Q. Must the employee state the leave is FML?

A. No, leave requested for a covered condition is part of the 12 workweeks provided by the FML policy. When an employee requests leave for a covered condition, the supervisor should note "FMLA" in the request form's approval block, and give the employee a copy of Publication 71.

8. ***The Chief Counsel's Memorandum***

Q. Must the employee designate as FMLA leave, leave taken which qualifies as FML, but was not requested or designated as such by the employee, i.e... is the employer REQUIRED to tell the employee he or she should take the leave as FMLA?

A. ... When leave is requested for a covered condition, whether or not FML is specified by the employee, the supervisor should mark FMLA in the PS 3971 approval block and give the employee a copy of Publication 71.

Q. What can be done about employees annotating all requests for leave "FMLA" on PS Form 3971?

A. Whether or not the employee requests FML... makes little difference, it is up to the supervisor to determine if the leave qualifies or not, and to so note on the PS 3971. [Underlining added]

Once the employee makes it known that her absence pertains to a covered condition, Management is required to inform the employee that she may take the leave under the auspices of the FMLA, by furnishing the employee with a written notice of her rights and obligations under the Act.[9] (See also footnote 8, the first question and answer.) No such notation was made on the Grievant's Form 3971, and no such notice was issued to the Grievant. Supervisor Norman, who issued the Notice of Removal and who would have been the person to have furnished the Grievant with any such FMLA notice, testified that she was unfamiliar with the requirement to issue such a notice, and indeed was unaware of the existence of any such written form of notice.

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9. *POSTAL SERVICE EMPLOYEES' ABSENCES UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993, QUESTIONS AND ANSWERS (Q&A)*

Q. How will I know if the requested leave is chargeable against the 12 week entitlement under the Family and Medical Leave Act?

A. When you indicate the request is for one of the conditions covered by the Family and Medical Leave Act, you will be provided a notice of expectations and employee obligations. If the leave is approved as one of the covered conditions, the approving official will note "FMLA" in the approved block of the form 3971. [Underlining added]

The Chief Counsel's Memorandum

Q. If an employee requests leave for a condition covered by FML, what information must the supervisor provide to the employee?

A. The approved PS 3971 with whether or not the leave will be considered FML noted..., any requirement for the employee to furnish additional medical certification, and a copy of Publication 71.

To be protected leave under the FMLA, the employee must timely inform Management of her medical condition, and that condition must be one which Management reasonably concludes is a "serious health condition" covered by the Act. The Employee may not claim sick leave generally, and then subsequently reveal the nature of her condition, in the hope of obtaining retroactive coverage under the FMLA.[10]

---

10. *The Chief Counsel's Memorandum*
Q. If an employee has simply applied for sick leave and then was diagnosed as having bronchitis and referred to another doctor, may the employee request to have the first one or two visits retroactively classified as FMLA leave?

A. Leave cannot be retroactively designated as FMLA leave after the leave is concluded.

RELEVANT PROVISIONS OF THE AGREEMENT

Article 19, Handbooks and Manuals

> 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. [ ]

THE UNION'S POSITION

Since all of the dates between the Grievant's absence on February 15th and her absence on February 25th were either nonscheduled days, a holiday, or were claimed by the Grievant as annual leave, her absence between those dates was uninterrupted, and constituted a single absence of 10-days' duration, rather than 2 separate events of absenteeism, as it was viewed by Management. Her absences were for genuine illnesses, and did not warrant her removal.

Management was required, under Part 515.9 of the ELM, to post a notice setting forth employees' rights and obligations under the FMLA:

> "**Family Leave Poster.** All postal facilities including stations and branches, are required to conspicuously display Poster 43, *Your Rights Under the Family and Medical Leave Act of 1993.* It must be posted, and remain posted, on bulletin boards where it can be seen readily by employees and applicants for employment."

The Postal Service failed to conspicuously display the document, with the result that the Grievant remained ignorant of her rights under the Act until after she had returned to work, and coincidentally learned of the enactment of the Act in reading a magazine (unrelated to the Postal Service). In fact, Management kept both the employees and their supervisors ignorant of their rights and responsibilities under the Act, as indicated by the fact that Supervisor Norman was unaware of her obligation to issue a written notice to employees claiming leave under the FMLA and, indeed, testified that she had never seen any such

notice. The Grievant's illness was one which was covered by the Act, and the issuance to her of the Notice of Removal was in violation thereof.

THE SERVICE'S POSITION

The Postal Service can not survive in a competitive environment if its employees are not regular in attendance. The Grievant was issued progressively more severe discipline for unsatisfactory attendance, but nonetheless failed to rehabilitate. Her unreliability contravened Parts 511 and 666 of the Employee and Labor Relations Manual:

> 511.43 Employees are expected to maintain their assigned schedule and must make every effort to avoid unscheduled absences. In addition, employees must provide acceptable evidence for absences when required.
>
> 666.8 Attendance
> 666.81 Requirement for Attendance
> Employees are required to be regular in attendance.

These provisions of the ELM are incorporated into the National Agreement through Article 19.

Under Part 515.51 of the ELM (see above), the Grievant's leave from March 19-29 would have been protected by the FMLA only if she had <u>expressly requested</u> FMLA leave <u>prospectively</u>, i.e. before taking the leave for which FMLA protection was claimed. She did not do so and, in fact, she did not assert any FMLA rights prior to Step 2 of this grievance. Leave cannot be retroactively designated as FMLA-protected, after the leave is concluded. The Grievant's leave was therefore not protected by the FMLA. Furthermore, no evidence was presented to show that the Grievant met the criteria for qualifying for family leave.

The Union's claim that the Postal Service failed to post the FMLA bulletin and otherwise publicize employees' rights under the Act through March, 1994 is an affirmative defense, for which the Union had the burden of proof. The claim was not proven. The Grievant failed to timely

exercise FMLA rights she might have had with respect to her March 19-29 absence, and the Union has not shown that this failure was caused by any act or omission of the Service.

DECISION

The Service's contention that the Grievant failed to timely request FMLA is misguided. Under the FMLA, the Grievant was not required to request FMLA leave, but rather to timely advise her supervisor, Ms. Norman, of her medical condition. It was then the obligation of Supervisor Norman [1] to determine whether that condition was a "serious health condition" covered by the Act and, if so, [2] to note the fact on the Grievant's Form 3971, [3] to furnish the Grievant with written notification of her rights and responsibilities under the Act, and [4] to advise the Grievant as to any medical documentation that would be required. The Arbitrator finds that the Grievant did advise Supervisor Norman of her condition at the start of her leave on March 19, 1994; that, at the time, Supervisor Norman was unaware of the requirements imposed upon her by the Act; and that, consequently, Supervisor Norman failed to determine whether the Grievant's condition was covered under the Act.

The Arbitrator finds that the Grievant's condition was a "serious health condition" covered by the Act, inasmuch as it involved a physical impairment which required her absence from work for more than 3 days, and which involved continuing treatment by her physician. Supervisor Norman therefore violated the Act by failing to note "FMLA" on the Form 3971 she prepared for the Grievant, and by failing to furnish the Grievant with both written notice of her rights and obligations under the act, and any medical documentation which might be required of her.

Because the Grievant's absence was protected leave under the provisions of the FMLA, the reliance upon that leave as the basis for her removal from the Postal Service was in violation of the Act, and is void, as a contravention of public policy and the laws of this Country. The citation

of that leave was also a violation of Article 19 of the Agreement, inasmuch as the Act has been expressly endorsed by the Postal Service, and integrated into its handbooks and manuals.

In the past, this Arbitrator has often been called upon to determine whether an employee's attendance record has been just cause for his/her termination of employment. In those cases, I have judged Management's actions in the context of the impact of the employee's attendance upon the operational effectiveness of the Service, the discipline historically applied to other employees under like circumstances, the degree and frequency of the employee's recidivism and the duration of his/her absences, and mitigating circumstance, such as the employee's work record and length of service. Inasmuch as these cases have all involved fewer than 12 weeks absence in a 12-month period, it is clear that, in the future, for absences covered by the Act, these criteria will be irrelevant, replaced by [1] the absolute standard imposed by the Act, and [2] the factual questions of whether the employee's condition is covered by the Act, and whether the technical requirements of the Act have been complied with. As a national priority, family and medical leave, to the extent prescribed by the Act, has been given priority over the operational requirements of employers, including the Postal Service. As observed by Postmaster Runyan, and previously noted in this decision

> "Managers in the Postal Service have had the authority to grant paid or unpaid leave for a variety of reasons, but this new bill formalizes what had been a discretionary policy regarding family leave situations. The Postal Service has supported the bill as good and sound legislation, and we will implement it vigorously."

In the present case, the Service failed to adhere to the provisions of the Act, and the Grievant was wrongly denied the protection afforded by it. In view of this holding, the Union's arguments that the Grievant's leave on February 15th and 25 constituted a single absence, and that the Service violated Part 515.9 of the ELM by failing to post Poster 43 - *Your Rights Under the Family and Medical Leave Act of 1993* - are moot.

AWARD

The grievance is sustained. The Grievant is to be reinstated and made whole of all wages and benefits.

November 27, 1994

Mark I. Lurie
Arbitrator

C-23583

REGULAR ARBITRATION PANEL

In the Matter of the Arbitration between UNITED STATES POSTAL SERVICE and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	Grievant: Stevan Conover Post Office: Pendleton, OR USPS No: E98N-4E-D 02091274 NALC DRT No: 02-039055

BEFORE: Mark S. Downing, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Carmen Arthur
Tori E. Clifford

For the Union: Linda S. Smith

Place of Hearing: 104 SW Dorion Ave
Pendleton, OR

Date of Hearing: July 11, 2002

Date of Award: August 10, 2002

Relevant Contract Provisions: Articles 3, 5, 10, 16 and 19

Contract Year: 1998-2001

Type of Grievance: Discipline (Removal)
Family and Medical Leave Act

Award Summary:

The employer did not have just cause to issue the January 11, 2002 notice of removal. THE GRIEVANCE IS SUSTAINED.

Mark S. Downing, Arbitrator

INTRODUCTION

On January 11, 2002, the United States Postal Service (employer) issued a notice of removal to Stevan Conover (grievant) for irregular attendance (AWOL) [Absent Without Leave]. The grievant was hired by the employer on August 30, 1997, and is employed as a letter carrier in Pendleton, Oregon.

The notice of removal was grieved by the National Association of Letter Carriers, AFL-CIO (union) under the parties' 1998-2001 collective bargaining agreement (agreement). After the employer and union were unable to resolve the grievance, the matter was referred to Arbitrator Mark S. Downing. A hearing was held on July 11, 2002 in Pendleton, Oregon. The parties presented oral closing arguments at the conclusion of the hearing to close the record.

ISSUE

The employer has raised an issue concerning the arbitrability of the grievance, arguing that the Arbitrator lacks authority to determine violations of the Family and Medical Leave Act (FMLA). The union argues that it is not seeking to prove a violation of the FMLA, but rather to show that the employer's actions were inconsistent with the FMLA and employer handbooks and manuals.

If the grievance is arbitrable, the parties agreed on the following definition of the issue to be determined by the Arbitrator:

1. Was the notice of removal for irregular attendance (AWOL) dated January 11, 2002 issued to the grievant for just cause?

2. If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS, ADMINISTRATIVE PROCEDURES, RULES AND REGULATIONS

1998-2001 NATIONAL AGREEMENT

ARTICLE 3

MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

...

B. To ... suspend, demote, discharge, or take other disciplinary action against such employees;

...

ARTICLE 5

PROHIBITION OF UNILATERAL ACTION

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

ARTICLE 10

LEAVE

...

Section 2. Leave Regulations

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

...

Section 5. Sick Leave

The Employer agrees to continue the administration of the present sick leave program, which shall include the following specific items:

...

D. For periods of absence of three (3) days or less, a supervisor may accept an employee's certification as reason for an absence.

ARTICLE 16

DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause ...

ARTICLE 19

HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions ... shall contain nothing that conflicts with this Agreement, and shall be continued in effect ...

EMPLOYEE AND LABOR RELATIONS MANUAL 16
(August 2000)

515 Absence for Family Care or Serious Health Condition of Employee

515.1 Purpose

Section 515 provides policies to comply with the Family and Medical Leave Act of 1993 (FMLA). ...

515.2 Definitions

The following definitions apply for the purposes of 515:

...

d. *Serious health condition* - illness, injury, impairment, or physical or mental condition that involves any of the following:

...

(4) *Chronic condition requiring treatments* -

a chronic condition that meets all of the three following conditions:

(a) Requires periodic visits for treatment by a health care provider ...

(b) Continues over an extended period of time ...

(c) May cause episodic, rather than a continuing period of, incapacity. ...

...

515.4 Leave Requirements

515.41 Conditions

Eligible employees *must* be allowed an total of up to 12 workweeks of leave within a Postal Service leave year for one or more of the following:

...

d. Because of a serious health condition that makes the employee unable to perform the functions of the employee's position.

...

515.9 Family Leave Poster

All postal facilities, including stations and branches, are required to conspicuously display WH Publication 1420, *Your Rights Under the Family and Medical Leave Act of 1993*. It must be posted, and remain posted, on bulletin boards where it can be seen readily by employees and applicants for employment.

[emphasis by *italics* in original]

FEDERAL REGISTER, Vol. 60, No. 4
Rules and Regulations, January 6, 1995

Subpart C - How do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee?

825.300 What posting requirements does the Act place on employers? ...

825.301 What other notices to employees are required of employers under the FMLA?

...

(b)(1) The employer shall also provide the employee

with written notice detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. ...

...

825.303 What are the requirements for an employee to furnish notice to an employer where the need for FMLA leave is not foreseeable?

...

(b) ... The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. ...

...

825.305 When must an employee provide medical certification to support FMLA leave?

(a) An employer may require that an employee's leave ... due to the employee's own serious health condition ... be supported by a certification issued by the health care provider of the employee ... . An employer must give notice of a requirement for medical certification each time a certification is required.

...

(d) At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. ...

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WAGE AND HOUR DIVISION

FMLA COMPLIANCE GUIDE
June 6, 2000

Purposes of the FMLA

The FMLA allows employees to balance their work and family life by taking reasonable unpaid leave for certain family and medical reasons. ...

...

Leave Entitlement

A covered employer must grant an eligible employee up to a total of **12 workweeks of unpaid leave** in a 12 month

period for one or more of the following reasons:

...

- when the employee is unable to work because of a serious health condition.

Intermittent/Reduced Schedule Leave - The FMLA permits employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances. ...

- Intermittent/reduced schedule leave may be taken ... because of the employee's serious health condition.

...

Serious Health Condition - "Serious health condition" means an illness, injury, impairment, or physical or mental condition that involves:

...

- any period of incapacity (or treatment therefor) due to a chronic serious health condition ...

...

Employee Notice - Eligible employees seeking to use FMLA leave **may** be required to provide:

...

- sufficient information for the employer to understand that the employee needs leave for FMLA-qualifying reasons (the employee need not mention FMLA when requesting leave to meet this requirement, but may only explain why the leave is needed);

...

[emphasis by **bold** in original]

FACTS

The notice of removal, and disciplinary actions leading up to the notice of removal, are based on the grievant's attendance and tardiness problems in 2001. In February or March of 2001, the grievant told his supervisor, Thomas Carstens, that he was taking anti-depressants which made him tired. The grievant and Carstens

shared psychiatrist stories as both of them were taking anti-depressants prescribed by their psychiatrists. Carstens told the grievant to bring in a doctor's slip and that FMLA leave was a possibility with proper documentation from a doctor.

The grievant's normal workday begins at 6:00 a.m. On April 21, 2001, the grievant was 55 minutes tardy. At 6:40 a.m. on that day, supervisor Robert Schaefer called the grievant at home. When there was no answer to his call, Schaefer left a message. At 6:42 a.m., Schaefer received a call from the grievant indicating that he was stuck at the railroad tracks by his home due to a stalled train. Schaefer drove to the railroad tracks and at 6:44 a.m. found no train stalled on the tracks. The grievant arrived for work at 6:55 a.m. On May 2, 2001, the grievant was issued a letter of warning for Irregular Attendance/AWOL. The warning concerned his tardiness on three days and being AWOL on two days.

On June 11, 2001, Carstens issued a 7-day suspension to the grievant for Irregular Attendance/AWOL. As with the letter of warning, the 7-day suspension was based on three tardys and two days of AWOL. On September 28, 2002, the grievant received a 14-day suspension for Failure to Follow Instructions/AWOL. Details concerning this suspension were not placed into evidence at the hearing.

On November 27, 2001, the grievant was 30 minutes late to work. When Carstens called him, the grievant explained that he had overslept. On December 5, 2001, Schaefer conducted an investigative interview concerning the November 27th tardiness. During this interview, the following conversation took place between Schaefer and the grievant:

Schaefer: At this time, two years ago you were one of my best carriers. You showed up everyday on time and carried most of the routes faster than the regular carrier. It seemed as though over night, your performance dropped, your attendance went bad, your attitude changed, and you started showing up late on a regular basis. What happened?

Grievant: I started to have some emotional and family problems around that time.

On December 6, 2001 when Schaefer arrived for work at 6:00 a.m., he discovered that the grievant had phoned in sick. Schaefer called the grievant who related the following information to Schaefer:

> Do you remember when you asked me yesterday about if there was anything that you didn't know about? I've been seeing a psychiatrist for the last year and he diagnosed me with clinical depression.

The grievant also told Schaefer in this conversation that he was on medication.

On December 18, 2001, Schaefer issued a 14-day suspension to the grievant for Irregular Attendance/AWOL. The suspension was based on two tardys and four days of sick leave during the November-December, 2001 time period. This suspension was presented to the grievant on December 20, 2001. Two days later, the grievant was 25 minutes tardy. When asked by supervisor Layne Wilson why he was late, the grievant replied that he had overslept. When the grievant arrived at work, he told Wilson that he needed a favor. The grievant asked Wilson if he would be willing to put down the grievant's start time as 6:00 a.m. Wilson refused the grievant's request. At the end of the workday, the grievant approached Wilson and renewed his request. Wilson again refused to alter the time records.

On December 27, 2001, Postmaster Ken Ault signed a Request for Personnel Action, requesting that a notice of removal be issued to the grievant. The request stated: "[the grievant] has had countless chances to correct his tardiness issues." The employer issued a notice of removal to the grievant on January 11, 2002 for Irregular Attendance (AWOL). The notice of removal stated as follows:

> You are charged with failure to meet the requirement to maintain regular attendance. You have been warned that your attendance record is unsatisfactory, most recently on December 20, 2001. You were late .42 hours on 12/22/2001. You were charged AWOL for that time.

The notice of removal made reference to four prior disciplinary offenses by the grievant: 1) Letter of Warning dated May 2, 2001; 2) Suspension of 7 days dated June 11, 2001; 3) Suspension of 14 days dated September 28, 2001; and 4) Suspension of 14 days dated December 18, 2001.

The union filed a grievance challenging the notice of removal. On February 27, 2002, the grievant submitted a three-page request for FMLA leave with the employer. The first page of the request, NALC Form 2 - Family and Medical Leave Act of 1993, was entitled "Medical Certification - Employee's Own Serious Health Condition" and was signed by Malcolm Townsley, M.D. Dr. Townsley indicated that the grievant's medical condition qualified as a "serious health condition" under the FMLA. In response to a question concerning the grievant's ability to perform the functions of his job, Dr. Townsley wrote: "Occasional intermittent days off are required for treatment."

The second page of the request for FMLA leave, NALC Form 3 - Family and Medical Leave Act of 1993, was entitled "Employee's

Certification of Own Serious Health Condition", and was completed by the grievant. He stated, as did Dr. Townsley on Form 2, that his medical condition began in October of 2000. A copy of a December 1, 2001 prescription for Prozac was included with Form 3. The prescription included the following warning: "May Cause Drowsiness." The third page of the request, NALC Form 5 - Family and Medical Leave Act of 1993, was entitled: "Employee Notice of Need for Intermittent Leave or for a Reduced Work Schedule." The grievant filled out Form 5, indicating that he would need "occasional days off and/or occasional tardies due to treatment and/or medication ..."

POSITION OF THE PARTIES

Position of the Employer

The employer argues that it issued the notice of removal only after the grievant's repeated failures to be regular in attendance. The employer notes that employees are required to make every effort to avoid unscheduled absences, and that no employer should be expected to tolerate employees who repeatedly fail to report to work for their scheduled work shifts.

The employer points out that the union admits that the grievant was absent or tardy on each and every day indicated. The union challenges the notice of removal on the basis that the grievant's absences may have been protected by the FMLA. The employer argues that the grievant never requested FMLA protection for his absences, and that the FMLA is not applicable under the circumstances of his case. Supervisors frequently asked the grievant if he was having personal problems, but he declined to explain his absences.

The employer believes that it has met its burden of proof to show just cause for removal of the grievant. The employer argues that it made numerous efforts to correct the grievant's behavior and followed the principles of progressive discipline. The employer issued four disciplinary actions to the grievant, including a letter of warning, 7-day suspension, and two 14-day suspensions, before removal was considered. As all of these disciplinary actions involved the same subject matter, the grievant was clearly placed on notice that his continuing attendance problems could lead to removal. Only when the grievant failed to correct his irregular attendance did the employer justifiably issue the notice of removal.

Position of the Union

The union disputes the employer's reliance on the four disciplinary actions issued prior to the notice of removal, as those actions were not grieved by local union officers unfamiliar with the agreement and the FMLA. The union argues that the notice of removal is fatally flawed due to the employer's failure to follow the FMLA. The union maintains that the grievant suffers from clinical depression, which is a "serious medical condition" covered by the FMLA. Medications taken by the grievant for that disorder cause sleepiness and insomnia. Side effects from his medicine are directly related to the grievant's attendance problems.

The union believes that the employer failed to follow numerous provisions of the FMLA. First, the employer failed to post a FMLA poster in the carrier work area. Second, the employer failed to provide the grievant with Publication 71, an employer publication explaining employee rights and responsibilities under the FMLA, after management became aware of his depression and family problems in February or March of 2001. The employer received additional

notice on December 6, 2001, when the grievant told his supervisor that he had been seeing a psychiatrist for the last year for clinical depression. Third, after being notified of his medical condition, the employer failed to inquire further into the matter. Fourth, the employer failed to tell the grievant how he could qualify for FMLA leave, and failed to provide the grievant with the proper form for medical certification under the FMLA.

The union challenges the employer's reliance on allegations that the grievant asked his supervisor to falsify time records, as the notice of removal did not mention those charges. To remedy the employer's failures, the union seeks full back pay and prompt processing of the grievant's request for FMLA leave. If accepted for FMLA leave, the union seeks removal of all disciplinary actions from the grievant's file.

DISCUSSION

Arbitrability of Grievance

The employer argues that as the Arbitrator has no authority to determine violations of the FMLA, the union's grievance is not properly before the Arbitrator. Under 29 CFR 825.400, employees who believe that their FMLA rights have been violated have two options: 1) File a complaint with the Secretary of Labor of the U.S. Department of Labor; or 2) File a private lawsuit in court.

The union maintains that it is not seeking to prove a violation of the FMLA, but rather to show that the employer's actions were inconsistent with the FMLA and its own handbooks and manuals. Under article 5 of the agreement, the employer is obligated to

follow the provisions of the FMLA. The employer has explicitly recognized this obligation in section 515 of its Employee and Labor Relations Manual (ELM). Under article 19 of the agreement, the employer must follow the procedures set forth in its handbooks and manuals, including the ELM.

A October, 1997 letter signed by employer and union officials at the national level states as follows:

> In a disciplinary hearing involving just cause, the union may argue as an affirmative defense that management's action were inconsistent with the Family and Medical Leave Act.

The union is contesting the grievant's notice of removal on the grounds that the employer failed to follow its own rules and regulations requiring compliance with the FMLA. The union seeks to overturn the removal decision and has not requested separate remedies for the employer's failure to follow the FMLA. Under these circumstances, the union's grievance is challenging the employer's actions as inconsistent with the FMLA, and the grievance is arbitrable and properly before the Arbitrator.

Family and Medical Leave Act of 1993

The FMLA provides employees with up to 12 workweeks of unpaid, job-protected leave a year when an employee is unable to work because of a serious health condition. Although FMLA leave is unpaid, employers are required to maintain group health benefits during the leave as if employees continued to work.

FMLA Poster

Under section 515.9 of the ELM, management is required to "conspicuously display" a FMLA poster "on bulletin boards where it

can be seen readily by employees ..." The poster is entitled: "Your Rights under the Family and Medical Leave Act of 1993".

The FMLA poster at the Pendleton station where the grievant works can be found on a bulletin board by the time clock. The bulletin board, which also contains other required postings, is on the clerk, as opposed to the letter carrier, side of the general work area. There is no FMLA poster in the carrier work area and carriers rarely go into the clerk work area.

The union asserts that the employer failed to comply with section 515.9 of the ELM. The FMLA poster is displayed on a bulletin board with other required postings. While physically situated in the clerk work area, the bulletin board also services carriers. Although placement of the FMLA poster is not ideal, there is insufficient evidence to show non-compliance with section 515.9.

Obligations of Parties under FMLA

The rights and responsibilities of postal service employees and management under the FMLA were summarized in a 1994 award by Arbitrator Mark Lurie as follows:

> Under the FMLA, the Grievant was not required to request FMLA leave, but rather to timely advise her supervisor ... of her medical condition. It was then the obligation of [the supervisor] [1] to determine whether that condition was a "serious health condition" covered by the Act and, if so, [2] to note the fact on the Grievant's Form 3971, [3] to furnish the Grievant with written notification of her rights and responsibilities under the Act, and [4] to advise the Grievant as to any medical documentation that would be required.
>
> [emphasis by underline in original]

Both employees and management have obligations under the FMLA.

Form 3971 is a postal service form entitled: "Request for or Notification of Absence". The form is initially filled out by an employee to indicate the type of absence (annual, sick, etc.) being requested. The form is then reviewed by a supervisor for official action. The only reference on the form to the FMLA is under the review portion of the form, where a supervisor can check boxes entitled: "Approved, not FMLA", or "Approved, FMLA".

Notice Obligations of Employee under FMLA

Section 825.303(b) of the rules and regulations issued on January 6, 1995 for implementation of the FMLA, states as follows:

> ... The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. ...

These notice requirements apply for employees where the need for FMLA leave is not foreseeable.

An employee's notice requirements under the FMLA were described by Arbitrator Devon Vrana in a 1996 award as follows:

> ... an employee is not required to expressly request FMLA leave on a Form 3971 or verbally. To be protected by the FMLA, the employee must disclose the cause of his absence, and that cause must be one which Management reasonably concludes is covered by the FMLA.
>
> [footnotes omitted from original]

The FMLA Compliance Guide issued by the U.S. Department of Labor on June 6, 2000, states that employees may be required to provide:

> sufficient information for the employer to understand that the employee needs leave for FMLA-qualifying reasons

(the employee need not mention FMLA when requesting leave to meet this requirement, but may only explain why the leave is needed);

To meet FMLA requirements, an employee must notify the employer that leave is needed and the reasons or medical condition for the leave. An employee need not mention the FMLA when requesting leave.

Obligations of Employer under FMLA

Once an employee notifies the employer of their medical condition, the obligations of the employer begin. Under section 825.303 of the rules and regulations, the employer is "expected to obtain any additional required information through informal means." Under section 515.41 of the ELM, management must determine whether the employee's medical condition qualifies as a "serious health condition" under the FMLA, making the employee unable to perform the functions of their position.

This obligation by the employer was explained by Arbitrator Donald Olson in a 1997 award as follows:

> ... the Employer's own reference material dealing with the FMLA, charges supervisors with the responsibility for designating whether or not an absence is FMLA qualified and to give notice of the designation to employees, if such employees have a serious health condition ... .

The grievant's medical condition may qualify under section 515.2 of the ELM as a "chronic [serious health] condition requiring treatments". Such chronic conditions must meet the following requirements:

(a) Requires periodic visits for treatment by a health care provider ...
(b) Continues over an extended period of time ...

(c) May cause episodic, rather than a continuing period of, incapacity. ...

In the grievant's February 27, 2002 request for FMLA leave, Dr. Townsley explains treatment for the grievant's medical condition as follows: "Occasional intermittent days off are required for treatment." The U.S. Department of Labor's FMLA Compliance Guide allows "employees to take leave on an intermittent basis or to work a reduced schedule under certain circumstances" because of an employee's serious health condition.

If the employer determines that the employee's medical condition meets the FMLA's definition of a "serious health condition", additional obligations are placed on the employer. Under section 825.301 of the rules and regulations, the employer must provide the employee with written notice of the employee's specific expectations and obligations under the FMLA. Such notice must explain any consequences of a failure to meet those obligations.

Medical Certification Obligations of Employee under FMLA

After the employer determines that the employee has a "serious health condition" under the FMLA, the employer provides the employee with notice of the employee's rights and responsibilities under the FMLA. At this point in time, additional obligations may be placed on the employee. Under section 825.305 of the rules and regulations, an employer may require that the employee's leave request be supported by a medical certification issued by the "health care provider of the employee."

Application of FMLA to Grievant

The grievant notified the employer of his medical condition in February or March of 2001, by informing supervisor Carstens that he was taking anti-depressants under the direction of a psychiatrist.

On December 5, 2001, the grievant told supervisor Schaefer that he had been seeing a psychiatrist for the last year, had been diagnosed with clinical depression, and was taking medication for his condition. Testimony was presented at the hearing indicating that it was common knowledge on the shop floor that the grievant was seeing a psychiatrist during 2001.

The grievant was absent numerous times during 2001. Form 3972, entitled "Absence Analysis", indicated that the grievant was tardy on 27 days in 2001. For 11 of those days, the grievant was tardy for 25 minutes or less. For 14 of those days, the grievant was late to work for between 26 and 41 minutes. In summary, for 25 of the 27 days, the grievant was tardy for 41 minutes or less.

The absence analysis chart indicated that the grievant was having equally serious problems with usage of sick leave. During 2001, the grievant was absent on 27 different days, using 238 hours of sick leave. These absences were in addition to his 27 tardys. The grievant's high number of tardys, coupled with his high usage of sick leave, did not go unnoticed by his supervisors. These were the exact reasons that the grievant was issued four disciplinary actions in 2001 prior to the notice of removal.

The grievant's high number of tardys, high usage of sick leave, and notice to his supervisors that he was taking anti-depressant medication under the direction of a psychiatrist for clinical depression, provided sufficient notice to the employer that leave was needed for his medical condition. As the grievant never received notice from the employer concerning his rights and responsibilities under the FMLA, he was not required to label his requests for leave as FMLA leave.

After receiving notice of the grievant's medical condition, the employer failed to meet its obligations under the FMLA. In February or March of 2001, supervisor Carstens considered the possibility of the grievant's medical condition as qualifying under the FMLA. A November 22, 1995 letter from the employer's national Labor Relations office to managers and human resource personnel on the subject of the FMLA is instructive. That letter states as follows:

> Management has two business days (absent extenuating circumstances) to designate requested leave as FMLA or FMLA pending documentation after learning that it may qualify. Get a PS Form 71 to the employee as soon as you learn of the possibility of FMLA.

Supervisor Schaefer testified that although he was familiar with Publication 71, he did not offer this document to the grievant when he learned on December 6, 2001 that the grievant had been seeing a psychiatrist. Schaefer stated that he did not think that seeing a psychiatrist qualified the grievant for FMLA leave. Postmaster Ault testified that management is obligated to provide Publication 71 when an employee "makes you aware of their medical condition." However, Ault indicated that he first became aware that the grievant was seeing a psychiatrist after he issued the notice of removal.

If the employer had requested additional medical information from the grievant it would have likely learned that the grievant was taking the prescription medications of Paxal, then Prozac at a later date, for his medical condition. Both of these medications have side effects that cause drowsiness, fatigue, sleepiness and inability to fall or stay asleep. These side effects could certainly make an individual tired.

On December 6, 2001, supervisor Schaefer indicated that he told the grievant to provide medical documentation for his absence that day. The grievant testified that he thought a doctor's slip was only required for absences of three days or more under article 10 of the agreement. This request by Schaefer for medical documentation cannot be considered, as claimed by the employer, to be a request for medical certification under the FMLA. Schaefer did not believe that seeing a psychiatrist qualified for FMLA leave. The employer never provided Publication 71 to the grievant. The grievant cannot be held responsible for providing medical certification of his condition under the FMLA when he was never notified by the employer of his obligations under the FMLA.

The employer failed to determine whether the grievant's medical condition was a "serious health condition" as defined by the FMLA, and failed to provide the grievant with a copy of Publication 71 explaining his rights and responsibilities under the FMLA.

Alleged Offenses

The employer maintains that it tried to assist and help the grievant, but he instead fabricated excuses and repeatedly lied as to the reasons for his absences. When his job was in jeopardy, the grievant resorted to asking a supervisor to falsify his time records so he would not get fired.

The notice of removal charged the grievant with Irregular Attendance (AWOL). None of the four disciplinary actions preceding the notice of removal, or the notice of removal itself, accuse the grievant of dishonesty or falsifying time records. A basic tenet of due process and just cause is that an employee must be provided with the opportunity to defend themselves against their accusers.

Employees must first have notice of the charges that they face. Only when such notice has been given by the employer can an employee prepare a defense to the charges. The grievant was never charged with dishonesty or falsifying time records. Absent such accusations, he is not required to defend himself against such charges and cannot be found to have committed those offenses.

DECISION ON REMOVAL

Based upon the competent, material and substantial evidence on the whole record, it is the decision of the Arbitrator that the employer did not have just cause to issue the January 11, 2002 notice of removal. THE GRIEVANCE IS SUSTAINED. The employer shall make the grievant whole for any loss of wages and/or benefits. The employer shall remove the disciplinary actions of May 2, 2001, June 11, 2001, September 28, 2001, December 18, 2001, and January 11, 2002 from the grievant's personnel file. The grievant's February 27, 2002 request for FMLA leave shall be processed by the employer in accordance with its handbooks and manuals.

Issued at Olympia, Washington, this 10th day of August, 2002.

MARK S. DOWNING, Arbitrator

C-23261

****

In the Matter of the National Arbitration Between

UNITED STATES POSTAL SERVICE	)	
	)	
and	)	
	)	
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	**Q98N-4Q-C01090839**
	)	**Publication 71**
	)	**Arbitrability**
and	)	
	)	
NATIONAL POSTAL MAIL HANDLERS UNION (Intervenor)	)	

****

Before: Dennis R. Nolan, Arbitrator, USC Law School, Columbia, SC 29208-0001.

Appearances:

For the Employer: Larissa Omelchenko Taran, Attorney, USPS, Washington, DC.

For the NALC: Thomas N. Ciantra, Cohen, Weiss and Simon, LLP, New York, NY.

For the NPMHU: Page Kennedy, Bredhoff & Kaiser, P.L.L.C., Washington, DC.

Place of Hearing: Washington, D.C.

Date of Hearing: October 5, 2001

Date of Award: April 28, 2002

Relevant Contract Provision(s): Articles 3, 5, 10 (Section 5), and 19

Contract Year: 1998-2001

Type of Grievance: Contract Interpretation

Award Summary: The dispute is arbitrable.

Dennis R. Nolan, Arbitrator

OPINION

I. Statement of the Case

The NALC filed this Article 19 appeal on February 8, 2001 to challenge certain revisions made by USPS to Publication 71. The parties could not resolve the dispute in the grievance process, so the NALC demanded arbitration. The National Postal Mail Handlers Union (NPMHU) eventually intervened. The first scheduled hearing date, in Washington, DC on October 5, 2001, was devoted to arguments about arbitrability. All parties appeared and had full opportunity to testify, to examine and cross-examine witnesses, and to present all pertinent evidence. Because the arguments on the arbitrability dispute were too complex to resolve from the bench, all parties filed lengthy post-hearing briefs, the last of which arrived on April 10, 2002.

The Postal Service claimed that the NALC had not raised the issue of whether the revisions conflicted with ELM 513.36 in the earlier steps of the grievance procedure. It therefore argued that the NALC could not do so at the arbitration hearing. The NALC disputed that assertion. Unlike the other arbitrability objections, which are purely interpretive matters, this raised a factual dispute. After some discussion on how best to proceed, the parties agreed that the Postal Service, as the objecting party, could request a second hearing to receive evidence about the arguments raised below (Tr. 99). In due course, the Postal Service notified me that there would be no hearing but neither the Employer nor NALC explained why. Each now blames the other and seeks to profit from the lack of evidence in the record. The Postal Service's brief asserts (at page 16) that the NALC "canceled the hearing" and concludes that the Employer's objection is therefore unrebutted and "establishes a procedural defect in the Union's Article 19 appeal." The NALC's brief asserts (page 2) that the Postal Service "abandoned its claim that the NALC failed to raise" the alleged conflict.

II. Statement of the Facts

Late in 2000, the Postal Service informed postal unions and others that it proposed to revise Publication 71, *Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act*. After some discussions with unions and the Department of Labor's Wage and Hour Division, it issued the final version on February 6, 2001. Two days later, the NALC filed this Article 19 appeal. That appeal concisely states the NALC's objections by alleging that Publication 71 revisions dealing with an employee's documentation of the reason for an absence conflict with Articles 5 and 19 of the National Agreement, with EL-311, Personnel Operations, and with the Family and Medical Leave Act (FMLA) itself.

Because this phase of the arbitration deals only with arbitrability, it is unnecessary to discuss the NALC's objections in detail. Briefly, though, the NALC alleges that the new version of Publication 71 could result in denial of leave when an employee fails to provide specified documentation while ELM 513.36 requires documentation for short-term absences "only when the employee is on restricted sick leave or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service." In practice, it argues, that provision has long allowed employees to take leave of three days or less for a medical condition without having to

provide documentation unless the Postal Service has a reasonable factual basis for questioning the employee's absence. It proffers that evidence in a hearing on the merits would show that the Postal Service has reversed that practice since it issued the revised Publication 71 and now requires documentation for short-term absences even where there is no reason to doubt the employee's reason for requesting leave.

III. The Issue

Is this Article 19 appeal arbitrable?

IV. Pertinent Authorities

1998-2001 AGREEMENT

ARTICLE 3
MANAGEMENT RIGHTS

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations: . . . .

ARTICLE 5
PROHIBITION OF UNILATERAL ACTION

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

ARTICLE 10
LEAVE

Section 5. Sick Leave

The Employer agrees to continue the administration of the present sick leave program, which shall include the following specific items:

A. Credit employees with sick leave as earned.

B. Charge to annual leave or leave without pay (at employee's option) approved absence for which employee has insufficient sick leave.

C. Employee becoming ill while on annual leave may have leave charged to sick leave upon request.

D. For periods of absence of three (3) days or less, a supervisor may accept an employee's certification as reason for an absence.

ARTICLE 19
HANDBOOKS AND MANUALS

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. At the request of the Union, the parties shall meet concerning such changes. 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 sixty (60) days after receipt of the notice of proposed change. . . .

EMPLOYEE AND LABOR RELATIONS MANUAL (2000)

513.36 **Sick Leave Documentation Requirements**

513.361 **Three Days or Less**

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

513.362 **Over Three Days**

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

515 Absence for Family Care or Serious Health Condition of Employee

515.1 Purpose of 515. This section provides policies to comply with the Family and Medical Leave Act of 1993. Nothing in this section is intended to limit employees' rights or benefits

available under other current policies (see 511, 512, 513, 514), or collective bargaining agreements. . . .

515.55 Employee Incapacitation. An employee requesting time off under this section because of his or her own incapacitation must satisfy the documentation requirements for sick leave in 513.31 through 513.38 or for leave without pay in 514.4. If absence exceeds 21 calendar days, evidence of ability to return to work with or without limitations must be submitted. If additional medical opinions are required, they are administered as described in 515.54.

PUBLICATION 71 (2001 Revision)

IV. Documentation on Request for Absence

Supporting documentation is required for your absence request to receive final approval. Documentation requirements may be waived in specific cases by your supervisor. *However, failure to provide requested documentation could result in a denial of FMLA-protected leave.*

V. The Parties' Positions on Arbitrability

A. The Postal Service

1. The Postal Service's first argument against arbitrability is that the Article 19 appeal is procedurally flawed.

(a) According to the Employer, Publication 71 is not a handbook, manual, or regulation as Article 19 uses those terms. It is, rather, only a document required by the FMLA to provide individual notice to employees of the FMLA's provisions. It is, in other words, part of the FMLA statutory framework, not of the collective bargaining framework. The Postal Service relies an award by Arbitrator Howard Gamser, H8C-NA-C 61 (December 27, 1982). In that decisions, the arbitrator found that a document issued by the Postal Service (EL-501) was not a handbook, manual, or regulation because it did not attempt to alter the ELM's leave regulations. Publication 71 stands in the same situation.

(b) The Postal Service made no substantive "change" to Publication 71 2001. It simply reorganized and repeated certain language. To support an Article 19 appeal there must be a significant change in one of the listed types of documents. Contrary to the Unions' assertions, an alleged change in Postal Service practice is insufficient to justify an Article 19 appeal.

(c) The main issue raised at the hearing by the NALC, an alleged conflict between Publication 71 and ELM 513.361, was not raised in previous proceedings. The NALC's cancellation of a planned hearing to receive evidence of prior discussions demonstrates its inability to prove that the parties had discussed the issue below.

(d) Finally, the appeal is time barred. Article 19 allows a union to demand arbitration within 60 days of receiving notice of a proposed changed. Here, both Publication 71 and the ELM provisions had been in effect at least since 1994, yet the Union did not file its appeal until early in 2001.

2. The Postal Service's second argument is that the core of the Union's case would require interpretation of the FMLA and its implementing regulations. That, it claims, is beyond the authority of an arbitrator. Relying on a 1983 decision by Arbitrator Richard Bloch, the Postal Service asserts that an arbitrator may only interpret collective bargaining agreements. Responding to the Unions' anticipated arguments that the Agreement's provisions are closely related to those of the statutes and that arbitrators routinely resolve FMLA disputes, it draws a distinction between *interpreting* a statute and *applying* it. Arbitrators may do the latter but not the former. Another postal union, the APWU, has sued the Postal Service over its changes in Publication 71. That suit demonstrates that the dispute is a legal one that belongs in court.

B. The NALC

1. The NALC begins by addressing the Postal Service's argument that an arbitrator may not interpret statutes and regulations. Even if this case turned on construction of the FMLA, it argues, it would still be arbitrable. The Agreement itself (Article 5) obliges the Employer not to take any actions affecting terms or employment that are "inconsistent with its obligations under law." Similarly, Article 3 on management rights limits the Employer to actions that are "consistent with applicable laws and regulations." Postal Service arbitrators have consistently interpreted laws, including the FMLA, when necessary to resolve grievances. Moreover, the Postal Service itself admitted that authority in settling at the national level Case No. F94N-4F-C 96032816 (P. Whitley). A settlement agreement in May of 1998 provided that "pursuant to Article 3, grievances are properly brought when management's actions are inconsistent with applicable laws and regulations."

2. The NALC then turns to the argument that Publication 71 is not a handbook, manual, or regulation within the meaning of Article 19. Even by a simple dictionary definition it is a "regulation" because it is "an authoritative rule dealing with details or procedure." The "details or procedures" at issue govern documentation requirements under ELM 515. ELM 515 does not itself set out documentation requirements; rather, it refers the employee back to the notice that is Publication 71. Form letters later issued by the Postal Service make this clear. They expressly direct the employee seeking leave to provide documentation pursuant to Section IV of Publication 71.

3. Third, the NALC argues that the changes in the 2001 version of Publication 71 were material modifications. In particular, the earlier version of the publication simply said that documentation was required before a leave request could receive final approval; the revision emphasizes that leave requests are governed by Publication 71's documentation requirements rather than by those of the ELM. That shift in emphasis is confirmed by the Postal Services' new practice of distributing Publication 71 as the official statement concerning necessary

documentation and by the Employer's new insistence on documentation even for short-term absences.

C. The NPMHU

Many of the NPMHU's arguments track those of the NALC and thus need not be repeated. It emphasizes the regulatory nature of Publication 71's documentation section by noting that it includes repeated mandates — that is, it requires employees to provide certain carefully detailed information. The publication is not merely a "derivative" document because no other Postal Service document contains those requirements. As a "rule or order that directs employee behavior," Publication 71 is a "regulation" under any reasonable meaning of that word. In the case decided by Arbitrator Gamser on which the Postal Service relies, the Employer disclaimed any intent to alter existing regulations or to change employee behavior. Here, in contrast, the Postal Service declined to make such a statement.

The NPMHU's other main point is that Postal Service arbitrators may interpret laws and regulations when necessary to resolve grievances. It notes that the issue in this case is not whether Publication 71 violates the FMLA but whether it conflicts with the ELM. Even if interpretation of the FMLA were required, an arbitrator can do so because the Agreement incorporates statutory or decisional law.

VI. Discussion

Although the issue in this proceeding is extremely narrow, the parties take it very seriously. Their submissions on arbitrability alone occupy 100 pages of a hearing transcript, three and a half inches worth of exhibits, 62 pages of briefs, plus assorted attached arbitration awards. Careful digestion of this mass of material reveals five disputed questions, which I will address in turn.

A. Is Publication 71 a handbook, manual, or regulation?

Article 19 permits the NALC to challenge changes in "handbooks, manuals and published regulations of the Postal Service." Both Unions rely on the last of those terms, asserting that Publication 71's documentation section is a "regulation." The Agreement does not define that term, so we have to assume the parties intended it to have its normal meaning as a general rule intended to direct behavior.

The Postal Service describes Publication 71 as simply "a document required by the FMLA to satisfy the individual notice requirements of that statute." It may indeed be that, but a notification required by a statute can also function as a general rule to direct employee behavior. The two, in short, are not mutually exclusive. Whether a notice serves that second function obviously depends on the facts of the case.

In this regard, the Employer's reliance on the Gamser award is misplaced. The EL-501 at issue in that case was simply a guide for supervisors, not for bargaining unit employees. Even though it looked like a handbook, was submitted to the Union as if it were a handbook, bore a handbook number, and was referred to by the Employer as a handbook, the Postal Service's cover letter specifically disclaimed any attempt to "alter existing Postal Service regulations." After noting the Postal Service's ambiguity as to whether EL-501 was an "authority" for interpreting the Agreement, Arbitrator Gamser said that the Employer could not have it both ways. Either EL-501 was an "internal management communication to supervisory and managerial personnel, outside the bargaining unit" or it was a separate "authority" on which management could rely. He relied on the Employer's disclaimer and directed it to "promulgate an official document" stating that EL-501 was not to be regarded "as a handbook having the force and effect of such a document issued pursuant to Article 19."

Publication 71, in contrast, did not come with a disclaimer of regulator force. In fact, the Postal Service expressly declined at the arbitration hearing to stipulate that the document was not intended to change existing rules. Moreover, Publication 71 goes to employees rather than just to their supervisors. It thus cannot be a simple "internal management communication." Finally, Publication 71 contains specific directions that employees must follow in order to obtain FMLA leave.

In sum, Publication 71 clearly meets the normal definition of a regulation and is therefore subject to an Article 19 appeal.

B. Did the 2001 Revision of Publication 71 Amount to a Material Change in that Document?

Article 19 permits appeals of "proposed changes that directly relate to wages, hours or working conditions." In the absence of any special contractual definition, "changes" must be given its normal meaning. We can safely assume that the parties used that word to apply to *material* changes; reissuance of an old document with a new typeface, correction of typographical errors, or changes in organization that have no practical effect would not give the Union an occasion for revisiting dormant complaints.

As to whether the 2001 revision constituted a material change, the evidence is limited. There were some wording changes but none of them flagrantly modifies an existing rule. To some extent, however, the Postal Service's objection begs the critical question. Even a small change in wording might have large practical consequences. If the union challenging a revision makes a plausible argument that the new words affect terms of employment, then the question of whether it is correct goes to the merits of the dispute, not to its arbitrability. To put it differently, the "change" hurdle in Article 19 is a very low one.

The heart of the NALC's objection involves one sentence the Postal Service added in 2001 to the beginning of Section IV of Publication 71: *"However, failure to provide requested documentation could result in a denial of FMLA-protected leave"* (emphasis in the original). On

one hand, that sentence is extremely similar to language contained in both the 1997 and 2001 introductory paragraphs: "Failure to provide such notice or documentation could result in denial of leave or other protections afforded under the Act." Putting old language in a different place or repeating it in two or more places normally would not amount to a material change. On the other hand, in rare cases location or frequency of wording may matter especially if (as here) the new words differ from the old ones.

The 2001 changes in Publication 71 initially seem minor and may well have no practical effect. Nevertheless, they are just important enough that the Unions should have the opportunity to demonstrate their impact in a hearing on the merits.

C. Is the Grievance Timely?

The Postal Service's timeliness objection piggybacks on its assertion that the 2001 version of Publication 71 merely carried forward the changes made in 1994 and 1997. If it did so, then obviously an appeal in 2001 would be far too late. Having found that the Unions cleared the "change" hurdle, I must also find that the challenge to the changes is timely. That the Unions may not have shown daylight when clearing that hurdle does not affect the timeliness of their jump.

D. Did the NALC Raise the Claim of a Conflict Between the Revised Publication 71 and ELM 513.36 Earlier in the Grievance Procedure?

I assume simply for the sake of argument that a union processing an Article 19 appeal must raise all issues before reaching the arbitration step. The next question is which party bears the burden of proof on that point once the Employer raises an arbitrability objection. Must the Postal Service must prove the Union's failure to raise the issue earlier, or must the Union prove that it did so? That somewhat abstract question is critical here because the record contains no evidence on either side of the issue. The allocation of the burden of proof will therefore decide the matter.

An arbitrability objection is a form of affirmative defense. Accordingly, the party raising the objection must prove its assertion. That is true whether the arbitrability dispute is substantive or (as here) procedural. A party claiming that the Agreement does not apply to the grievance must show that it does not. A party claiming that the grievance is untimely must show that it was filed after the appropriate deadline. Similarly, a party claiming that a particular issue had not been raised earlier must show that was the case. The Postal Service failed to do so. The record contains only a bare assertion contained in its counsel's opening statement.

By failing to present any evidence on the parties' earlier discussions, the Postal Service waived its opportunity to prevail on this basis. Whether or not the Union previously discussed the alleged conflict with ELM 513.36, it is not barred from doing so now.

E. May an Arbitrator Interpret a Statute and Its Implementing Regulations?

Before the middle 1960s, it was rare for a party to raise a legal issue in labor arbitration. Parties understandably assumed that the purpose of arbitration was solely to interpret or apply the collective bargaining agreement. Certain language in Supreme Court opinions seemed to support that understanding. Once Congress began to regulate employment relationships more carefully, though, the separation of "legal" and "contractual" questions became harder to maintain. Scholars, arbitrators, and advocates began a long-lasting debate about whether labor arbitrators could or should apply external law when resolving contractual grievances.[1]

To the extent that those debates produced a consensus, it was that arbitrators could not rely *solely* on the dictates of external law. More generally, most arbitrators shied away from legal questions if they could solve the case at hand in some other way. Many added comments to the effect that an arbitrator's proper role was simply to interpret the applicable contract. Usually, though, they reserved the possibility that external law might be applicable in an appropriate case.

Writing while those debates were fresh in mind, distinguished Postal Service arbitrators (who were, not incidentally, often leading members of the National Academy of Arbitrators) followed that pattern. In a 1982 APWU case (H8C-4A-C-11834), Arbitrator Ben Aaron wrote that "the arbitrator's function is to interpret and apply the Agreement." In "the circumstances of this case," he said, "there is not necessity to look to the external law." The clear implication of his last statement was that in some other cases there might be such a necessity. Similarly, in a 1983 Federation of Postal Police Officers case (FPSP-NAT-81-006), Arbitrator Richard Bloch held that "a claim premised solely upon the Fair Labor Standards Act would be outside the Arbitrator's jurisdiction." His addition of the adverb "solely" indicates that an arbitrator might have jurisdiction over a "mixed" case involving both statutory and contractual issues.

As the years passed and arbitrators more frequently faced legal issues, it became apparent that there were some undeniable holes in the wall of separation between "law" and "contract." One obvious exception to the general rule is that parties who incorporate external law in their contract, either expressly or by paraphrase, necessarily expect their arbitrators to interpret and apply the incorporated law. That may sometimes require examination of implementing regulations and relevant judicial precedent.

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[1] See, for example, Bernard Meltzer, Ruminations About Ideology, Law, and Labor Arbitration, 20 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 1 (1967); Robert G. Howlett, The Arbitrator, the NLRB, and the Courts, 20 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 67 (1967); Richard Mittenthal, The Role of Law in Arbitration, 21 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 42 (1968); Michael I. Sovern, When Should Arbitrators Follow Federal Law?, 23 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 29 (1970); and Theodore J. St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at *Enterprise Wheel* and Its Progeny, 30 PROCEEDINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 29 (1977).

A second exception may be less obvious but is firmly established as a canon of contract interpretation. It is reasonable to assume that parties intend their agreements to be legal and legally enforceable. Given two interpretations of a disputed term, then, an arbitrator should adopt the one that is consistent with applicable law rather than the one that would be illegal. That exercise, too, might require examination of implementing regulations and relevant judicial precedent. A good example is a 1987 APWU case (H1C-NA-C 101) cited by the Postal Service on a different point. Arbitrator Dan Collins carefully examined the Rehabilitation Act, cases interpreting that Act, and the position of the EEOC regarding its meaning when deciding an Article 19 challenge. He concluded that the Postal Service did not violate Article 19, but reached that conclusion only after interpreting and applying external legal authority.

All of this is a roundabout way of reaching the Postal Service's objection that, because one NALC argument might require interpretation of the FMLA, the grievance is not arbitrable. In fact, neither Union's brief advanced the argument anticipated by the Postal Service. The mere possibility that the Unions might raise a legal issue in a hearing on the merits hardly suffices to bar them from arbitration. Nor does a pending suit on Publication 71 brought by the APWU demonstrate that court is the only place in which the FMLA may be of use. As the Supreme Court once held, it is quite possible to use the same legal arguments in different forums, arbitral and judicial. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

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

I find that the presence or possibility of an argument involving external law does not make a case inarbitrable.

AWARD

For the reasons stated, none of the Postal Service's arbitrability objections is meritorious. The dispute is therefore arbitrable.

Dennis R. Nolan, Arbitrator and Mediator

April 28, 2002
Date

LABOR RELATIONS

UNITED STATES POSTAL SERVICE

Mr. William H. Young
Vice President
National Association of
Letter Carriers, AFL-CIO
100 Indiana Avenue, NW
Washington, DC 20001-2197

Re: F90N-4F-D 95043198
M. Wencke
West Sacramento, CA 95799-0050

Dear Mr. Young:

Recently, we met to discuss the above-referenced case, currently pending national arbitration.

After reviewing this matter, it was mutually agreed that no national interpretive issue is presented in this case. We further agreed that the provisions of ELM Section 515, "Absence for Family Care or Serious Health Condition of Employee" are enforceable through the grievance arbitration procedure. Whether or not the provisions of ELM 515 are applicable and timely raised in this case is a fact question suitable for regional resolution or arbitration.

Accordingly, it was agreed to remand this case to the parties at Step 3 for further processing or to be rescheduled for arbitration, as appropriate.

Please sign and return the enclosed copy of this decision as your acknowledgment of agreement to remand this case, removing it from the national arbitration listing.

Sincerely,

Pete Bazylewicz
Manager
Grievance and Arbitration
Labor Relations

William H. Young
Vice President
National Association of Letter
Carriers, AFL-CIO

Date: 2/26/97

475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-4100

LABOR RELATIONS

M-01378

UNITED STATES POSTAL SERVICE

November 22, 1995

MANAGERS, HUMAN RESOURCES (AREA)

SUBJECT: Family and Medical Leave Act

This is to remind you that there are several issues of concern regarding the Postal Service's implementation of the Family and Medical Leave Act (FMLA). Postal policies and programs are not being revised or changed because of the FMLA. However, the following issues require clarification:

1) There have been reports of Department of Labor (DOL) Investigators making unannounced visits to postal facilities to gather information concerning FMLA violation complaints.

The Law allows DOL officials to investigate compliance with FMLA and postal managers should cooperate with them and provide relevant information upon request. However, we are not aware of any legal obligation that the Postal Service must allow employees to meet with DOL investigators for interviews on-the-clock, although we may do so as a courtesy.

2) Some American Postal Workers Union (APWU) members are concerned that health care providers may provide restricted medical information when filling out the DOL Form WH-380 for the employee.

The DOL WH-380 form does not require medical information that directly violates the employee's right to privacy. However, we realize health care providers may give more detail than requested on the form (i.e., prognosis and diagnosis) and that employees may not want to provide this information to their immediate supervisors. Therefore, to address the union's concern, the Postal Service reviewed and approved APWU and NALC FMLA forms that, when properly filled out by the health care providers, provide enough information is provided to certify that the absence qualifies as a covered condition under the FMLA.

Employees do not need to use the WH-380 or the union forms, they only need to provide the required information as listed on Publication 71. It is the employees' responsibility to provide enough information to their immediate supervisor, or to the person who normally

475 L'Enfant Plaza SW
Washington DC 20260-4100

approves and disapproves leave so the absence can be designated as qualifying or non-qualifying under the FMLA. If the employee does not provide enough information and the supervisor does not know the reason for the leave, the absence is not designated as covered under the FMLA.

3) Postal Service regulations do not require employees to submit a diagnosis/prognosis when requesting sick leave for themselves or for their dependents. However, in cases where employees voluntarily provide this information, supervisors have a responsibility to protect the employees' and dependents' privacy. Therefore, all restricted information is to be submitted to the medical unit to be filed in the employee's medical file, returned to the employee, or destroyed after necessary review.

4) Procedures for light duty and limited duty assignments have not changed. Follow the applicable collective bargaining agreements and postal policy for light and limited duty assignments.

5) COP and OWCP procedures have not changed except for the requirement to notify affected employees when such absences will be counted towards their 12 weeks of FMLA leave entitlement. With regards to the Privacy Act, Postal Service regulations provide that information (including medical records) concerning postal employees may be reviewed by those officers and employees of the Postal Service who have a need for such information in the performance of their duties. Accordingly, it is clear that managers and supervisors who process OWCP claims must have access to appropriate medical information and OWCP forms.

The FMLA specifically provides that when the worker's compensation absence and FMLA leave are running concurrently, the provisions of the workers' compensation statute permit the Postal Service or its representative to have direct contact with the employee's health care provider.

Attached are additional questions and answers for your information. Should you have any questions concerning this matter, please call Corine T. Rodriguez at (202) 268-3823.

Patricia A. Heath
Acting Manager
Contract Administration (NALC/NRLCA)

LABOR RELATIONS

UNITED STATES
POSTAL SERVICE

Mr. Vincent R. Sombrotto
President
National Association of Letter Carriers, AFL-CIO
100 Indiana Avenue, NW
Washington, DC 20001-2144

Re: Q98N-4Q-C 01090839
CLASS ACTION
Washington, DC 20001-9998

Dear Mr. Sombrotto:

We recently met in pre-arbitration discussion concerning the above referenced grievance. The issue is whether Publication 71, "Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act", violates the National Agreement by requiring "supporting documentation" for an absence of three days or less in order for an employee's absence to be protected under the Family and Medical Leave Act (FMLA).

After reviewing this matter, we agree that no national interpretive issue is presented. The parties agree to resolve the issue presented based on the following understanding:

The parties agree that the Postal Service may require an employee's leave to be supported by an FMLA medical certification, unless waived by management, in order for the absence to be protected. When an employee uses leave due to a condition already supported by an FMLA certification, the employee is not required to provide another certification in order for the absence to be FMLA protected.

We further agree that the documentation requirements for leave for an absence of three days or less are found in Section 513.361 of the Employee and Labor Relations Manual which states in pertinent part that:

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

Please sign and return the enclosed copy of this letter as your acknowledgment of agreement to settle this case and remove it from the pending national arbitration listing.

Douglas A. Tulino
Manager
Labor Relations Policies and Programs

William H. Young

Vincent R. Sombrotto
President
National Association of Letter Carriers, AFL-CIO

Date: 12-09-02

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DOREEN RICCO, *Plaintiff-Appellant,* *v.* JOHN E. POTTER, Postmaster General, et al., *Defendants-Appellees.*	No. 03-3294

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 02-00496—Donald C. Nugent, District Judge.
Argued: April 23, 2004
Decided and Filed: July 27, 2004
Before: MERRITT and MOORE, Circuit Judges; DUGGAN, District Judge.(*)

COUNSEL

ARGUED: Jonathan T. Hyman, REMINGER & REMINGER CO., Cleveland, Ohio, for Appellant. Annette G. Butler, ASSISTANT UNITED STATES ATTORNEY, Cleveland, Ohio, for Appellees. **ON BRIEF:** Jonathan T. Hyman, Richard C. Haber, REMINGER & REMINGER CO., Cleveland, Ohio, for Appellant. Annette G. Butler, ASSISTANT UNITED STATES ATTORNEY, Cleveland, Ohio, for Appellees.

MOORE, J., delivered the opinion of the court, in which DUGGAN, D. J., joined. MERRITT, J. (pp. 14-15), delivered a separate concurring opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. This appeal from the dismissal of a claim under the Family and Medical Leave Act of 1993 ("FMLA") raises an important issue of statutory construction. Specifically, this appeal requires us to interpret the phrase "hours of service" as it is used in the FMLA. We hold that make-whole relief awarded to an unlawfully terminated employee may include credit towards the hours-of-service requirement contained in the FMLA's definition of "eligible employee."

Plaintiff-Appellant, Doreen Ricco ("Ricco"), appeals the district court's dismissal under Federal Rule of Civil Procedure 12(b)(6) of her claim pursuant to the FMLA against her former employer, Defendant-Appellee, John E. Potter, Postmaster General ("Postmaster"). On appeal, Ricco argues that the district court erred by adopting the reasoning of *Plumley v. Southern Container, Inc.*, 303 F.3d 364, 367 (1st Cir. 2002), in which the First Circuit held that the hours-of-service requirement contained in the FMLA's definition of "eligible employee" includes only hours during which an employee performed actual work, not hours for which an employee was compensated pursuant to an arbitration award. Ricco further argues on appeal that the district court did not adequately balance the competing interests of employers and employees and created an incentive for employers unlawfully to terminate employees to prevent employees from satisfying the hours-of-service requirement.

For the following reasons, we **REVERSE** the district court's judgment granting the Postmaster's motion to dismiss under Rule 12(b)(6) and **REMAND** this case for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual Background

In July 1993, the United States Postal Service ("Postal Service") hired Ricco to work at its general mail facility in Cleveland, Ohio.(1) In December 1997, the Postal Service issued Ricco "a notice of removal, effectively terminating her employment." Joint Appendix ("J.A.") at 26 (Am. Compl. ¶ 7). Ricco timely grieved her December 1997 termination and ultimately proceeded to an arbitration hearing on January 19, 1999. In a February 8, 1999 award, the arbitrator ordered that Ricco's termination be converted to a thirty-work-day suspension and that Ricco "be reinstated subject to passing a fitness-for-duty examination and be made whole." J.A. at 26 (Am. Compl. ¶¶ 9, 10). Subsequently, Ricco "passed the fitness-for[-]duty examination and was returned to work with full credit for years of service for seniority and pension purposes." J.A. at 26-27 (Am. Compl. ¶ 10).

After Ricco returned to work, from May through July 1999, she suffered from depression and migraines after the death of her husband, and consequently she required intermittent leaves of absence. Due to this serious health condition, Ricco requested FMLA leave in early May 1999. According to Ricco, the Postal Service denied her request for FMLA leave because it concluded that she had not met the hours-of-service requirement.(2) Ricco alleges that she "had not 'worked' 1250 hours in the preceding 12 months solely because she had been unlawfully terminated in December 1997 and in violation of the Collective Bargaining Agreement."(3) J.A. at 27 (Am. Compl. ¶ 15). Ricco further alleges that the Postal Service has previously recognized "that '[w]hen an[] employee is awarded back pay, accompanied by equitable remedies (i.e. full back pay with seniority and benefits, or a 'make whole' remedy), the hours the employee would have worked if not for the action which resulted in the back pay period, are counted as work hours for the 1250 work hour eligibility requirement under the Family Medical Leave Act (FMLA).'" J.A. at 29 (Am. Compl. ¶ 27).

On October 15, 1999, the Postal Service issued Ricco another notice of removal "due to a failure to maintain a regular work schedule." J.A. at 27 (Am. Compl. ¶ 14). Ricco timely grieved her October 1999 termination and proceeded to another arbitration hearing. In a November 19, 2001 award, the arbitrator affirmed Ricco's dismissal "on the basis that [Ricco] was absent from work [and further] stated that 'this is not the proper forum to litigate any alleged violations of the FMLA' and therefore refused to consider whether the FMLA had been violated." J.A. at 28 (Am. Compl. ¶ 19). Thereafter, Ricco commenced this action in federal court.

B. Procedural Background and Jurisdiction

On March 14, 2002, Ricco filed a two-count complaint in the district court alleging that the Postmaster terminated her in violation of the FMLA and Ohio public policy. On September 6, 2002 Ricco filed a motion to dismiss Count II of her complaint, which asserted a claim based upon Ohio public policy, because that claim had been foreclosed by Ohio Supreme Court precedent. At a status conference on October 2, 2002, the Postmaster raised the potential applicability of the *Plumley* decision and the parties agreed that Ricco would file an amended complaint supplementing her factual allegations and that the Postmaster would then file a motion to dismiss. Ricco filed her first amended complaint on October 17, 2002, and thereafter the Postmaster filed his motion to dismiss on October 21, 2002. The district court granted the Postmaster's motion to dismiss on February 7, 2003. Ricco filed a timely notice of appeal.

The district court had jurisdiction pursuant to 28 U.S.C. § 1331, as Ricco's FMLA claim presented a federal question. This court has jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

II. ANALYSIS

A. Standard of Review and Statute of Limitations

We review de novo a district court's dismissal under Rule 12(b)(6). *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 451 (6th Cir. 2003). "In deciding whether to grant a Rule 12(b)(6) motion we 'must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations [of the plaintiff] as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief.'" *Id.* at 451-52 (quoting *Allard v. Weitzman (In re DeLorean Motor Co.)*, 991 F.2d 1236, 1240 (6th Cir. 1993)). Moreover, a Rule 12(b)(6) "motion should not be granted 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Id.* at 425 (quoting *Cameron v. Seitz*, 38 F.3d 264, 270 (6th Cir. 1994) (quotation omitted)). The Postmaster points out that he timely raised in his answer as an affirmative defense the expiration of the FMLA's two-year statute of limitations, but that the district court did not rule upon this issue in its opinion. The FMLA provides:

> (1) In general
>
> Except as provided in paragraph (2), an action may be brought under this section not later than 2 years after the date of the last event constituting the alleged violation for which the action is brought.
>
> (2) Willful violation
>
> In the case of such action brought for a willful violation of section 2615 of this title, such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought.

29 U.S.C. § 2617(c). The Postal Service terminated Ricco, allegedly in violation of the FMLA, on October 15, 1999, and Ricco filed her complaint approximately two and one-half years later. Therefore Ricco's FMLA claim is time-barred unless she proves that the Postmaster's violation was willful.

Ricco, in both her initial complaint and her first amended complaint, averred that the Postmaster and the Postal Service acted negligently, willfully, and maliciously when they violated her rights under the FMLA. An employer commits a willful violation of the FMLA when it acts with knowledge that its conduct is prohibited by the FMLA or with reckless disregard of the FMLA's requirements; therefore the determination of willfulness involves a factual question. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125-130 (1985) (defining the standard for a willful violation of the Age Discrimination in

Employment Act); *Hillstrom v. Best Western TLC Hotel*, 354 F.3d 27, 33 (1st Cir. 2003); *see also Williams v. Schuller Int'l, Inc.*, No. 00-3614, 2002 WL 193929, at *3 (6th Cir. Feb. 5, 2002) (applying *Thurston*'s standard of willfulness to claims brought under the FMLA). Because a plaintiff's factual allegations must be taken as true for purposes of deciding a Rule 12(b)(6) motion to dismiss, a plaintiff may withstand such a motion merely by having alleged that the FMLA violation was willful. *See Cucci v. Prison Health Servs., Inc.*, 153 F. Supp. 2d 605, 608-09 (E.D. Pa. 2001).

B. Statutory Interpretation

On appeal, Ricco contends that the district court erred by adopting the reasoning in *Plumley*, arguing that the First Circuit erroneously concluded that the hours-of-service requirement contained in the FMLA's definition of "eligible employee" means only hours that an employee performed actual work not hours for which an employee was compensated pursuant to an arbitration award. In *Plumley*, the First Circuit looked, as directed by the FMLA, to the Fair Labor Standards Act of 1938 ("FLSA") for guidance regarding the proper interpretation of the hours-of-service requirement. *Plumley*, 303 F.3d at 369-72.

Ricco points out, however, that neither the FMLA nor the FLSA define the term "hours of service" and argues that neither the FLSA nor its applicable regulations support the interpretation of the hours-of-service requirement adopted in *Plumley*. Ricco argues that the FLSA merely defines "regular rate," and that although the definition of "regular rate" excludes payment for occasional periods where no work is performed due to certain causes, unlawful termination should not be so excluded. Because the FMLA and FLSA do not define the term "hours of service," Ricco urges this court to define the term to include those hours that an employee is deemed to have worked pursuant to a make-whole award issued by an arbitrator in order to effectuate the FMLA's purpose of "balanc[ing] the demands of the workplace with the needs of the family," and to discourage employers from unlawfully terminating employees to prevent them from meeting the hours-of-service requirement. Appellant's Br. at 17.

In response, the Postmaster argues that together the FMLA and the FLSA adequately define the term "hours of service." The Postmaster asserts that the legislative history of the FMLA, the pertinent provisions of the FLSA, and Supreme Court precedent interpreting the FLSA all indicate that the hours-of-service requirement does not include time for which an employee was paid but did not work or time spent on unpaid leave. The Postmaster further asserts that interpreting the term "hours of service" to include those hours that an employee is deemed to have worked pursuant to a make-whole award issued by an arbitrator would undermine the FMLA's purpose of allowing "employees to take *reasonable* leave . . . in a manner that accommodates the legitimate interests of the employer." Appellee's Br. at 12.

The FMLA entitles eligible employees to twelve weeks of unpaid leave during any twelve-month period for certain statutorily prescribed reasons. 29 U.S.C. § 2612(a)(1). The FMLA defines the term "eligible employee" as:

> an employee who has been employed —
>
> (i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and
>
> (ii) for at least 1,250 hours of service with such employer during the previous 12-month period.

29 U.S.C. § 2611(2)(A).(4) The FMLA does not define the term "hours of service"; however, it does specify: "For purposes of determining whether an employee meets the hours of service requirement specified in subparagraph (A)(ii), the legal standards established under section 207 of this title shall apply." *Id.* at (2)(C). The applicable regulations explain, "The determining factor is the number of hours

an employee has worked for the employer within the meaning of the FLSA." 29 C.F.R. § 825.110.

Section 7 of the FLSA does not define the term "hours of service," but it does provide in its definition of "regular rate" standards for determining the rate at which employees must be compensated for engaging in overtime work.(5) FLSA, ch. 676, § 52 Stat 1060 (1938) (codified as 29 U.S.C. § 207) ("§ 207"). The FLSA specifies that an employee's "regular rate" of compensation does not include, among other things,

> (2)payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, *or other similar cause*; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar *payments to an employee which are not made as compensation for his hours of employment*[.]

29 U.S.C. § 207(e) (emphases added). The applicable regulations explain:

> This provision of section 7(e)(2) deals with the type of absences which are infrequent or sporadic or unpredictable. It has no relation to regular "absences" such as lunch periods nor to regularly scheduled days of rest. . . .
>
> . . .
>
> . . . The term "other similar cause" refers to payments made for periods of absence due to factors like holidays, vacations, sickness, and failure of the employer to provide work. Examples of "similar causes" are absences due to jury service, reporting to a draft board, attending a funeral of a family member, inability to reach the workplace because of weather conditions. Only absences of a nonroutine character which are infrequent or sporadic or unpredictable are included in the "other similar cause" category.

29 C.F.R. § 778.218(b), (d).

In *Plumley*, the First Circuit concluded that these statutes and regulations indicate that the hours-of-service requirement includes only hours that the employee actually worked, not hours for which an employee was compensated pursuant to an arbitration award. 303 F.3d at 370-73. No other circuit has addressed this issue.

It is true that neither the FMLA nor the FLSA defines the term "hours of service," but the FMLA specifies that an employee's "hours of service" are to be calculated according to the standards contained in § 207. Examination of § 207 leads to the conclusion that the only plausibly applicable standards are those contained in the definition of the term "regular rate." In response to public comment, the Department of Labor stated that the legislative history of the FMLA indicates that "the minimum hours of service requirement is meant to be construed in a manner consistent with the legal principles established for determining hours of work for payment of overtime compensation." Summary of Comments, 60 Fed. Reg. 2186 (January 6, 1995). It is also true, however, that § 207 limits additional unenumerated exclusions from the determination of an employee's "regular rate" to "other similar causes," and that time that an employee does not work due to vacation or illness is conceptually dissimilar from time that an employee does not work due to unlawful termination.

We conclude that time that an employee would have worked but for her unlawful termination is not an "other similar cause" within the meaning of § 207. Such hours are different from occasional hours of absence due to vacation, holiday, illness, and the employer's failure to provide work, etc., in that they are hours that the employee wanted to work but was *unlawfully prevented* by the employer from

working. Section 207 does not clearly prevent such hours from counting, and the purpose of the FMLA's hours-of-service requirement is properly served by including these hours. In such cases, the employer's unlawful conduct has prevented the employee from satisfying the hours-of-service requirement. Moreover, denying employees credit towards the hours-of-service requirement for hours that they would have worked, but for their unlawful termination, rewards employers for their unlawful conduct. We conclude that neither the FMLA nor the FLSA addresses directly the situation in this case involving hours that an employee would have worked but for her unlawful prior termination by her employer.

We note that back-pay awards often include payment for overtime work that an employee would have performed but for her employer's violation of employment laws. *See, e.g., United States v. City of Warren*, 138 F.3d 1083, 1097 (6th Cir. 1998) (upholding an award of lost overtime granted to prevailing plaintiffs in a Title VII case); *EEOC v. Ky. State Police Dep't*, 80 F.3d 1086, 1100 (6th Cir.) (upholding an award of lost overtime payments granted to prevailing plaintiffs in an Age Discrimination in Employment Act case), *cert. denied*, 519 U.S. 963 (1996). Such back-pay awards involve two calculations — (1) determining the number of overtime hours the employee likely would have worked but for her unlawful termination; and (2) determining the employee's likely rate of overtime pay. While the calculations contained in § 207 are necessary to determine the employee's likely rate of overtime pay, they have nothing to do with the determination of how many hours the employee likely would have worked but for her unlawful termination. When calculating a back-pay award, the determination of how many hours the employee likely would have worked but for her unlawful termination is typically based upon the employee's work history. Similarly, when calculating the credit towards the hours-of-service requirement due as part of a make-whole award, the determination of how many hours the employee likely would have worked but for her unlawful termination should also be based upon her employment history.

The goal of a make-whole award is to put the employee in the same position that she would have been in had her employer not engaged in the unlawful conduct; this includes giving the employee credit towards the FMLA's hours-of-service requirement for hours that the employee would have worked but for her unlawful termination. The district court must determine in the first instance the number of hours that Ricco would have worked but for her unlawful termination in order to ascertain Ricco's eligibility under the hours-of-service requirement for FMLA leave.

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the district court's order granting the Postmaster's motion to dismiss pursuant to Rule 12(b)(6) and **REMAND** this case for further proceedings consistent with this opinion.

CONCURRENCE

MERRITT, Circuit Judge, concurring. The defendant-employer in this case discharged plaintiff wrongfully, preventing her continued work, according to a now-final, arbitration award, and thereby prevented her from qualifying for benefits under the Family Medical Leave Act. I concur in the Court's opinion and simply add the idea that a contrary decision would contravene fundamental general principles of restitution and equitable remedies of long standing by allowing the employer to profit from its own infringement of the plaintiff's right to the statutory benefits derived from her own labor.

The remedies provided by the Family Medical Leave Act and the Fair Labor Standard Act are make-whole, equitable remedies, as the Court's opinion suggests. The Restatement of Restitution in its introductory note sets out the underlying principle:

> The principles expressed in this Chapter represent not only a large body of contemporary, "positive' law but also a view of justice traceable to Roman law and beyond. The central idea is the conjunction of unjust enrichment on the one side and loss of grievance on the other. Rules of liability in restitution depend in part on the wrongful acquisition of gain and in part on harm or loss wrongfully imposed. In some cases the fact that a person has acquired a gain by wrongdoing is the principal reason for requiring him to make restitution.

The first section of the Restatement then provides:

> **§ 1. The General Principle: Unjust Enrichment**
>
> A person who receives a benefit by reason of an infringement of another person's interest, or of loss suffered by the other, owes restitution to him in the manner and amount necessary to prevent unjust enrichment.

American Law Institute, *Restatement of the Law 2d*, Tent. Draft 1, pp. 7-8 (April 5, 1983). See also *Lightly v. Qouston*, 127 Eng. Rep. 774 (C.P. 1808) in which Lord Mansfield applied the restitution concept to the appropriation of the right of an employee of his labor, upholding an action in the form of assumpsit for work and labor wrongly prevented by the defendant. See Palmer, *Law of Restitution* § 2.1, n. 5 (1978), discussing the *Lightly* case in a modern context. This same fundamental principle of restitution should be applied in this case where the employer wrongfully prevented the labor of the employee thereby through its action denying the employee the benefit of family medical leave. To leave the status quo in place would unjustly enrich the employer at the expense of the employee.

Footnotes

[*] The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] Because this is an appeal from the district court's judgment granting the Postmaster's motion to dismiss under Rule 12(b)(6), we recite the facts as they are recounted in Ricco's amended complaint.

[2] To be an "eligible employee" under the Family and Medical Leave Act of 1993 ("FMLA") an employee must have worked for her employer for at least twelve months and must have completed "at least 1,250 hours of service with such employer during the pervious 12-month period." 29 U.S.C. § 2611(2)(A).

[3] In her amended complaint, Ricco avers that her December 1997 termination was "unlawful." Because this is an appeal from the district court's judgment granting the Postmaster's motion to dismiss under Rule 12(b)(6), we must assume that the arbitrator did, in fact, determine that Ricco's December 1997 termination was unlawful.

[4] The determination of whether an employee meets the FMLA's eligibility requirements is made in reference to the date the employee commences his or her leave, not the day the employer takes an

adverse action against the employee. *Butler v. Owens-Brockway Plastic Prods., Inc.*, 199 F.3d 314, 316 (6th Cir. 1999).

5 Under the FLSA, an employee must be compensated for overtime work at a rate "not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1).

In the
United States Court of Appeals
For the Seventh Circuit

No. 03-4204

RODNEY HARRELL,

Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 02 C 2056—**Michael P. McCuskey**, *Chief Judge*.

ARGUED SEPTEMBER 24, 2004—DECIDED JULY 19, 2005
REARGUED DECEMBER 9, 2005—DECIDED MAY 4, 2006

Before FLAUM, *Chief Judge*, and RIPPLE and WILLIAMS, *Circuit Judges*.

RIPPLE, *Circuit Judge*. Rodney Harrell filed this action against his former employer, the United States Postal Service ("USPS" or "Postal Service"), alleging violations of the Family and Medical Leave Act ("FMLA" or "Act"), 29 U.S.C. § 2601 et seq. The parties filed cross-motions for summary judgment, and the district court granted summary judgment in favor of the Postal Service. Mr. Harrell appealed. This panel initially affirmed in part and reversed in part the judgment of the district court. On the petition of the

Postal Service, with the United States Department of Labor ("Department") as amicus curiae, the panel granted rehearing. For the reasons set forth in the following opinion, we affirm the judgment of the district court in its entirety.

I

BACKGROUND

A. Facts

Mr. Harrell began working for the Postal Service in 1984 as a clerk at the Decatur, Illinois post office. He was a member of a collective bargaining unit represented by the American Postal Workers Union, AFL-CIO ("APWU" or "Union"), and he was covered by a national collective bargaining agreement between the APWU and the Postal Service known as the National Agreement.

On February 2, 2000, Mr. Harrell felt ill and left work early. On February 10, 2000, he submitted to the Postal Service a medical form completed by his physician, Dr. Robert Smith, which certified that his absence was due to fatigue, stress, sleep disturbance and difficulty concentrating. Dr. Smith indicated that the health problems had begun on February 2 and probably would last four weeks. On February 23, 2000, Mr. Harrell submitted a second health certification, in which Dr. Smith estimated that he would be able to resume work on March 6, 2000.

The Postal Service responded by a letter dated February 23, 2000, and advised Mr. Harrell that, according to postal regulations, in order to return to work,

> (1) You must submit medical documentation outlining the nature and treatment of the illness or injury, the

> inclusive dates you were unable to work, and any medicines you are taking. This medical information is to be reviewed by the Postal Medical Officer.
>
> (2) You may be required to be examined by the Postal Medical Officer after your documentation is reviewed. The bill for this release for work exam will be paid by the Postal Service.

R.27, Ex.A, Ex.3. Mr. Harrell maintains that he did not receive this letter until March 7, 2000.

Mr. Harrell attempted to return to his job on March 6. However, Jane Cussins, the Decatur post office supervisor, informed him that he had not been cleared to return to work; at that time she explained the applicable postal regulations to Mr. Harrell. In order to facilitate the clearance process, Cussins made him an appointment for an examination by the USPS-contract physician for later that morning. Mr. Harrell went to the physician's office, but he refused to consent to an examination because he believed that he already had provided the Postal Service with sufficient medical information to entitle him, under the FMLA, to return to work. Mr. Harrell returned to Cussins' office, and she told him that she would fax the documentation submitted by Mr. Harrell to the postal nurse for review.

The postal nurse reviewed the February 10 and February 22 certifications submitted by Mr. Harrell, and she concluded that the information was insufficient to clear him for duty. Specifically, the forms had no information about continuing medications, restrictions on Mr. Harrell's ability to work or when he had been declared fit to return to work. On March 10, 2000, the postal nurse called Mr. Harrell to obtain his physician's contact information; he refused to provide the information and expressly stated that he did not

want her to contact his physician. Two weeks later, nonetheless, the postal nurse faxed a return-to-work form to Dr. Smith's office. The office refused to release any medical information without Mr. Harrell's consent.

In the meantime, the Postal Service mailed Mr. Harrell a letter dated March 9, 2000, reminding him that

> employees returning to duty after 21 days or more of absence due to illness or serious injury require medical certification. This certification must include evidence of your ability to return to work, with or without limitations. A medical officer or contract physician evaluates the medical report and makes a medical assessment as to your ability to return to work before you are allowed to return.

R.27, Ex.A, Ex.5. The letter also explained that the forms prepared by Dr. Smith, which had explained Mr. Harrell's need for leave, were insufficient to clear him for duty because they did not describe the nature of treatment he received or list any medications he was taking. Finally, the letter advised that, if he did not present appropriate documentation within five days, he would be considered absent without leave and subject to discipline, including removal. This letter was sent by both regular and certified mail.

On March 15, 2000, having not received a reply from Mr. Harrell, the Postal Service mailed him another letter (also via regular and certified mail) which declared him absent without leave and scheduled a predisciplinary hearing for March 17. The letter advised that failure to appear could result in disciplinary action, including removal. On March 22, the Postal Service sent Mr. Harrell a notice of removal.

On March 21, 2000, Mr. Harrell sent a letter to the Postal Service. He maintained that he had not received the March 9 and March 15 warning letters until March 20. He also asserted that the medical documentation he had provided in order to qualify his absence as FMLA leave was sufficient by law to entitle him to return to work. Despite this belief, Mr. Harrell returned to Dr. Smith and obtained a return-to-work certification. The certification, dated March 23, 2000, stated that Mr. Harrell was "fit to return to work without restrictions." R.27, Ex.A, Ex.7.

The Postal Service responded to Mr. Harrell by letter on March 31, 2000, which advised:

> You were notified in writing on February 23, 2000, that this medical documentation had to include the nature of treatment of your illness and any medicines you were taking. You have again failed to provide medical documentation adequate for the Postal Medical Officer to make a determination as to your ability to return to work.
>
> In conclusion, we want the opportunity to review medical documentation from your attending physician that includes all the required information. We have scheduled the following appointment for you to be examined by the Postal contract physician.

R.22, Ex.6, Ex.10. Mr. Harrell again refused to provide further information or to submit to an examination. By letter dated April 27, 2000, the Postal Service terminated his employment.

B. District Court Proceedings

Mr. Harrell alleged that the Postal Service violated the FMLA in five ways: (1) failing to restore him to work after he presented a medical clearance; (2) requiring him to submit to a medical examination by a USPS-contract physician prior to allowing him to return to work; (3) terminating his employment because he took FMLA leave; (4) contacting his physician without his consent; and (5) failing to provide him with notice of the Postal Service's return-to-work requirements and the consequences of not complying with those requirements. The parties filed cross-motions for summary judgment, and the district court granted summary judgment in favor of the Postal Service.

1.

With respect to Mr. Harrell's first three claims, the Postal Service asserted that the conditions it had placed on his return to work were permitted by the National Agreement that incorporated by reference the postal handbooks and manuals governing employees' leave. Specifically, the Postal Service contended that any return-to-work certification requirements included in a collective bargaining agreement ("CBA") take precedence over the FMLA's return-to-work provisions under 29 U.S.C. § 2614(a)(4), which provides that employers may impose

> a uniformly applied practice or policy that requires each employee to receive certification from the health care provider of the employee that the employee is able to resume work, *except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.*

Id. (emphasis added).

Mr. Harrell contended that the Postal Service was precluded from arguing that the National Agreement incorporated the postal regulations governing return to work after FMLA leave because the Postal Service previously made, and lost, the same argument in a different case. The district court, however, determined that *United States v. Mendoza*, 464 U.S. 154, 162 (1984), did not allow Mr. Harrell to invoke the doctrine of collateral estoppel offensively against the United States based on a litigation to which he was not a party.

The district court then concluded that the postal handbooks and manuals are part of the National Agreement. It further determined that, because the postal regulations had the force of a valid collective bargaining agreement, those regulations, and not the FMLA's provisions, controlled Mr. Harrell's right to reinstatement. In addition, the district court found that the postal regulations justified the Postal Service's requirement that Mr. Harrell provide more detailed medical documentation from his health care provider or submit to a medical examination by a USPS-contract physician. Moreover, the district court believed that such requirements did not diminish any substantive right provided by the FMLA. The court took the view that

> USPS employees always have the right guaranteed by the FMLA to be restored to their employment following FMLA leave. The agreement and the USPS regulations merely alter the procedure by which employees go about being restored.
>
> It is possible to imagine a situation in which altering the procedure attached to a certain substantive right would in essence impinge on or prohibit the exercise of that right. This case does not present such a situation,

> however, given the modest and seemingly simple certification process the USPS imposes for employees who exceed 21 days of FMLA leave. Cussins was able to make Harrell an appointment with the contract doctor on the very morning he sought to return to work. Alternatively, the [postal nurse] needed only two single-sided forms filled out by a doctor, noting Harrell's condition, treatment, medication, and work restrictions. Neither process is so onerous that it effectively abrogates Harrell's right of restoration under the FMLA.

R.41 at 9.

2.

Next, the district court granted the Postal Service summary judgment on the claim that it had failed to provide Mr. Harrell with adequate notice of the requirements for returning to work and of the consequences for not meeting those requirements. *See* 29 C.F.R. § 825.310(c). The district court pointed to Mr. Harrell's "deposition testimony in which he admits that he was aware of the USPS regulations concerning returning to work following an absence of more than 21 days." R.41 at 11. The court noted, moreover, that Mr. Harrell was informed of the return-to-work requirements by the letters from the Postal Service and by Cussins, to whom he had spoken when he attempted to return to work.

3.

Finally, the district court granted the Postal Service summary judgment on Mr. Harrell's claim that the Postal Service had violated the FMLA by contacting his personal

physician without his consent. *See* 29 C.F.R. § 825.310(c). Although the district court found that a violation had occurred, it dismissed the claim because Mr. Harrell had suffered no injury in that Dr. Smith's office did not release any information that contributed to his termination.

II

DISCUSSION

A. Standard of Review

We review a district court's grant or denial of summary judgment de novo. *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1048 (7th Cir. 2000). In doing so, we construe all facts and reasonable inferences in the light most favorable to the nonmoving party. *Id.* Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

B. Failure to Return to Work

Congress enacted the FMLA in order to assist workers in meeting the needs of their families and the demands of their jobs. *See Price v. City of Fort Wayne*, 117 F.3d 1022, 1023 (7th Cir. 1997). The statute responded to the perception that

> [p]rivate sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family. This failure continues to

> impose a heavy burden on families, employees, employers and the broader society. [This legislation] provides a sensible response to the growing conflict between work and family by establishing a right to unpaid family and medical leave for all workers covered under the act.

S. Rep. No. 103-3, at 4 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2, 6 ("S. Rep. 103-3"). The FMLA makes available to eligible employees up to twelve weeks of leave during any twelve-month period for one or more of the following reasons: (1) the birth of the employee's child; (2) the placement of a child with the employee for adoption or foster care; (3) the care of the employee's child, spouse or parent who has a serious health condition; and (4) the inability of the employee himself to perform the functions of his position because of a serious health condition. 29 U.S.C. § 2612(a)(1). At the conclusion of a qualified-leave period, the employee is entitled to return to his former position of employment, or to an equivalent one, with the same terms and benefits. *Id*. § 2614(a)(1);[1] *see also* 29 C.F.R. § 825.214(a). To protect these

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[1] Section 2614(a)(1) provides:

> (1) In general
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> Except as provided in subsection (b) of this section, any eligible employee who takes leave under section 2612 of this title for the intended purpose of the leave shall be entitled, on return from such leave—
>
> (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or
>
> (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and

(continued...)

rights, the FMLA declares it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided." 29 U.S.C. § 2615(a)(1). In this case, Mr. Harrell contends that the Postal Service violated his rights under the FMLA by refusing to return him to his position after his physician provided an unqualified certification of his fitness to return to duty.

An employee's right to return to work after taking FMLA leave is not unlimited. The Act seeks to accomplish its purposes "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(3); *see also* 29 C.F.R. § 825.101(b) ("The enactment of the FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations."). An employee is not entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." 29 U.S.C. § 2614(a)(3)(B); *see also* 29 C.F.R. § 825.216(a) ("An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period."). An employee returning from FMLA leave also is not entitled to restoration if he cannot perform the essential functions of the position or an equivalent position.[2] 29 C.F.R.

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[1] (...continued)
conditions of employment.

29 U.S.C. § 2614(a)(1).

[2] The Department of Labor regulations discuss an employee's right to restoration:

(continued...)

§ 825.214(b).

In addition, the Act permits an employer, as a condition of restoring employees who take FMLA leave, to have a policy that requires all such employees to obtain medical certification from their personal health care provider indicating that the employee is able to resume work. 29 U.S.C. § 2614(a)(4). The Act provides that nothing in § 2614(a)(4) "shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of employees." *Id.* The interplay between the FMLA's return-to-work provisions and a CBA that governs the return of employees who take leave due to a serious health condition is discussed in the statute's accompanying regulations:

> (a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable

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(...continued)

> (a) On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions or employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See also* § 825.106(e) for the obligations of joint employers.
>
> (b) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act (ADA). *See* § 825.702.

29 C.F.R. § 825.214.

> to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.
>
> (b) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. . . .
>
> (c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

29 C.F.R. § 825.310(a)-(c).

In the present case, the Postal Service maintains that it had the right, under the FMLA, to require Mr. Harrell to provide sufficient medical documentation from his health care provider or to be cleared for duty by a USPS-contract physician, as a condition of returning to work. In the Postal

Service's view it appropriately employed, under 29 U.S.C. § 2614(a)(4), a uniform practice requiring employees to provide a fitness-for-duty certification from their personal health care provider; and, although the accompanying regulations provide that this certification need only be a simple statement of the employee's ability to work, *see* 29 C.F.R. § 825.310(c), the FMLA's certification provisions do not supersede a valid collective bargaining agreement that governs return to work for such employees, *see* 29 U.S.C. § 2614(a)(4); 29 C.F.R. § 825.310(b).

Mr. Harrell challenges this theory on four grounds: (1) collateral estoppel forecloses the Postal Service from arguing that the terms of the National Agreement allow it to limit postal employees' right to return to work after FMLA leave; (2) the postal handbooks and manuals are not part of the National Agreement; (3) the postal return-to-work provisions are invalid because they diminish a substantive right afforded by the FMLA; and (4) the requirements imposed by the Postal Service in this case contravened the postal return-to-work provisions. We shall address these issues in turn.

1. Collateral Estoppel

Mr. Harrell first contends that the Postal Service is precluded from arguing that its handbooks and manuals are negotiated parts of the National Agreement because it raised and lost this argument in *Routes v. Henderson*, 58 F. Supp. 2d 959, 994 (S.D. Ind. 1999). The doctrine of collateral estoppel provides that "once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation." *Mendoza*, 464 U.S. at 158. The "offensive use of collateral estoppel occurs when

a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party." *Id*. at 159 n.4. Mr. Harrell seeks to invoke nonmutual collateral estoppel, which occurs when the plaintiff was a nonparty to the prior lawsuit. *Id*. The district court determined that applying this doctrine against the Postal Service was not appropriate. We review a district court's decision whether to apply offensive collateral estoppel for an abuse of discretion. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979).

As the district court recognized, the Supreme Court has established that nonmutual offensive collateral estoppel does not extend to litigation against the United States. *Mendoza*, 464 U.S. at 162. The United States differs from private litigants in that its litigation is geographically broad and often involves issues of national significance. *Id*. at 159-60. Among other concerns expressed by the Court, precluding the United States from relitigating issues against different parties would "thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue" and would "deprive th[e] Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before" it grants certiorari. *Id*. at 160.

Mr. Harrell submits that *Mendoza* does not apply in this case because Congress has placed the Postal Service on the same footing as a private litigant by authorizing it to "sue and be sued." 39 U.S.C. § 401. Mr. Harrell reads too much into this waiver of immunity: That the Postal Service is amenable to the judicial process does not "change the fact that the party being sued is still the federal government." *In re Young*, 869 F.2d 158, 159 (2d Cir. 1989) (per curiam). Indeed, Congress has provided that the Postal Service "is

part of the executive branch of government, that its employees are part of the federal civil service, and that it possesses certain powers unique to governmental entities, such as the authority to exercise the power of eminent domain in the name of the United States." *Baker v. Runyon*, 114 F.3d 668, 670-71 (7th Cir. 1997) (citing 39 U.S.C. §§ 201, 1001(b) & 401(9)). The "sue and be sued" provision, if anything, indicates that "waiver of sovereign immunity is necessary solely because the Postal Service is a government agency." *Id*. (citing *Western Sec. Co. v. Derwinski*, 937 F.2d 1276, 1280 (7th Cir. 1991) (stating that the "sue or be sued" clause "permit[s] the suit to go forward notwithstanding that it is a suit against a federal agency")); *see also United States Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 744 (2004) ("While Congress waived the immunity of the Postal Service, Congress did not strip it of its governmental status."). Accordingly, we conclude that the district court did not abuse its discretion in concluding that the use of collateral estoppel was not appropriate in this case, and, thus, the Postal Service may argue that the National Agreement incorporates the postal handbooks and manuals that relate to employees' return to work.

2. Incorporation

The premise underlying the Postal Service's position in this case is that the National Agreement incorporates by reference the regulations in the postal handbooks and manuals that govern an employee's return to work after taking leave for a serious health condition. The Postal Service relies upon Article 19 of the agreement, which reads:

> 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. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's instructions.

R.27, Ex.I, Ex.1 at 123.

Mr. Harrell argues that this paragraph is too vague and general to incorporate the contents of the postal handbooks and manuals into the collective bargaining agreement. He also relies on the declaration of Greg Bell, the director of industrial relations for the APWU, who attests that the postal handbooks and manuals are not part of the National Agreement because they were promulgated unilaterally by the Postal Service, rather than through any collective bargaining between the Postal Service and the APWU. *See* R.27, Ex.I at ¶ 10.

Other courts of appeals, by contrast, have concluded in analogous contexts that the provisions contained in the postal handbooks and manuals that affect working conditions are incorporated by reference into the National Agreement. *See Woodman v. Runyon*, 132 F.3d 1330, 1334 (10th Cir. 1997) (noting that the postal manual governing injury compensation was part of the National Agreement because "Article 19 . . . incorporates those parts of all USPS handbooks, manuals and published regulations which directly relate to wages, hours, or working conditions"); *Kroll v. United States*, 58 F.3d 1087, 1091 (6th Cir. 1995) (concluding that Postal Service employee suggestion program was incorporated into the National Agreement through the postal manual because Article 19 "incorporates by reference all

parts of postal handbooks, manuals, and regulations that 'directly relate to wages, hours, or working conditions' ").

Indeed, the APWU itself has argued in other litigation that Article 19 incorporates the postal handbooks and manuals into the National Agreement. For instance, in *United States Postal Service v. American Postal Workers Union*, 922 F.2d 256 (5th Cir. 1991), the Fifth Circuit noted that,

> [a]lthough article 19 states that nothing in the handbooks, manuals and regulations shall conflict with the Agreement, it does not specifically state that the Agreement incorporates these texts. Thomas A. Neill, Director of Industrial Relations for the APWU, whose duties include negotiation of the National Agreement and administration of the grievance procedure, states in his "declaration" that "[t]he handbooks and manuals are applied in labor relations between the APWU and USPS as part of the National Agreement." These texts, Neill adds, are incorporated by reference into the Agreement and arbitrators routinely interpret them in deciding grievance arbitration cases. The Postal Service does not dispute Neill's sworn declaration.

Id. at 259 n.2.

In light of the fact that both parties to the National Agreement have maintained previously that the postal handbooks and manual affecting working conditions are incorporated by reference into that agreement, Mr. Harrell stands in a weak position to assert otherwise. We agree with our sister circuits that Article 19 is sufficient to incorporate the postal handbooks and manuals relating to wages, hours or working conditions into the National Agreement. Certainly, the postal handbooks and manuals that govern an employee's return to work after an extended absence relate to wages, hours or working conditions.

3. Diminishment of FMLA Rights

Mr. Harrell next contends that, even if the postal return-to-work regulations are part of a valid collective bargaining agreement, the Postal Service was not allowed to impose any condition on his return that is more stringent than what is specifically allowed by the FMLA, and, by doing so, the Postal Service violated rights protected by the FMLA. The Postal Service takes the opposite view. It maintains that the FMLA allows for a more stringent return-to-work certification if required by state law or if set forth in a CBA. Thus we arrive at the pivotal issue in this case: Whether the Postal Service can rely upon return-to-work regulations incorporated into a valid collective bargaining agreement to impose requirements on employees that are more burdensome than what is set forth in the statute. To resolve this issue, we begin with the language of the statute, specifically 29 U.S.C. §§ 2614(a)(4) and 2652. If the intent of Congress, as expressed in the language of the statute, is clear with respect to this issue, then "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). However, "if the statute is silent or ambiguous with respect to the specific issue," the court must defer to the agency's answer if it "is based on a permissible construction of the statute." *Id.* at 843. Generally speaking, an agency's interpretation of a statute that it administers is "permissible" if it is "reasonable." *Id.* at 845.

Section 2614(a)(4) permits employers to impose, as a condition of returning to work,

> a uniformly applied practice or policy that requires each employee to receive certification from the health care provider of the employee that the employee is able to

> resume work, except that nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees.

29 U.S.C. § 2614(a)(4). The legislative history for this section notes that the last phrase "clarifies that [§ 2614(a)(4)] was not meant to supersede other valid State or local laws or collective bargaining agreement that, for reasons such as public health, might affect the medical certification required for the return to work of an employee who had been on medical leave." S. Rep. 103-3 at 32.

Section 2652, in turn, reads:

> (a) More protective
>
> Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established under this Act or any amendment made by this Act.
>
> (b) Less protective
>
> The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan.

29 U.S.C. § 2652. The legislative history to this section adds that "[subsection (a)] specifies that employees must continue to comply with collective bargaining agreements or employment benefit plans providing greater benefits than the act. Conversely, [subsection (b)] makes clear that rights under the act cannot be taken away to collective bargaining or employer plans." S. Rep. 103-3 at 38; *see also id*. at 47 (ex-

plaining that under § 2652 nothing in the FMLA "shall diminish an employer's obligation under a collective bargaining agreement or employment benefit plan to provide greater leave rights nor may the rights provided under this title be diminished by such agreement or plan").

As noted above, Mr. Harrell believes that the Postal Service's insistence on a detailed return-to-work statement violated the FMLA. He asserts that, although the Postal Service was allowed to have a uniform fitness certification policy under 29 U.S.C. § 2614(a)(4), this provision is limited by the language of 29 U.S.C. § 2652(b) which provides that "[t]he rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan." Therefore, as these provisions apply to his case, Mr. Harrell submits that, because Dr. Smith cleared him for work without restrictions, the Postal Service was not authorized to impose a more stringent certification requirement, even if such a requirement was part of the governing collective bargaining agreement.

The Postal Service and the Department of Labor urge a different interpretation of these provisions. They maintain that § 2614(a)(4), with its deference to "a valid State or local law or a collective bargaining agreement," defines the "right" to return to work as guaranteed by the FMLA. The Postal Service goes on to explain that,

> [b]ecause an employee has no right under the Act to circumvent a collective bargaining provision governing his return to work, applying section 2614 to require additional certification measures does not "diminish" any "right established for employees under th[e] Act," and therefore does not contravene section 2652.

Rehearing Pet. at 11.

Both parties urge that we need not look beyond the statutory language to resolve the question at hand—whether a CBA can impose a more stringent return-to-work requirement than a simple certification by the employee's own physician. We do not believe this to be the case. Here, § 2614 provides that an employer may have a certification requirement, but further provides that "nothing in this paragraph shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of such employees"; § 2652 states that nothing in the Act "shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement . . . that provides greater family or medical leave rights to employees than the rights established under this Act" and further states that rights provided by the FMLA "shall not be diminished by any collective bargaining agreement or any employment benefit program or plan."

There are two possible ways to reconcile these provisions. The first is the interpretation urged by Mr. Harrell—that a CBA can provide greater, but not fewer, rights to employees. This interpretation, however, renders the last clause of § 2614(a)(4) superfluous, a result that we usually try to avoid. *See, e.g.*, *United States v. Alvarenga-Silva*, 324 F.3d 884, 887 (7th Cir. 2003) ("Courts should avoid statutory constructions that render another part of the same provision superfluous."). The second possible interpretation—the one urged by the Postal Service—is to read § 2614(a)(4) as an exception to the general rule set forth in § 2652. Such a reading is consonant with general canons of statutory interpretation, *see United States v. Salerno*, 108 F.3d 730, 737 (7th Cir. 1997) (describing the "cannon [sic] of statutory interpretation that a more specific statutory provision takes precedence over

a more general provision"); however, Congress' intent to limit the operation of § 2652 with respect to return-to-work provisions could have been made clearer through the use of a cross-reference to § 2614(a)(4). Given the shortcomings with each interpretation, we are not able to conclude that Congress *clearly* addressed the question at issue through the statutory language. We therefore may turn to the interpretive regulations to resolve the issue.

Chevron instructs that we must defer to the reasonable interpretation of an agency tasked with administering the statute. Whether an interpretation is reasonable involves a two-step inquiry. The first step requires that the court identify the agency's position on the specific issue. The second step requires a determination of whether the agency's position is a principled one. *Chevron*, 467 U.S. at 844.

Here, Mr. Harrell maintains that the interpretation of § 2614(a)(4) set forth in the Department of Labor's regulation is no more than a restatement of the language of the statute and, therefore, is not worthy of deference. Although such an argument does find support in recent Supreme Court case law,[3] we find it unpersuasive with respect to the regulation at issue. It is true that part of the implementing regulation, 29 C.F.R. § 825.310,[4] follows closely the language of the statute; however, the regulation goes beyond the mere recitation of the statutory language and speaks to the issue

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[3] *See Gonzales v. Oregon*, 126 S. Ct. 904, 915 (2006) (rejecting the Government's argument that an interpretive rule was worthy of deference under *Auer v. Robbins*, 519 U.S. 452 (1997), in part because "the underlying regulation does little more than restate the terms of the statute itself").

[4] The relevant sections of 29 C.F.R. § 825.310 are set forth supra at 13.

presented in this case. First, the title of the regulation sets forth the question that the regulation purports to answer: "Under what circumstances may an employer require that an employee submit a medical certification that the employee is able (or unable) to return to work (i.e., a 'fitness-for-duty' report)?" 29 C.F.R. § 825.310. Subsection (a) then states the general proposition that, as a condition of restoring an employee to his or her position after FMLA leave, "an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees . . . who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work." 29 C.F.R. § 825.310(a). Subsection (b) speaks more directly to the situation presented here; it states:

> (b) *If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied.* Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

29 C.F.R. § 825.310(b) (emphasis added). Not only does subsection (b) clearly state that a CBA takes precedence over

the statutory requirements, the examples that follow illustrate that the Department of Labor does not believe that return-to-work requirements found in a CBA only can provide employees with greater protections than the statutory language. The last example discussing the warehouse laborer is particularly telling: A CBA that provided only greater rights to employees could not require a warehouse laborer, as a condition of returning to work, to be examined by an orthopedist; if the employee had obtained a return-to-work release from his general practitioner, that release, without more, would suffice under the statutory provisions of the FMLA. Thus subsection (b) not only provides for compliance with a CBA, it also indicates that the CBA may impose more stringent return-to-work requirements on the employee than those set forth in the statute.[5]

Having identified the agency's answer to the question,[6] the

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[5] Subsection (c) then goes on to describe the statutory protections set forth in the act for returning to work—those protections that are applied in the event subsection (b) is inapplicable. *See* 29 C.F.R. § 825.310(c), supra at 13.

[6] A Department of Labor Opinion Letter, Opinion Letter FMLA-113, further elucidates the Department's position vis-a-vis CBAs and establishes that the Department's position has remained consistent over time. The letter states:

> How FMLA's certification provisions interact with the terms of a CBA that govern an employee's reinstatement is specifically discussed in § 825.310(b) of the regulations. If the terms of the CBA, for instance, require a fitness-for-duty examination in addition to a return-to-work certification, then those terms apply with certain conditions. The FMLA, which has adopted the guidelines of the Americans with Disabilities Act (ADA), requires that any fitness-for-duty examination as

(continued...)

last inquiry is whether this interpretation is a reasonable one and, as a result, is entitled to deference from the courts. We believe that this final requirement also is met. First, there is support in the legislative history for this interpretation. As noted above, the portion of the Senate report that discusses § 2614(a)(4) states that the language of § 2614(a)(4)

> clarifies that section 104(a)(4) was not meant to supersede other valid State or local laws or collective bargaining agreement, that, for reasons such as public health, might affect the medical certification required for the return to work of an employee who had been on medical leave. For example, section 104(a)(4) does not supersede a State law that requires specific medical certification before the return to work of employees who have had a particular illness and who have direct contact with the public. . . .

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[6] (...continued)

> a condition for returning to work must be job-related and consistent with business necessity.
>
> . . . If the above-referenced return-to-work medical certification and fitness-for-duty examinations provisions in the handbook and manual are a part of the CBA as you have asked that we assume, then these provisions would apply instead of the FMLA's return-to-work certification requirements. . . .

Opinion Letter, FMLA-113 (September 11, 2000). Thus, the Department of Labor consistently has taken the position that § 2614(a)(4) means that return-to-work provisions set forth in a CBA, whether providing greater or fewer protections to employees than are explicitly set forth in the FMLA, take precedence over the statutory protections provided to employees in the Act.

S. Rep. 103-3, at 31 (1993). Additionally, the Department's interpretation avoids a construction of the statute that would render the last clause of § 2614(a)(4) superfluous. If that clause were interpreted to give CBA's precedence over the statutory protections only if those protections were greater than that provided in the Act, then § 2614(a)(4) and § 2652 would provide the same guarantees. Finally, the Department's interpretation of § 2614 gives effect to the rule of statutory construction that specific provisions take precedence over more general provisions. Section 2652 speaks in broad terms to the protections provided to employees by the Act; § 2614(a)(4), however, addresses a very specific issue—return-to-work certifications. Thus, with respect to the specific right to which § 2614(a)(4) is addressed—returning to work upon the certification of a physician—a CBA, state statute or local ordinance, may take precedence over the statutory protections provided by other places in the Act.[7]

Because the Department of Labor's regulations reasonably interpret § 2614(a)(4) to allow a CBA to impose stricter return-to-work restrictions than those otherwise incorporated into the FMLA, we defer to that interpretation and hold that the Postal Service did not violate the FMLA when it required Mr. Harrell to comply with the return-to-work provisions set forth in the handbooks and manuals incorpo-

[7] Mr. Harrell cites two district court opinions, *Marrero v. Camden County Board of Social Services*, 164 F. Supp. 2d 455 (D.N.J. 2001), and *Routes v. Henderson*, 58 F. Supp. 2d 959 (S.D. Ind. 1999), that reach a different conclusion. For the reasons set forth in this section, we respectfully disagree with those courts.

rated into the National Agreement.[8]

C. Contacting Employee's Health Care Provider

Despite Mr. Harrell's express refusal to give his consent, the postal nurse contacted his personal physician and requested additional medical information. The district court determined that this contact violated the FMLA, as provided in the statute's accompanying regulations:

> If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employer's health care provider. However, a health care provider

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[8] Mr. Harrell also argues that the Postal Service violated its own regulations when it required that he undergo an examination by a designated physician. He claims that the return-to-work requirements do not specifically reference the portion of the employee manual dedicated to FMLA leave, and, therefore, those requirements are not meant to apply to the FMLA section. We find this argument unpersuasive. Nothing in the language of the statute or regulation suggests that a CBA's return-to-work provisions must specifically reference the FMLA or cross-reference the section of the CBA dedicated to implementing the FMLA in order to be effective.

Mr. Harrell also points to statements by Postal Service administrators, regarding the requirements for returning to work after FMLA leave, made several years prior to Mr. Harrell's illness and attempted return-to-work. However, Mr. Harrell failed to establish either that these statements represented the current administrative practice under the existing CBA or Employee Labor Relations Manual, or that he relied upon these statements in refusing to undergo an examination by the Postal Service physician.

> representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.

29 C.F.R. § 825.307(a).

The rights established by the FMLA can be enforced through civil actions. Section 2615 makes it "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided." 29 U.S.C. § 2615(a)(1). An employer who violates this section shall be "liable to any eligible employee affected" for compensatory damages and "for such equitable relief as may be appropriate, including employment, reinstatement, and promotion." *Id*. § 2617(a)(1).[9] The district court ruled that Mr.Harrell was

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[9] The full text of § 2617(a)(1) reads:

> (a) Civil action by employees
>
> (1) Liability
>
> Any employer who violates section 2615 of this title shall be liable to any eligible employee affected—
>
> (A) for damages equal to—
>
> (i) the amount of—
>
> (I) any wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or
>
> (II) in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses sustained by the employee as a direct result

(continued...)

not entitled to any damages on this claim because the violation caused him no injury: Dr. Smith's office refused to release any medical information to the postal nurse absent Mr. Harrell's consent. This conclusion is correct. Our review of the record also found no indication that any information obtained from the postal nurse's contact with Dr. Smith's office in any way compromised Mr. Harrell's return-to-work status or was a factor in the Postal Service's decision to terminate his employment. Section 2617 affords

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(...continued)

> of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee;
>
> (ii) the interest on the amount described in clause (i) calculated at the prevailing rate; and
>
> (iii) an additional amount as liquidated damages equal to the sum of the amount described in clause (i) and the interest described in clause (ii), except that if an employer who has violated section 2615 of this title proves to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii), respectively; and
>
> (B) for such equitable relief as may be appropriate, including employment, reinstatement, and promotion.

29 U.S.C. § 2617(a)(1).

> no relief unless the employee has been prejudiced by the violation: The employer is liable only for compensation and benefits lost "by reason of the violation," § 2617(a)(1)(A)(i)(I), for other monetary losses sustained "as a direct result of the violation," § 2617(a)(1) (A)(i)(II), and for "appropriate" equitable relief, including employment, reinstatement, and promotion, § 2617(a)(1)(B). The remedy is tailored to the harm suffered.

Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 88-90 (2002).[10] Because Mr. Harrell was not harmed by the unauthorized contact with his physician, § 2617 provides him no remedy, including equitable relief, and the district court correctly granted the Postal Service summary judgment on this claim.

D. Notice Requirements

Finally, Mr. Harrell alleges that the Postal Service interfered with his FMLA rights by failing to provide him with

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[10] *See also Cianci v. Pettibone Corp.*, 152 F.3d 723, 728-29 (7th Cir. 1998) (holding that plaintiff had no claim under FMLA because she had suffered no diminution in income and incurred no costs as a result of alleged violation); *see also Cavin v. Honda of American Mfg., Inc.*, 346 F.3d 713, 726 (6th Cir. 2003) ("Even when an employee proves that his employer violated § 2615, '§ 2617 provides no relief unless the employee has been prejudiced by the violation' " (quoting *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 88-90 (2002)); *Sarno v. Douglas Elliman-Gibbons & Ives, Inc.*, 183 F.3d 155, 162 (2d Cir. 1999) (concluding that the FMLA does not give "an employee a right to sue the employer for failing to give notice of the terms of the Act where the lack of notice had no effect on the employee's exercise of or attempt to exercise any substantive right conferred by the Act").

timely and sufficient notice of the requirements for returning to work and of the consequences for failing to comply with those requirements. The Act's implementing regulations require that an employer must provide notice "detailing the specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations," 29 C.F.R. § 825.301(b), "within a reasonable time after notice of the need for leave is given by the employee—within one or two business days if feasible," *id*. § 825.301(c). If the employer fails to provide adequate and timely notice, it "may not take action against an employee for failure to comply with any provision required to be set forth in the notice." *Id*. § 825.301(f).

The district court concluded that Mr. Harrell's claim was "belied by his deposition testimony in which he admits that he was aware of the USPS regulations concerning returning to work following an absence of more than 21 days." R.41 at 11. The court found, moreover, that, upon realizing that Mr. Harrell's leave would exceed twenty-one days, Cussins mailed to him a letter outlining in detail the return-to-work certification requirements. In addition, Mr. Harrell discussed his alternatives with Cussins when he first had attempted to return to work.

Mr. Harrell contends that the Postal Service was required to inform him of his return-to-work obligations at the time he requested FMLA leave, not at the time he attempted to return to work. On February 2, and again on February 23, 2000, Mr. Harrell notified his supervisors that he might be absent for up to four weeks. The Postal Service initially advised him of its return-to-work requirements by letter dated February 23, 2000. Although, according to Mr. Harrell, he did not receive this letter until March 7 (the day after he attempted to return to work), nothing in the record suggests

that the Postal Service delayed in attempting to notify Mr. Harrell of his obligations within a reasonable time after he advised the Postal Service that he needed to take an extended absence.

Furthermore, even assuming that the Postal Service failed to provide adequate notice, Mr. Harrell was not harmed by this violation. On March 6, 2000, when Mr. Harrell attempted to return to work, he was told by Cussins what he needed to do in order to be cleared for work. By letters dated March 9 and March 15, 2000, the Postal Service reiterated to Mr. Harrell his return-to-work obligations and told him that he would be subject to removal if he failed to comply with those conditions. Then, when Mr. Harrell responded by letter on March 21, the Postal Service sent him another letter requesting an opportunity to review medical documentation from his health care provider and scheduling an appointment for him to be examined by a USPS-contract physician. Mr. Harrell again refused this request. The Postal Service did not terminate his employment until April 27, 2000.

This chronology demonstrates that Mr. Harrell had ample notice of the Postal Service's expectations and of his obligations related to returning to work. We conclude that, on this record, the district court's grant of summary judgment in favor of the Postal Service was appropriate on this claim.

Conclusion

Accordingly, for the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

A true Copy:

Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 05-2297

Denise R. Hite,	*	
	*	
Plaintiff - Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	Southern District of Iowa.
Vermeer Manufacturing Company; Rick Leedom,	*	
	*	
	*	
Defendants - Appellants.	*	

Submitted: January 11, 2006
Filed: May 9, 2006

Before MURPHY, HANSEN and SMITH, Circuit Judges.

SMITH, Circuit Judge.

Denise R. Hite sued her employer, Vermeer Manufacturing Company ("Vermeer") and her supervisor, Rick Leedom, for retaliation in violation of the Family Medical Leave Act (FMLA). The jury returned a verdict in favor of Hite and awarded her back pay. The district court awarded Hite front pay, liquidated damages plus interest, and attorney's fees. The district court[1] subsequently denied Vermeer's and Leedom's motions for judgment as a matter of law or for a new trial and to amend

[1]The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa.

or alter the judgment. Vermeer and Leedom appeal the denial of their post-trial motions. We affirm.

I. *Background*

We recite the facts in the light most favorable to the jury's verdict. *United States v. Selwyn*, 398 F.3d 1064, 1065 (8th Cir. 2005).

Denise Hite began working for Vermeer on December 15, 1997, as a drill operator and progressed to CNC lathe machine operator in May 1999. Prior to joining Vermeer, Hite had been diagnosed with major depressive disorder by her physician, Dr. Nancy Vander Broek. Major depressive episodes hampered Hite's work ability. Beginning in January 2000, Hite exercised her rights to take leave under the FMLA to address the severe depression bouts which recurred periodically in 2000 and 2001.

When Hite needed to use FMLA leave, she would contact her supervisor directly or leave a message for him prior to the start of her shift. In addition, Hite would notify Pam Montegna, Vermeer's FMLA Coordinator. Hite would then fill out a short-term disability application with Dr. Vander Broek to give to Montegna. Dr. Vander Broek would also certify when Hite could return to work.

In February 2001, Dr. Vander Broek recommended intermittent FMLA leave for Hite because of the sporadic nature of her illness. Intermittent leave enabled Hite to use FMLA leave for periods of time less than an entire shift. Hite used this intermittent FMLA leave when she arrived at work 15 or 30 minutes late or wanted to leave work early due to her condition.

Hite's difficulty exercising FMLA leave began when Rick Leedom became Hite's supervisor. From the beginning of his supervision, Leedom reacted negatively to Hite's use of FMLA leave. When Hite missed work, Leedom would question whether she was really sick under the FMLA guidelines. Leedom would call Hite into

his office and tell her he "couldn't see anything wrong with her" and therefore she "needed to be at work." He also said that because of her absences, her production levels would be called into question. In addition, Leedom commented to his assistant that FMLA was "bad for the company" and complained regularly to Martin Van Wyk, Vermeer's Human Resources Manager, and Montegna about Hite's use of FMLA leave.

Leedom also routinely transferred Hite to different machines upon her return from leave. The machines were of a lower classification than the CNC lathe machine and were more difficult for Hite to operate. Leedom informed Hite that he was transferring her because "the CNC lathe was a critical machine that needed to be run every day, every shift, 24 hours a day" and because of her FMLA leave. When Hite would complain to Van Wyk about Leedom moving her, she would eventually be returned to the CNC lathe machine; however, Leedom continued to transfer her to different machines. Her pay was never adversely affected by the transfers.

During employee evaluations on December 6, 2000, Leedom informed Hite that he would permanently remove her from the CNC lathe machine if she continued to use FMLA leave. The evaluation noted that Hite had seven unexcused absences, which were days that Hite used her FMLA leave. Leedom told Hite that if she continued to use FMLA leave, her job at Vermeer would be in jeopardy.

During January 2001, Hite used her vacation time because she was ill and wanted to receive pay. Vermeer's policy required the employee to call in and request a vacation day. The employee received the vacation day the same day she requested it. Pursuant to the policy, Hite called in on three consecutive days asking for vacation time. On the fourth day, however, Leedom called back and left a voice message on Hite's answering machine, stating that her vacation time was denied and that she must report to work the next day or she would lose her job. Leedom told Hite that for the rest of 2001, she had to give a 30-day notice to use her vacation days. Hite requested

vacation leave the day her grandfather died but was denied because of the 30-day notice Leedom imposed. Also Leedom disciplined Hite for every sick day that was not covered by FMLA, vacation time, or personal time, something that was solely at Leedom's discretion and for which he did not punish other employees.

Hite frequently complained to Van Wyk and Montegna about Leedom's reaction to her use of FMLA leave. Leedom treated Hite differently than other employees by citing her for minor rule violations not commonly used with other workers. After one such citation, Hite met with Leedom and Van Wyk regarding the disciplinary action. Hite refused to sign the disciplinary form. After the meeting, Hite had an anxiety attack and went to the FMLA office to meet with Montegna. Hite told Montegna that Leedom and Van Wyk were making it impossible for her to be at work and were harassing her about using FMLA leave. She expressed her fear that she would lose her job because of her complaints, as well as her use of FMLA leave. Montegna told Hite she would talk to Van Wyk about Hite's concerns. After that meeting, Hite went to see Dr. Vander Broek and took two weeks FMLA leave.

When Hite returned to work, she had another meeting with Montegna and Van Wyk. Prior to the meeting, Leedom requested that Van Wyk remove Hite from the CNC lathe machine because of her absences and their effect on productivity. During the meeting, Montegna, Van Wyk, and Hite decided that if Hite would agree to move to a different job, "all harassment and retaliation by Rick Leedom against [Hite] for [her] disability would be stopped." While the new machine Hite operated was more difficult for her to operate and was physically too demanding for her, she worked at the machine until her termination.

After Hite's transfer, Becky Nichols, a contract nurse hired by Vermeer, frequently contacted Dr. Vander Broek seeking "clarification" of Hite's use of FMLA

leave.[2] Hite never gave anyone at Vermeer permission to contact Dr. Vander Broek seeking information about her use of FMLA leave.

Hite's last use of FMLA leave was on June 14, 2001. About two months later, Hite requested and received permission from Leedom to place a cell phone call on company property.[3] On the same day, Leedom informed Human Resources Manager Cornelis Van Walbeek and, according to Van Walbeek's testimony, recommended to Van Walbeek that he terminate Hite. Subsequently, Van Walbeek summarized Hite's disciplinary history, taking into account Hite's entire disciplinary history contrary to company practice of only considering one year. Van Walbeek's review of Hite's attendance records familiarized him with Hite's FMLA usage.

Van Walbeek, Leedom, and Hite met on August 28, 2001. At the meeting, Hite was informed that she was being terminated for using her cell phone outside the plant and away from her machine during company time. When Hite tried to explain to Van Walbeek that Leedom gave her permission to use her cell phone prior to making the call, Van Walbeek responded that he did not care. In addition to the alleged cell phone policy violation, Van Walbeek considered additional disciplinary actions in

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[2]The FMLA prohibits Vermeer, an employer, from directly contacting an employee's doctor. Under the FMLA, Vermeer was to keep confidential all of its employees' medical information; however, it allowed Nichols to access Hite's confidential medical information because Nichols was an on-site medical advisor. Montegna testified that the regulations permitted Vermeer to have a person as the employer's representative contact the doctor for clarification, and that she reviewed this with her United States Department of Labor contact.

[3]Vermeer had no written cell phone usage policy at the time, and no other employee had ever been fired for improper use of a cell phone. Vermeer, however, had "communicated [its] expectations to employees" about cell phone use, telling its employees at departmental meetings that they should not use their cell phones on company time unless a supervisor approved it. At Vermeer, a policy violation can result in disciplinary action, including termination.

determining to terminate Hite's employment. As of August 24, 2001, Hite had received written warnings and received coaching and counseling ("C&C") regarding attendance, safety, and conduct on eleven occasions. Only four of the eleven disciplinary actions occurred within a year of her termination date.

Hite filed suit against Vermeer and Rick Leedom, alleging retaliation under the FMLA. At trial, Hite presented the testimony of Ruth Johnson and Stacy Wharton, former Vermeer employees, about Vermeer's retaliatory practices. Johnson testified that after she began taking FMLA leave for her anxiety disorder, she began having disciplinary problems at Vermeer. Montegna told Johnson to "get [her] act together or [she would] lose her job." Johnson testified that she was ultimately terminated as a result of the FMLA absences. Similarly, Wharton testified that she experienced adverse employment actions after using FMLA leave. Wharton also testified that her father, a long-time supervisor at Vermeer, told her that Hite had been targeted for termination because of her FMLA absences.

The jury returned a verdict in favor of Hite, awarding her back pay in the amount of $107,571.97. The district court subsequently awarded Hite $15,512.76 in front pay, liquidated damages in an amount equal to that awarded by the jury for back pay, $107,571.97, and attorney's fees and costs of $78,866.50. Vermeer and Leedom filed motions for judgment as a matter of law or for a new trial and to amend or alter the judgment. The district court denied their motions.

II. *Discussion*

Vermeer and Leedom raise three arguments on appeal: (1) that the district court erred in finding that there was sufficient evidence of FMLA retaliation; (2) that the district court erred in finding there was sufficient evidence to support the award of liquidated damages plus interest; and (3) that the district court abused its discretion in refusing to amend the judgment to reduce the back pay award.

A. *FMLA Retaliation Claim*

Vermeer and Leedom first argue that the district court should have granted their motion for judgment as a matter of law because insufficient evidence supports a finding of a causal link between Vermeer's termination of Hite and her use of FMLA leave, or, in the alternative, insufficient evidence exists to support a finding of pretext. We review a district court's denial of judgment as a matter of law de novo. *Kipp v. Mo. Highway & Transp. Comm'n*, 280 F.3d 893, 896 (8th Cir. 2002). We review a court's denial of a motion for a new trial for an abuse of discretion. *Adzick v. UNUM Life Ins. Co. of Am.*, 351 F.3d 883, 886 (8th Cir. 2003).

"Under [the] FMLA, eligible employees are entitled to take leave from work for certain family or medical reasons, including a 'serious health condition that makes the employee unable to perform the functions of the position of such employee.'" *Cooper v. Olin Corp., Winchester Div.*, 246 F.3d 1083, 1090 (8th Cir. 2001) (quoting 29 U.S.C. § 2612(a)(1); *Reynolds v. Phillips & Temro Indust., Inc.*, 195 F.3d 411, 413 (8th Cir. 1999)). "The FMLA provides eligible employees up to 12 workweeks of unpaid leave during any 12-month period." *Darby v. Bratch*, 287 F.3d 673, 679 (8th Cir. 2002) (citing 29 U.S.C. § 2612). It prohibits employers from discriminating or "retaliating" against an employee for asserting her rights under the Act. *Id*. (citing 29 U.S.C. § 2612(a)(2)). Therefore, an employer may not consider "an employee's use of FMLA leave as a negative factor in an employment action." *Id*. "Basing an adverse employment action on an employee's use of leave, or in other words, retaliation for exercise of Leave Act rights, is therefore actionable." *Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 832 (8th Cir. 2002).

An employee can prove retaliation through circumstantial evidence, using the *McDonnell Douglas* burden-shifting analysis. *Id*. (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–03 (1973)). First, the employee must establish a prima facie case of retaliatory discrimination by showing that "she exercised rights afforded by the Act, that she suffered an adverse employment action, and that there was a

causal connection between her exercise of rights and the adverse employment action." *Id*. Second, once the employee establishes a prima facie case, the burden shifts to the employer to article a legitimate, nondiscriminatory reason for its actions. *Id*. at 833. Finally, the burden shifts back to the employee to demonstrate that the "employer's proffered reason is pretextual." *Id*. The employee must present evidence that "(1) creates a question of fact regarding whether [the defendant's] reason was pretextual and (2) creates a reasonable inference that [the defendant] acted in retaliation." *Id*.

We recognize that "[w]hen the parties have developed a full trial record, we are not concerned with plaintiff's prima facie case." *EEOC v. Kohler Co.*, 335 F.3d 766, 772 (8th Cir. 2003). Instead, once the jury makes a finding of retaliation "and that judgment is being considered on appeal, the *McDonnell Douglas* presumptions fade away, and the appellate court should simply study the record with a view to determining whether the evidence is sufficient to support whatever finding was made at trial." *Id*. at 773 (internal quotations and citation omitted). We must affirm the jury's verdict "unless, viewing the evidence in the light most favorable to the prevailing party, we conclude that a reasonable jury could not have found for that party." *Id*. at 772 (internal quotations and citation omitted). We do not lightly set aside a jury's verdict. *Id*.

"Thus, the principal issue before us is whether [Hite] produced sufficient evidence to allow a reasonable jury to find [that Vermeer] retaliated against [her]." *Id*. at 773.

1. *Causation*

Vermeer questions whether Hite sufficiently established causation. We evaluate the causal-connection evidence "in light of all the evidence in the record." *Id*. at 773 n.7. To establish a causal link between the employee's exercise of FMLA rights and

her termination, the employee must prove "that an employer's 'retaliatory motive played a part in the adverse employment action.'" *Kipp*, 280 F.3d at 897 (quoting *Sumner v. United States Postal Serv.*, 899 F.2d 203, 208–09 (2d Cir. 1990)). "[E]vidence that gives rise to 'an inference of a retaliatory motive' on the part of the employer is sufficient to establish a causal link." *Id.* (quoting *Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989)).

An employee can establish a causal link between her protected activity and the adverse employment action through "the timing of the two events." *Eliserio v. United Steelworkers of Am.*, 398 F.3d 1071, 1079 (8th Cir. 2005). "A pattern of adverse actions that occur just after protected activity can supply the extra quantum of evidence to satisfy the causation requirement." *Smith*, 302 F.3d at 832. The mere coincidence of timing, however, is rarely sufficient to establish the causation element. *Haas v. Kelly Serv., Inc.*, 409 F.3d 1030, 1037 (8th Cir. 2005). Cases in which we have determined that temporal proximity alone was sufficient to create an inference of the causal link "have uniformly held that the temporal proximity must be 'very close.'" *Wallace v. Sparks Health Sys.*, 415 F.3d 853, 859 (8th Cir. 2005).

Even if temporal proximity alone is insufficient to establish causation, the employee may attempt to prove causation by providing evidence of the employer's discriminatory comments. *See Watson v. O'Neill*, 365 F.3d 609, 613 (8th Cir. 2004) (finding a causal connection between the employee's protected activity and the adverse employment action where one supervisor said that he was not "going to let a nigger manage my bitches," while another supervisor commented that the employee "would never excel in the agency" because he assisted in a 1993 employment discrimination case against the supervisor). Furthermore, where an ultimate decisionmaker relies on the discriminatory comments of another employee or supervisor in deciding to

terminate the employee, the employee may be able to establish a causal connection. *See Fast v. Southern Union Co., Inc.*, 149 F.3d 885, 891 (8th Cir. 1998).

An employee may attempt to "shorten the gap between her protected activity and the adverse action by showing that shortly after she [engaged in the protected activity, the employer] took escalating adverse and retaliatory action against her." *Kasper v. Federated Mut. Ins. Co.*, 425 F.3d 496, 503 (8th Cir. 2005). When the employee presents such background information, we may consider it as evidence of discrimination. *Henderson v. Ford Motor Co.*, 403 F.3d 1026, 1037 (8th Cir. 2005); *see also Bassett v. City of Minneapolis*, 211 F.3d 1097, 1105 (8th Cir. 2000) (holding that excessive pattern of protected activity followed by disciplinary measures established causation); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1060 (8th Cir. 1997) (declining to decide whether "each act in itself constituted actionable 'adverse employment action' because [the employee] essentially claimed that [the employer] had systematically retaliated against him, that is, that all the acts were taken in response to his filing the employment discrimination charge and were thus connected to one another").

We find that sufficient evidence supports the jury's finding of a causal link between Vermeer's termination of Hite and her use of FMLA leave. While Hite last used her FMLA leave two months before her termination, she presented additional evidence other than temporal proximity to establish the causation element.

First, as in *Watson*, Leedom made comments to Hite in which he specifically told her she would lose her job if she continued to use FMLA leave. Furthermore, Van Walbeek, the ultimate decisionmaker, testified that Leedom recommended Hite's termination and that while he "couldn't recall" whether he and Leedom discussed Hite's use of FMLA leave, he was aware of all the FMLA time Hite had used when

he terminated her. Based on Van Walbeek's testimony, the jury could infer that Van Walbeek did rely, at least in part, on Hite's FMLA usage in terminating her.

Second, Hite presented evidence that Vermeer and Leedom took escalating retaliatory action against her for using FMLA leave. Each time Hite returned from FMLA leave, Leedom questioned her about whether she really was sick under the FMLA guidelines and spoke negatively of her use of FMLA leave. Leedom moved Hite to different machines, telling her he was doing so because she used FMLA leave and disciplined her for every sick day not covered by FMLA. In addition, he punished her for returning late from break and not clocking out—activities that Johnson and Wharton testified Vermeer normally did not punish. Hite was also the only employee that Leedom required to give 30-days notice before using vacation days. Finally, Van Wyk and Montegna admitted that Leedom had been punishing Hite for using FMLA leave when they told Hite that Leedom's treatment of her would stop if she would switch machines.

2. *Pretext*

"If the employer comes forward with evidence of a legitimate, nondiscriminatory reason for its treatment of the employee, the employee must then point to some evidence that the employer's proffered reason is pretextual." *Smith*, 302 F.3d at 833. The employee shows pretext by establishing that the employer's "justification for the [adverse action] was unworthy of credence." *Id*. at 833–34.

An employee can prove pretext in several ways. First, the employee can show that the employer's proffered explanation has no basis in fact. *Logan v. Liberty Healthcare Corp.*, 416 F.3d 877, 881 (8th Cir. 2005). "In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 143 (2000).

Also, the employee can prove pretext by showing that the employer varied from its normal policy or practice to address the employee's situation. *Erickson v. Farmland Indus., Inc.*, 271 F.3d 718, 727 (8th Cir. 2001). For example, the employee could show that the employer routinely treated similarly situated employees who were not in the protected class more leniently. *Smith*, 302 F.3d at 835. Likewise, the employee could demonstrate that she was discharged pursuant to an inconsistent policy. *Wallace*, 415 F.3d at 860.

If the employee presents strong evidence of a prima facie case, then such evidence may establish pretext. *Smith*, 302 F.3d at 834. In addition, "the trier of fact may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual.'" *Reeves*, 530 U.S. at 143 (quoting *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981)).

We find that sufficient evidence exists to support a finding of pretext for Vermeer's proffered justification for terminating Hite, which was that Hite was using her cell phone outside the plant and away from her machine during company time. Not only is the evidence presented in Hite's prima facie case suggestive of pretext, but the jury could also have found that Leedom's allegation that Hite used her cell phone without permission had no basis in fact. Hite testified that Leedom gave her permission to be away from her machine and use her cell phone. In addition, Wharton testified that her father, a supervisor at Vermeer, told her that Hite had been targeted for termination because of her FMLA absences. The jury was entitled to make a credibility determination as to whether it believed Leedom or Hite; it chose to believe the latter.

Second, Hite presented evidence that Vermeer did not respond to other employees in the way that it responded to Hite. Johnson and Wharton testified that it was common for Vermeer employees not to be punished for leaving the plant at lunch

without clocking out, while Leedom did punish Hite for not clocking out on her lunch break.

Finally, Johnson and Wharton testified that they had personally experienced retaliation by Vermeer for taking FMLA leave, demonstrating a pattern of discrimination. Therefore, we hold that the district court did not err in finding that sufficient evidence of FMLA retaliation existed to support the jury's verdict.

B. *Liquidated Damages and Interest*

Vermeer's and Leedom's second argument is that the district court's award of liquidated damages and interest was unsupported by the evidence. We review a district court's award of liquidated damages and interest for an abuse of discretion. *Thorson v. Gemini, Inc.*, 205 F.3d 370, 383 (8th Cir. 2000).

1. *Liquidated Damages*

The FMLA provides that the employer "shall be liable to any eligible employee affected [by a violation of the Act] . . . [for] an additional amount as liquidated damages equal to the sum of the amount" of other damages and interest awarded pursuant to § 2617(a)(1)(A)(i) and (ii). 29 U.S.C. § 2617(a)(1)(A)(iii).

There is, however, an exception to "this otherwise mandatory call for liquidated damages." *Thorson*, 205 F.3d at 383. That is, if the employer proves "to the satisfaction of the court that the act or omission which violated section 2615 of this title was in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation of section 2615 of this title, such court may, in the discretion of the court, reduce the amount of the liability to the amount and interest determined under clauses (i) and (ii) respectively." 29 U.S.C. § 2617(A)(iii); *see also Thorson*, 205 F.3d at 838 (stating that if good faith is shown, then the "court in its discretion may decline the award of liquidated damages").

To avoid a liquidated damages award, the defendant bears the burden of establishing that it acted with subjective good faith and that it had an objectively reasonable belief that its conduct did not violate the law. *See Hultgren v. County of Lancaster*, 913 F.2d 498, 509 (8th Cir. 1990) (applying standard of the Fair Labor Standards Act). The good faith requirement demands that the defendant establish that it honestly intended to ascertain the dictates of the FMLA and to act in conformance with it. *See Marshall v. Brunner*, 668 F.2d 748, 753 (3rd Cir. 1982) (applying standard of the Fair Labor Standards Act).

However, even if the employer did act in good faith, "the decision to award liquidated damages is still within the discretion of the trial court." *Nero v. Indust. Molding Corp.*, 167 F.3d 921, 928 (5th Cir. 1999). The district court should exercise its discretion "consistently with the strong presumption under the statute in favor of doubling." *Shea v. Galaxie Lumber & Constr. Co., Ltd.*, 152 F.3d 729, 733 (7th Cir. 1998).

Showing good faith when a jury has determined intentional retaliation is a very high bar to clear, if indeed it can be. However, based upon the record before us, we have no difficulty holding that the district court did not abuse its discretion in awarding liquidated damages. Here, the jury found that Vermeer and Leedom intentionally retaliated against Hite for taking FMLA leave. The jury was presented with evidence that Leedom harassed Hite about using FMLA leave on a continual basis, and that when Hite complained to her superiors, Leedom's harassment did not cease.

2. *Interest*

When an employer violates the FMLA, such employer is liable to the employee for "the interest on the amount described in clause (i) calculated at the prevailing rate . . . ." 29 U.S.C. § 2617(A)(ii). Clause (i) refers to the jury's award for "any wages, salary, employment benefits, or other compensation denied or lost

to such employee by reason of the violation [of the FMLA]." *Id*. § 2617(A)(i)(I). Section 2617 indicates that the award of such interest is mandatory. *Id*. § 2617 ("Any employer who violates section 2615 of this title shall be liable to any eligible employee affected. . . ."). Vermeer and Leedom make no convincing argument nor cite any authority showing that the interest awarded was improperly calculated. We therefore affirm the district court's interest award.

C. *Back Pay Award*

The final argument of Vermeer and Leedom is that the district court should have granted their motion to alter or amend the judgment regarding back pay because the jury's back pay award was based on an amount Hite would have made had she worked a full 52 weeks per year since her termination. They argue that the evidence shows that Hite would have worked no more than 40 weeks per year had she continued to work at Vermeer; therefore, the district court erred by not remitting to an amount for 40 weeks.

We will only reverse a district court's denial of a motion for remittitur "upon a manifest abuse of discretion or because the verdict is so grossly excessive the result is monstrous or shocking." *Callantine v. Staff Builders, Inc*., 271 F.3d 1124, 1133 (8th Cir. 2001).

Federal Rule of Civil Procedure Rule 59(e) allows the district court to alter or amend a judgment so that the district court can "rectify its own mistakes in the period immediately following the entry of judgment." *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450 (1982) (internal quotations omitted).

Under Rule 59(e), the "district court should grant remittitur only when the verdict is so grossly excessive as to shock the court's conscience."*Am. Bus. Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135, 1146 (8th Cir. 1986). "Whether an

award is excessive rests within the discretion of the trial court." *Jenkins v. McLean Hotel, Inc*., 859 F.2d 598, 600 (8th Cir. 1988).

When an appellate court is "confronted on review with a jury determination as to a particular measure of damages buttressed by the conclusion of the trial court, who had the benefit of hearing the testimony and observing the demeanor of the witnesses, that the verdict should stand," it "'should be certain that the award is contrary to all reason before it orders a remittitur or a new trial.'" *Slatton v. Martin K. Eby Constr. Co., Inc.*, 506 F.2d 505, 508 (8th Cir. 1974) (quoting *Taylor v. Washington Terminal Co.*, 409 F.2d 145, 148 (D.C. Cir. 1969)).

Here, the jury awarded the amount that the parties stipulated was the correct amount of wages and benefits Hite would have earned had she not been fired by Vermeer. Vermeer and Leedom argued to the jury that Hite's back pay damages should be reduced because of hypothetical FMLA use Hite would have used in the future. The jury apparently rejected this argument.

Therefore, we hold that the district court did not abuse its discretion in denying the motion for remittitur because the jury's back pay award is not grossly excessive or "conscience shocking" in light of the evidence presented to the jury.

III. *Conclusion*

Accordingly, we affirm the judgment of the district court.

REGULAR ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION	Grievant: Theresa Couch
BETWEEN	Issue: Leave of Absence
UNITED STATES POSTAL SERVICE ("Employer")	Post Office: Topeka, KS
	Case No. 194C-41-C 97033793
AND	
AMERICAN POSTAL WORKERS UNION ("Union")	Arb. Case No. 99/021

BEFORE: **ELLIOTT H. GOLDSTEIN**
ARBITRATOR

APPEARANCES:

For the United States Postal Service: **Charles Stevens**
Labor Relations Specialist
Midwest Area Operations

For the Union: **Tom Maier**
National Business Agent

Place of Hearing: **Topeka, KS**

Date of Hearing: **March 24, 1999**

Date of Award: **April 30, 1999**

AWARD:

For the reasons stated in the Opinion and Award set forth hereinafter, and incorporated herein as if fully rewritten, the grievance is sustained in its entirety.

ELLIOTT H. GOLDSTEIN
Arbitrator

I. INTRODUCTION

The hearing in this case was held on March 24, 1999 at the Postal Facility located at 500 S.W. Montara Parkway, #4, Topeka, Kansas, commencing at 10:00 a.m. before the undersigned arbitrator who was duly appointed by the parties to render a final and binding decision in this matter. At the hearing, the parties were afforded a full opportunity to present such evidence and argument as desired, including an examination and cross-examination of all witnesses. No formal transcript of the hearing was made. The arbitrator did make a tape recording of the hearing. The parties waived the filing of post-hearing briefs, whereupon the hearing was declared closed. Both parties stipulated at the hearing as to this Arbitrator's jurisdiction and authority to hear this case and issue a final and binding decision in this matter.

II. ISSUE

The parties did not agree on a statement of the issue. They proposed different issues: The Service's statement of the issue was:

> Did the USPS in Topeka, KS violate Article 10 of the National Agreement when the Grievant was not allowed to return to duty until she had obtained proper medical documentation for the time in question?

The Union proposed the following issue:

> Was the Grievant, Theresa Couch, improperly denied work from September 26, 1996 though October 8, 1996? If not, what is the appropriate remedy?

I have reviewed both statements of issue. Based on the evidence and arguments presented, I find that the issue in this matter is:

> Did the Service violate the National Agreement on September 26, 1996, when Grievant was sent home and was required to use her own time until she could obtain light duty documentation regarding her lifting restrictions on October 8, 1996? If so, what is the appropriate remedy?

III. RELEVANT CONTRACT PROVISIONS.

Article 3 – Management Rights

The Employer shall have the exclusive right, subject to the provisions of this Agreement and consistent with applicable laws and regulations:

A. To direct employees of the Employer in the performance of the official duties:

B. To hire, promote, transfer, assign, and retain employees in position within the Postal Service and to suspend, demote, discharge, or take other disciplinary action against such employees;

C. To maintain the efficiency of the operations entrusted to it;

D. To determine the methods, means, and personnel by which operations are to be conducted;

E. To prescribe uniform dress to be worn by letter carriers and other designated employees; and

F. To take whatever actions may be necessary to carry out its mission in emergency situations; i.e., an unforeseen circumstances or a combination of circumstances which calls for immediate action in a situation which is not expected to be of a recurring nature.

(The preceding Article, Article 3, shall apply to Transitional Employees)

Article 10 – Leaves

* * * *

Section 5. Sick Leave

The Employer agrees to continue the administration of the present sick leave program which shall include the following specific items:

A. Credit employees with sick leave as earned.

B. Charge to annual leave or leave without pay (at employee's option) approved absence for which employee has insufficient sick leave.

C. Employee becoming ill while on annual leave may have leave charged to sick leave upon request.

D. For periods of absence of three (3) days or less, a supervisor may accept an employee's certification as reason for an absence.

* * * *

IV. FACTUAL BACKGROUND

The Grievant in this matter is Theresa Couch ("Couch" or "Grievant"). Grievant is a full time clerk in the CFS Unit in the Postal Facility in Topeka, KS. On September 16, 1996, Grievant felt ill at work. Grievant then approached her Union Steward, Tammy Streeter. Grievant expressed a concern to Streeter that she was already under a Letter of Warning for failure to maintain a proper work schedule and did not want to further endanger her job. Grievant requested that Streeter speak on Grievant's behalf with Grievant's supervisor, Tanya Schaaf. Streeter then had a conversation with Schaaf. Streeter then explained to Schaaf the Grievant's pain and explained that Grievant did not want to endure further discipline, but she needed to

go home because she felt ill. Then Grievant, Streeter and Schaaf met together and Grievant was given the approval to go home.

Grievant visited her doctor, Dr. Stephen Saylor on September 19, 1996 and asked that he fill out a Physician Certification Form in order to obtain leave under the Family and Medical Leave Act (FMLA). Dr. Saylor completed this form. Grievant returned to work on September 20 and submitted the form to Schaaf. That form, in relevant part, stated:

> Without giving a specific diagnosis or prognosis, briefly note how the medical facts meet the criteria of the category checked above: **Pt. Has been in for 2 office visits and here for tests.**
>
> Date Condition commenced: **9-16-96**
>
> Probable duration of condition: **4 weeks**
>
> * * * *
>
> Will the employee be off from work intermittently or work on a reduced schedule as a result of this condition and/or treatments? **Yes** Note the probable time and duration. **Will be unable to do heavy lifting due to illness.**
>
> * * * *
>
> If additional or continuing treatments are required for the condition, provide the nature and regimen of the treatments, an estimate of the probable number of treatments, the length of absence required by the treatments, and the actual or estimated dates of the treatments if known.
>
> **Pt. Will be seen one more time by Dr. Saylor in office 10-8-96.**
>
> Is the employee able to perform the functions of the employee's position? **X** If no, describe the physical restrictions placed on the employee, including the duration of such restrictions. *No answer provided.*

Health Care Provider's Signature **/s/ Dr. Saylor** Date **9/20/96**
(Hand written portions are in bold) (Jt. Ex. 3).

Grievant returned to work on September 20 and submitted the completed FMLA form to Schaaf. Grievant remained at work without any problems until September 26. Between the 20th and 26th, Schaaf did not question Grievant's lifting restriction at all. On September 26, Grievant approached Schaaf and told her that she was experiencing abdominal pain and dizziness and requested to leave early. At this point, Schaaf, apparently for the first time, noticed that Grievant's FMLA form indicated that she could not engage in any "heavy lifting". Schaaf then instructed Grievant to clock out that day and to not return to work at all until the Grievant had obtained completed copies of the Service's 'light duty" forms. It is clear from the record that the supervisor's decision was made, at least in part, because of the hitherto unnoticed medical restriction of any "heavy lifting for Grievant."

The Grievant left work and took the forms back to Dr. Saylor's office and requested that he completed the forms. At the time she reached his office, Dr. Saylor was not present. Grievant left them for him to complete, explaining the need to have the forms filled out so she could return to work. On the following day, September 27, Grievant contacted Dr. Saylor's office again and was told that Dr. Saylor would not complete these forms until Grievant came in for another office visit. The next scheduled office visit for Grievant was on October 8, 1996. Grievant asked for an earlier appointment, but there were none available. Grievant then requested that Dr. Saylor immediately notify Grievant if an earlier appointment came up, so she

could get the forms completed. Grievant then called Schaaf and explained the situation. Schaaf reiterated that Grievant could not return to work until the light duty forms were completed, the record evidence reveals.

On September 28, 1996, at approximately 4:30 am, Grievant's pain escalated and the Grievant had to be taken to the Emergency Room. Grievant was sent home with a pain prescription and to return for a Gall Bladder Sonogram (Jt. Ex. 4). O n October 4, 1996, Dr. Saylor did have a cancellation. His office called Grievant and asked her to come in, thus allowing the Grievant to obtain the documentation that Schaaf requested. At that time, Dr. Saylor filled out the Light Duty form. On the form, he indicated that Grievant was suffering from an abdominal muscle strain. Dr. Saylor indicated that Grievant could not do any lifting of any objects weighing more than 5 pounds and that this restriction would last for approximately 4 weeks. Finally, Dr. Saylor indicated that Grievant could return to work on October 8, 1996 (Jt. Ex. 5).

Between September 26 and October 4, Grievant called Schaaf on every workday and indicated that she had been unable to see Dr. Saylor. Between September 26 and October 8, Grievant was forced to use up all her remaining sick time (68) hours. After she had exhausted her sick time she went on leave without pay (LWOP) (Jt. Ex. 12).

On October 8, 1996, Grievant returned to work and gave Schaaf the light duty form. At that time, Schaaf gave her a memo which indicated that her request for FMLA time between September 19 and October 5 would be:

> *provisionally accepted* based on the diagnosis of a second opinion from a health care provider. The Postal Service will schedule an appointment with a specialist that is not employed or contracted with the Postal Service for you. The Postal Service will also pay for the second opinion (emphasis added)(Jt. Ex. 7).

Pursuant to this memo, Grievant made an appointment with her own OB/GYN, Dr. Bonebrake, for October 15, 1996 (Jt. Ex. 8). Before that appointment, Schaaf also requested that Grievant submit FMLA forms from Dr. Bonebrake. Further, she requested that Grievant's FMLA claim be extended until the Grievant produced forms from Dr. Bonebrake. On October 25, 1996, Dr. Bonebrake filled out the Grievant's FMLA form. According to Dr. Bonebrake's written report, he found no incapacity in the Grievant and that the Grievant was or should have been able to perform the full duties of her position (Jt. Ex. 9).

On November 1, 1996, Dr. Saylor examined Grievant again. After this particular examination, he filled out a new light duty form. In that light duty report, Dr. Saylor indicated that Grievant could now work without restrictions (Jt. Ex. 10).

On November 5, 1996, the current grievance was filed at the first step. In that Grievance, Steward Streeter explained what had occurred to the Grievant. The remedy requested was that the Grievant be paid administrative leave for those days absent awaiting medical documentation. The Grievance also requested that Grievant's sick leave, which had been used between September 26 and October 8, be restored and that Grievant "be made whole."

As part of the Grievance Process, Grievant filled out a witness statement on November 16, 1996. That statement indicated:

> [On September 26] Mrs. Schaaf then realized my FMLA form said no lifting. She then told me to go home and not to come back until I had a light duty form filled out by my doctor ... I was informed [by my doctor] that he would not fill it out until he saw me....On Friday, September 27, I contacted Supervisor Schaaf and explained that I dropped the form off to my doctor, but he wouldn't fill it out until he saw me and without knowing my job duties. Again, she told me not to return until I had the form filled out....(Jt. Ex. 11).

On December 5, 1996, the Service responded at Step 2. In its response, the Service indicated:

* * * *

> ...To allow the grievant to work without sufficient medical evidence would be careless on the part of the service and place the grievant in a potentially unsafe work situation...
>
> Simply put, the Grievant's documentation does not show she could work on the dates in question [9/26-10/8]. Her supervisor allowed her to use sick leave. However, the Grievant has no sick leave balance, therefore she is requesting administrative leave. Lack of sick leave does not require the Service to substitute administrative leave.
>
> Finding that the supervisor acted in a reasonable manner as supported by the facts in the case, the grievance must be denied (p.2-3).

On November 29, 1996, the Grievance was appealed to Step 3. In that appeal, the Union stated:

> Poor decision-making and neglect forced the Grievant lost time between September 26, 1996 and the Grievant's return to duty on October 8, 1996. Local APWU's position is CFS Supervisor, Tanya Schaaf was negligent in reviewing medical documentation Ms. Schaaf required of the Grievant. Therefore, abusing the rights of a supervisor as agreed upon in the National Agreement. For these reasons, we respectfully appeal to Step 3.

On February 2, 1997, the Service denied the Grievance, indicating that there was no evidence to justify Grievant's request for administrative leave. On March 14, 1997, the Union forwarded the Grievance to arbitration (Jt. Ex. 2).

V. POSITIONS OF THE PARTIES

A. The Service

According to the Service in this case, the Union has the burden to prove a contractual violation in this case but it cannot do so. It also argues that it acted appropriately on September 26 when it required the Grievant to obtain light duty forms prior to returning to work. In addition, the Service contends it had the right to require Grievant to use her own time to obtain these forms. That is the nub of the Service's theory of the case.

The Service acknowledges that Supervisor Schaaf did not see the lifting restrictions that Grievant had on her FMLA form when Grievant returned to work on September 20, 1996. When the Grievant then presented herself to her supervisor as being ill on September 26, 1996, she told management that she was having some abdominal pain and dizziness. According to the Service, the dizziness was a "new symptom" that had not been previously identified to Service representatives. Because this new symptom was present, the Service did not know what was wrong with the Grievant, it asserts.

The dizziness mentioned above could have been an indication of a new medical problem not previously addressed by the previous FMLA form, the Service avers.

Because this potentially was a new problem, and because Schaaf noticed the lifting restrictions in conjunction with her new complaints, Schaaf was fully justified in telling Grievant to obtain further medical documentation to detail her lifting status, the Service suggests. It also emphasizes demand for a new medical assessment, in the context of a request for light duty as a basis for keeping Grievant off work, was reasonable. There was an "intervening factor" in the chain of causation, Management submits. The fact that Grievant's medical status was unstable, and needed to be reviewed by medical personnel again, that Schaaf's request is confirmed by Grievant's emergency room visit on September 28, the Service also asserts.

Moreover, according to the Service, it had every right to request that Grievant obtain a light duty form and to not allow the Grievant to return until she filled it out because of the "extra" or new claims of dizziness and abdominal pain. The Service further indicates that it had no choice but to ask for a light duty assessment. Because a new symptom had presented itself on September 26, the Service did not know what danger Grievant might be put in if she continued to work without further guidance from a physician, the Service argues.

Consequently, the Service contends that it acted reasonably and it did not violate the National Agreement on September 26 when it required Grievant to provide acceptable medical documentation to the Service to explain her medical condition and limitations prior to allowing her to return to work. Management had no control as to how long it took Grievant to have the form filled out by her personal physician. The time lapse was the responsibility of Grievant, the evidence of record shows. Because

the Service acted appropriately, the Union cannot meet its burden of proof and the Grievance must be denied, since local Management was not arbitrary or capricious in its actions, concludes the Service.

B. The Union

The Union contends that the Service acted inappropriately and violated the National Agreement on September 26 when it instructed Grievant to clock out and "not return" until she had provided the Service with the completed relevant light duty forms, *on her own time*.

First, the Union contends the Service was negligent when it reviewed the documentation on September 20. At that time, the documentation already indicated that Grievant had lifting restrictions. By the time she reviewed it, Supervisor Schaaf had already accepted this form and had it in her possession for 6 days. According to the Union, Supervisor Schaaf's acceptance of the form and subsequent neglect in reviewing the medical documentation on September 20 forced the Grievant to lose her own time unnecessarily.

Second, according to the Union, if the Service wanted further information, it should have requested it immediately on September 20 and not waited until September 26. Further, after accepting the information without question on September 20, if the Service wanted more information from the Grievant, it should allowed her to get it on administrative leave, not personal time.

It is also the Union's position that it was inappropriate to force the Grievant to seek a second opinion from an OB/GYN for her condition upon her return on October

8. According to the Union, it was an invasion of privacy for the Service to require this second opinion. Additionally, once the FMLA form was accepted, later demands for further medical substantiation should have been handled by the use of administrative leave, with pay, and not by ordering Grievant off-the-clock. The responsibility at the point this grievance arose was Management's, the Union insists.

Thus, based on this information, the Union requests that the Grievance be sustained. As a remedy, the Union asks that any time which the Grievant was forced to use between September 26 and October 8 be changed to "administrative leave" and that Grievant be compensated for this entire period. In addition, the Union asks that any paid time which the Grievant lost during the relevant time period be restored to the Grievant. Based on the evidence presented, the Grievant used a total of 68 hours of sick time, I note.

It was upon these facts that the case came to me for final resolution.

VI. DISCUSSION AND FINDINGS

After a complete and thorough review of all the evidence and arguments presented, I agree with the Union that the Service improperly when it sent Grievant home on her own time on September 26 and instructed her that she could not return until she had her light duty forms completed. I find that once the Service allowed Grievant to work for 6 days under the auspices of the September 20 FMLA forms, it was inappropriate for the Service to then "change the rules" and now require Grievant to get additional information on her own time. While it did have the right to have

these forms completed, the Service should have done so on September 20 when the forms were first submitted, I note. When it allowed Grievant to work under these forms for 6 days, the Service waived its right to have Grievant obtain the light duty forms "on her own time" for the reasons detailed below.

Thus, I find that the Service should have placed Grievant on administrative leave when it required these forms to be completed. The Grievant also should have been paid for the entire period of September 26 through October 8 and any time that Grievant had to use her own sick time between September 26 through October 8 should be restored to the Grievant. My reasons follow.

First, I note that this case presents a relatively uncomplicated fact pattern. Grievant was employed in the CFS Unit at the Topeka, KS postal facility. On September 16, 1996, she was experiencing some abdominal pain. However, Grievant had had some previous attendance problems. Instead of immediately leaving work and taking sick time, she first consulted her steward, Tammy Streeter and told her of the concerns. She asked Streeter to speak with Grievant's supervisor, Tanya Schaaf about this dilemma. Streeter then approached Schaaf and told her about the Grievant's situation. After that, all three met and Schaaf allowed Grievant to leave work, the record shows.

On September 20, Grievant returned to work with an FMLA form from her primary physician, Dr. Saylor. That form clearly indicated that Grievant could do no heavy lifting for approximately 4 weeks. Schaaf then allowed Grievant to return to work. Apparently, Schaaf did not notice Grievant's lifting restrictions at that time.

Grievant then continued to work without incident until September 26, when she indicated to Schaaf that she was experiencing "some pain and dizziness." At this point, Schaaf told Grievant to clock out and indicated that she could not return to work until her physician had completed the Service's "light duty" forms. Concern about Management liability certainly was a factor in that decision, the evidence of record strongly indicates.

On her way home from work that day, Grievant attempted to contact her physician, Dr. Saylor in order to fill out these forms. However, Dr. Saylor refused to complete these forms until Grievant saw him again. Grievant's next appointment was not until October 8. When Grievant requested an earlier appointment, she was told that there were none available, but that if a cancellation occurred, she would be notified. Grievant did receive an appointment on October 4 when she saw Dr. Saylor. At that time, Dr. Saylor released Grievant to work on October 8 with lifting restrictions of a maximum of 5 pounds for approximately 4 weeks. Also, during the period of September 26 through October 4, Grievant contacted Schaaf every day and told Schaaf of her inability to obtain an appointment with her doctor, the evidence discloses. The record also shows that Dr. Saylor released all of Grievant's work restrictions on November 1, 1996. Whatever happened after that is not before me in this current case.

Second, the record is clear that when Grievant returned to work on October 8, with her completed light duty form, Supervisor Schaaf required her to get a second opinion from an OB/GYN. Grievant did make an appointment with her OB/GYN, Dr.

Bonebrake. Based on the evidence in the record, it appears that the Service never sent her to an independent OB/GYN. Rather, Grievant saw Dr. Bonebrake on October 15, 1996. He indicated that there was no incapacity present and that she did not meet the criteria for FMLA status.

Before turning to the merits, there are two preliminary matters that must be addressed. First, I find contrary to the Union's contention that this Grievance only deals with the absence of the Grievant from September 26 through October 8 and the resulting loss of time that was the primary subject of the discussions about this case at the lower steps of the grievance procedure, before the arbitration hearing, I believe the evidence of record reveals. I also note that, while the Union has raised the questions of the propriety of requiring a second opinion from an independent OB/GYN, it has only requested that Grievant be compensated for the period of time of September 26 through October 8, I further stress. There has been evidence presented by both sides as to the propriety of requiring a second opinion, there has been no remedy requested in this regard, I emphasize. Further, the Grievant has lost no time because of this later request for an OB/GYN examination, I find, based on my reading of the record evidence. Thus, I find that I need not reach the issue of the OB/GYN exam. The focus of this decision shall be for the loss of compensation/paid time off during the period of September 26 through October 8, I rule.

Third, neither the Grievant nor the Supervisor were present to testify at the arbitration. However, based on the evidence in the record, as well as the statements of the advocates, there does not seem to be any real dispute as to what occurred and

I do not believe that credibility is at issue. Hence, any claims of procedural problems due to these absences are rejected by me.

The only issue, as I see it, is whether the Service acted appropriately in its actions concerning light duty. This case presents a fairly simple issue. Did the Service have the right to send Grievant home on September 26 on her own time and not allow her to return until she had completed the Service's light duty forms? Or is the Union correct that once the Service accepted the limitations identified in the FMLA form of September 20 and allowed the Grievant to work for 6 days under these limitations, it did not have the right to send the Grievant out again on her own time until the forms were filled out? No one questions that the Service had a right to put Grievant off-work, I hold. The real issue is the financial liability for that action, I specifically find.

Fourth, it is clear to me at least, as explained above, that the Service has the right to require proper medical documentation prepared when an employee request that he/she be granted FMLA Leave. In the documents which the *Union* presented, the Service makes it very clear that documentation is appropriate in the event of FMLA Leave:

> **NOTICE FOR EMPLOYEES REQUESTING LEAVE FOR CONDITIONS COVERED BY THE FAMILY AND MEDICAL LEAVE ACT**
>
> * * * *
>
> **IV. DOCUMENTATION**
>
> *Supporting documentation is required for your leave request to receive final approval.* Documentation requirements may be waived in specific circumstances by your supervisor.

For qualifying conditions (1) or (2), you must provide the birth or placement data;

For conditions (3) or (4), you must provide documentation from the health care provider stating:

a. The health care provider's name, address, phone number and type of practice, and the patient's name.

b. A certification that the patient's condition meets the FMLA definition of a serious health condition, supporting medical facts, and a brief statement as to how the medical facts meets the definition's criteria.

c. The approximate date the serious health condition commenced, it's probable duration, and the probable duration of the patient's present incapacity, if different.

d. Whether you will need to take leave intermittently or to work on a reduced schedule as a result of the serious health condition; and if so, the probable duration of such schedule, an estimate of the probable number of and the interval between episodes of incapacity, and the period required for recovery, if any.

* * * *

Supporting information that is not provided at the time the leave is requested must be provided within 15 days, unless this is not practical under the circumstances. If the Postal Service questions the adequacy of a medical certification, a second or third opinion may be required. These are obtained off the clock. However, the Postal Service will pay for these opinions.

During your absence, you must keep your supervisor informed of your intentions to return to work and status changes that affect, your ability to return. *Failure to provide can result in the denial of family and medical leave under these policies.* (emphasis added)(Un. Ex. 2)

Reviewing this documentation, it is clear that the Service can require that an employee provide relevant medical documentation in order to obtain leave under the FMLA. In this case, I do not quarrel with the basic right of the Service to obtain both

the FMLA certification as well as the light duty certification in order to allow her to continue to work without possible mishap. I so rule.

Fifth, I hold that the question which arises in this case is not the actual request for documentation, but the manner in which the documentation was requested. Here, Grievant returned to work on September 20, 1996, with an FMLA certification which indicated that she could not do any "heavy lifting". I believe that all parties would agree that the term "heavy lifting" is an ambiguous term and requires further definition. Such clarification would be necessary to protect both the Service and the Grievant if timely made. However, based on the evidence presented, it is clear that Supervisor Schaaf simply "missed" this medical limitation at that point. Schaaf then allowed Grievant to work, presumably without any restriction, for 6 days, through September 26. By allowing her to work these 6 days without question, it appears that Supervisor Schaaf "accepted" this initial FMLA documentation without question as the Union suggested, I rule.

On September 26, Grievant then presented herself to Schaaf and indicated that she was ill and unable to work, the record discloses. Grievant told Schaaf that she was experiencing pain and dizziness. According to the Service's arguments, the dizziness was a "new symptom," which previously had been unreported. Because of this symptom, Schaaf sent Grievant home with the instruction that Grievant could not return to work until she had obtained a light duty form.

The Service contends from the above scenario that this new symptom was justification for the new documentation which Grievant had to obtain "on her own

time." I do not find it surprising that the Service's representative did not ask for new FMLA substantiation. Grievant was not asking for time off. She had been released with a medical restriction on any "heavy lifting" at work. Clearly, she could be required to obtain a more precise medical explanation of what was within the imposed physical limitations as to the type of work she could safely do. That is not the point here. The point is, bluntly, who was responsible to pay for the obtaining of the medical information at that point in the sequence of events, I rule. The clarification of the previously submitted form was reasonable. Putting Grievant off-the-clock, as if the situation described above was somehow her fault, was not logical or fair, I hold.

Sixth, the Union contends, I further note, that the Service's reliance on the Grievant's use of the term "dizziness" was simply an excuse to require the Grievant to obtain more documentation on her own time. Supervisor Schaaf had failed to note the lifting limitation on September 20 and used this new symptom as an excuse to require the Grievant to obtain documentation on her own time, without having to give her administrative leave. I simply am unconvinced that that fact was really an intervening factor, which made Grievant the "beneficiary" of the mandate to clarify her physical status, under these unique and narrow facts.

In short, after reviewing all of the evidence, I must agree with the Union as to whose benefit was involved. The Grievant should have been sent home on September 26 and given administrative leave to obtain the light duty form, I hold, because it was the Service who requested this light duty form 6 days earlier when Schaaf first received Grievant's FMLA certification form. While it certainly would have been

acceptable to ask Grievant for a light duty form on September 20 on her own time, it was not acceptable to do so 6 days later, because of her own initial error. For all intents and purposes, Schaaf gave *final approval* to Grievant's FMLA request when she accepted the form, I hold. The Service accepted the initial FMLA certification form without question and allowed the Grievant to work, without incident for 6 days. Once it did this, it was unreasonable to ask Grievant to obtain a light duty form *on her own time,* I rule.

Based on this analysis, I also believe that the Service used the new symptom of dizziness as a "straw man", that is as an excuse, to force the Grievant to obtain the light duty form on her own time, as mentioned earlier. Further, I believe that if the Service was actually concerned that the new symptom of "dizziness", it should have asked Grievant to obtain *more medical information*, not simply a light duty form. Thus, it should be the Service, and not the Grievant which should have provided the time needed to correct the error, I find. Grievant's use of 68 hours of her own sick time must be restored, I therefore conclude, for the reasons about to be discussed in detail below.

My ruling in the instant case is consistent with a similar case I decided, *USPS and NALC*, Case No. C8N-4K-C-15579 (Grievant: Walter Besch)(Goldstein, Arb. 1981). In that case, the grievant returned from medical leave. Grievant at that time worked in a post office in the far outlying reaches of St. Louis. Under local Postal rules, grievant was required to bring his Return To Work Form to the main Postal Facility in downtown St. Louis, in order to be allowed to return to work. Grievant did

so, but in doing so, incurred some mileage and parking fees. He sought to be reimbursed for those fees, indicating that such fees were incurred on "official business". In rejecting the grievance in that case, I based my decision on for whose purpose or behalf the action or action was taken:

> The basic fallacy in the Union's position is that it makes no attempt to define "business", which I perceive to be the crucial word and concept in dispute here.
>
> Although "business" is a broad and diffuse concept, there is no question in my mind that the controlling idea is for whose purpose and/or benefit has the action or action been taken. For example, all *work status* mileage payments in some way rather directly relate to the primary benefit and mission of the postal service – the delivery of mail. On the other hand, the primary purpose of sick leave is to benefit the affected employee. No one is contending here that the grievant ... should be reimbursed for mileage and parking for medical examination while on sick leave and pay status...
>
> ...None of these factors make it official business of the post office or its employees to return from sick leave status to work duty. Those actions are individual in purpose and for the primary benefit of the involved employee. These actions may be required of employees but the requirements do not transform actions for individual benefit into official business broadly authorized by the service. Benefit and purpose remain the touchstone of what constitutes official business. (emphasis in original) (*Id.* at 11-13).

Applying this case to Grievant's case, it is clear that the purpose of obtaining the light duty forms was for the Service's benefit, I rule. A review of the facts in this case indicate that it was the Service, and <u>not</u> the Grievant, who needed to have the light duty form prepared to protect its interests. As the Service's representative Schaaf had failed to review the lifting limitation in the September 20 FMLA form, she believed she needed to correct this deficiency. By sending Grievant to obtain this

form on her own time after she had already submitted "acceptable" documentation, the Service representative was thus sending the Grievant to do the Service's bidding, for the benefit of the Service. Thus, the Service must pay for the time spent in obtaining these documents, I conclude. The "benefit" is the protection from potential liability, I also rule.

Finally, it appears that the Service is arguing that even if administrative leave should have been granted, I should not grant it for the entire period of September 26 through October 8 because the Grievant visited the Emergency Room on September 28 at 4:30 am and because Dr. Saylor saw her on October 4, but did not release her to work until October 8. Thus, according to the Service, Grievant could not have worked during part of the relevant that time period and that somehow this affects any compensation she should receive in this matter. However, that is not the issue in this case. The issue in this case is whose time should have been used to obtain the light duty forms, the Service's or the Grievant's? If she had been unable to obtain the forms while on administrative leave, that leave would continue until the forms in fact were obtained. The fact that she may have been ill for a few days during the time she was obtaining these forms is irrelevant. I thus reject the Service's contentions as to that line of argument, I hold.

In sum, because the Service misread the FMLA form, the Grievant should not be penalized. The time between September 26 and October 8 should have been marked as administrative leave, not sick time or LWOP. Any sick time which the Grievant had to provide in the form of sick time should be restored to the Grievant.

The Grievance is sustained on that basis, and under these narrow factual circumstances, I determine.

VII. AWARD

For the reasons stated in the Opinion and Award, incorporated herein as if fully rewritten, the Arbitrator finds that:

1. The Grievance is sustained in its entirety;

2. The Service violated the National Agreement when it required the Grievant, Theresa Couch to leave work on September 26, 1996 and not allow her to return to work until she had obtained a completed light-duty form on October 8, 1996 using her own paid time off;

3. The Grievant was improperly required to use 68 hours of sick leave between September 26, 1996 through October 8, 1996;

4. The Grievant's period of September 26 through October 8 shall be changed to reflect that this time was taken as administrative leave. Any time for which the Grievant was not paid during that period shall be paid; and

5. The Grievant shall be re-credited with any hours of the paid time off which she was required to use.

It is so ordered.

ELLIOTT H. GOLDSTEIN
Arbitrator

April 30, 1999

Regular Arbitration Panel

In the Matter of Arbitration	)	**Grievant: John Lennox**
Between	)	
United States Postal Service	)	**Post Office: Youngstown, Ohio**
and	)	
American Postal Workers Union	)	**Case No: C94C-4C-C98040114 C2N9717**

Before: Michael E. Zobrak, Arbitrator

Appearances:

For the Postal Service: William R. Pagan, Labor Relations Specialist
For the Union: Gregory See, Arbitration Advocate

Place of Hearing: Youngstown, Ohio

Date of Hearing: April 12, 2000

Date Of Award: May 18, 2000

Relevant Contract Provisions: Articles 19 and 37

Contract Year: 1994-98

Type of Grievance: Return to work.

Award Summary

The Grievant's OWCP claim was denied and he was given an offer to return to work. He testified that he obtained the necessary medical certification and hand carried that documentation to the Youngstown, Ohio Post Office. The documentation needed to be verified by the Akron, Ohio District. More than two weeks passed before the Grievant was returned to employment. The Postal Service claimed problems in verifying the medical certification. The delay in returning the Grievant to employment was excessive and unjustified. He is to be made whole for lost wages, shift differential, premium pay and holiday pay for the period between August 30, 1997 and the actual date of his return to employment.

Michael E. Zobrak, Arbitrator

ADMINISTRATION

By letter of March 24, 2000, the undersigned was notified of his appointment by the parties to hear and decide a matter then in dispute between them. A hearing went forward on April 12, 2000, where both parties presented testimony, written evidence and arguments in support of their respective positions, and where the Grievant appeared and testified on his own behalf. The record was closed at the conclusion of the hearing and this matter is now ready for final disposition.

GRIEVANCE AND QUESTION TO BE RESOLVED

On December 10, 1997, the following grievance (Joint Exhibit 2) was filed:

Employee released from doctor to return to work. No reply from Akron for approx. 2 wks.

The question to be resolved is did the Postal Service violate the National Agreement through the manner it returned the Grievant to employment? If so, what should the remedy be?

CITED PORTIONS OF THE AGREEMENT

The following portions of the Agreement (Joint Exhibit 1) were cited:

ARTICLE 19

HANDBOOKS AND MANUALS

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 have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions. Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least sixty (60) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within sixty (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Unions upon issuance.

ARTICLE 37

CLERK CRAFT

(Entire Provision)

FACTUAL BACKGROUND

The Grievant was initially hired by the Postal Service as a letter carrier. At the time of the events leading to the filing of this grievance the Grievant was employed as a Distribution Clerk, Tour 1. While working as a carrier, the Grievant began to suffer from foot problems. The Grievant filed four (4) OWCP claims related to his foot problems. He filed a fifth OWCP claim, which was subsequently denied as not being work related. By letter of March 24, 1997, the Grievant was sent a rehabilitation job offer for a Modified Distribution Clerk position at the Youngstown, Ohio Post Office. The Grievant signed and accepted the modified rehabilitation position.

The Grievant testified that on August 23, 1997 he obtained a "Premedical Clearance Return to Work Form Following Extended Illness." The Akron District of the Postal Service developed the form containing the medical information. He claims to have hand carried the form to the Youngstown, Ohio Post Office on the same day it was obtained. Included with the above-cited form was a "Medical Certification and/or Clearance To Return To Work" form also used in the Akron District. The Grievant maintains that when he did not hear from anyone concerning his return to work, he began to make phone calls to the Youngstown Post Office and to the Akron District Office to inquire why he was not being returned to work.

The Grievant was not returned to employment for approximately two weeks after he returned the medical certification. As the result of the delay in his return to employment, the Grievant did not receive the Labor Day holiday pay. The instant grievance was filed to protest the wages lost as the result of the delay in returning the Grievant to employment.

CONTENTIONS OF THE PARTIES

UNION CONTENTIONS

The Union contends that the unjustifiable delay in returning the Grievant to employment resulted in the Grievant's losing a substantial amount of wages. The Grievant sought a response

on the delay from Youngstown and Akron, but was never told the reasons for the delay. The Grievant hand carried the form to the Youngstown Post Office and sought information concerning when he would be returning to work. The Grievant suffers from a serious medical condition and should have been granted Family and Medical Leave. The Grievant provided the Postal Service with the necessary medical information for his return to employment. Once that information was provided, he should have been returned to his job as soon as possible. The Postal Service has not offered any rationale for not promptly returning the Grievant to his job. Had he been returned to employment in a timely manner, he would have been entitled to holiday pay, night differential and Sunday premium. The Union requests that the grievance be sustained.

POSTAL SERVICE CONTENTIONS

The Postal Service takes the position that the Union has not met its burden of proof, nor has it cited any provision of the National Agreement that has been violated. There is no question that medical certification was required before the Grievant could be returned to employment. The Grievant should have sent the certification directly to Akron. The Postal Service is unaware of when the information was received in Akron for verification. The Grievant should have provided at Step 2 or 3 of the grievance procedure the exact dates of the return of the medical certification. Without that information it is impossible for the Postal Service to determine if any delay occurred. The telephone calls made by the Grievant to Akron and did not take place until September. Issues related to FMLA were not raised during the grievance procedure. The Postal Service seeks denial of the grievance.

DISCUSSION AND FINDING

The Grievant testified that he hand carried the medical certification document to the Youngstown Post Office on Saturday, August 23, 1997. It is evident by subsequent Postal Service actions that those documents were received and sent to the Akron District. The Postal Service did not present testimony or evidence that would refute the Grievant's claim that the documents were delivered to the Youngstown Post Office immediately after he obtained the documents from his physician. The Grievant's testimony is accepted as being credible on this point.

The Postal Service failed to immediately recall the Grievant and return him to work despite receipt of the medical documents. The undersigned, however, accepts the argument that

the Postal Service needed to verify the information contained in those documents. The extended delay, however, resulted in the Grievant's losing the opportunity to earn wages while performing duties for the Postal Service. While the Step 2 response indicates that the Akron Medical Center had difficulties in contacting the Grievant's physician, the extent of the delay in returning the Grievant to work has not been justified.

Accepting that the medical documentation was received in Youngstown, not Akron, on August 23, 1997, a period of one week between the presentation of the documents in Youngstown and the time needed to verify the information contained thereupon, could be understandable.[1] Any additional delay cannot be justified. The Grievant is to be made whole for any additional wages and benefits lost, including holiday pay, premium pay and shift differential, for the period between August 30, 1997 and the actual date of the Grievant's return to employment. Issues related to FMLA were not raised during the processing of the grievance and are not given any consideration herein.

[1] The one week delay in returning the Grievant to employment is acceptable under the circumstances noted herein A one week delay may not be acceptable under different circumstances. This finding is limited to the circumstances cited in this case and may not apply in other such cases.

ACCELERATED ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION between UNITED STATES POSTAL SERVICE and AMERICAN POSTAL WORKERS UNION	Grievant: Taylor Post Office: Charleston, WV Case #: D94C-4D-C 98114980 C98253190

Before:	Arbitrator Michael Wolf
Postal Service Advocate:	Jeffery Meadows
Union Advocate:	James Brooks
Place of Hearing:	Charleston, WV
Date of Hearing:	February 11, 1999
Date of Briefs:	March 22, 1999
Date of Award:	April 27, 1999
Contract Provisions:	Article 19; EL-311, Section 342; ELM 513.561
Contract Year:	1994-1998
Type of Grievance:	Contract

Summary of Award

The grievance is sustained. Eight hours of sick leave shall be restored to the Grievant.

Michael Wolf
MICHAEL WOLF

ISSUE

The Postal Service framed the issues as follows: "Is this grievance arbitrable? If so, did the Postal Service violate Article 19 of the National Agreement when the grievant was not permitted to return to duty on March 10, 1998, without being cleared by the medical unit for his absence of March 9, 1998? If so, is the grievant entitled to the remedy requested by the union at Step 2?"

The Union proposed an alternative statement of the issue: "Did Management violate the collective bargaining agreement when they requested return to work documentation from the grievant after missing one day of work due to an Family & Medical Leave Act covered illness (FMLA)? And if so, what shall the remedy be?

I find that the arbitrability issue has been properly presented to me and that the parties' statements of the issue on the merits are not materially different.

RELEVANT CONTRACT PROVISIONS

Article 19. **Handbooks and Manuals.**

> Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly related to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with his 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....

EL-311, Section 342 **Return to Duty After Extended Illness or Injury**

> **342.1 Certification After 21 Days.** Employees returning to duty after 21 days or more of absence due to illness or serious injury must submit medical

evidence of their ability to return to work, with or without limitations. A medical officer or contract physician evaluates the medical report and, when required, assists in employee placement to jobs where they can perform effectively.

342.2 Other Required Certification. Employees returning to duty after an absence for communicable or contagious diseases, as well as mental and nervous conditions, diabetes, cardiovascular diseases, epilepsy, or following hospitalization, must submit a physician's statement stating unequivocally that they are fit for full duties without hazard to themselves or others, or indicating the duties which they are capable of performing. These also must be approved by the postal medical officer where available. In facilities where there is no medical officer, the opinion of a postal medical officer designated by the Region must be requested in questionable cases.

342.3 Contents of Certification. All medical certifications must be detailed medical reports and not simply a statement of ability to return to work. There must be sufficient data to make a determination that the employee can return to work without hazard to self or others. In instances of hospitalization for mental or nervous conditions, the attending physician's certificate must also state that the employee has been officially discharged from the hospital. In diabetes and epilepsy cases, the certificate must state that the condition is under adequate control. The medical officer (at installations with one) makes the final medical determination of suitability for return to duty and/or the need for limited duty assignment. Other offices must refer the case to the medical officer designated by the Region.

ELM Section 513.36 **Documentation Requirements**

513.361 **Three Days or Less**

For periods of absence of 3 days or less, supervisors may accept the employees' statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work is required only when the employee is on restricted sick leave (see (513.37) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service.

513.362 **Over Three Days**

For absences in excess of 3 days, employees are required to submit medical documentation or other acceptable evidence of incapacity for work.

BACKGROUND

A hearing was conducted in this case on February 11, 1999. The Union's sole witness was the Grievant, Joseph F. Taylor. The Postal Service's three witnesses were John Comer (Associate Medical Director for the Appalachian and Kentucky Districts), Kelley Moore (Occupational Health Nurse Administrator) and Gerald Riddle (Supervisor of Customer Service). The parties also submitted joint and separate exhibits. The following summary of the facts is derived from the documentary and testimonial evidence presented at the hearing.

The Grievant has been employed by the Postal Service for approximately 11 years, the past two years as a bulk mail clerk. In 1991 he was diagnosed with diabetes. After consulting with his physician, the Grievant began wearing a self-regulating pump that administers insulin to his blood. After his diagnosis, the Grievant completed the forms necessary to identify his diabetes as an illness covered by the Family and Medical Leave Act (FMLA).

The Grievant testified without contradiction that he has been absent from work approximately three or four days each year since 1991 as a result of problems associated with the amount of insulin delivered by the pump. In such instances, the Grievant was absent from work only a day or two. In most instances, the inadequate insulin levels resulted from mechanical problems with

the pump (e.g., a clog in the apparatus). The Grievant has been trained to clean the pump to correct minor problems. When the Grievant is able to correct these problems himself, he does not normally schedule an appointment with his doctor.

Prior to March 1998, whenever these short absences occurred, he returned to work without providing any fitness-for-duty certificate from his doctor. His supervisors never asked him to provide such certification as a condition of returning to work. On March 9, 1998, the Grievant called in sick to Supervisor Riddle. He explained that it was related to his diabetes. Riddle telephoned the medical office and was told that the Grievant should not be permitted to return to work until he presented a doctor's certification stating that the Grievant was fit to return to duty. Riddle conveyed this instruction to the Grievant by telephone and sent him a written notification to this effect. The Grievant told Riddle that he had never previously been required to provide such certification, but Riddle told him that he (Riddle) could not clear the Grievant to return to work.

On March 10, 1998, the Grievant tried to return to work without having visited his doctor. Riddle told him that he could not return without a certification. He was sent home and put on sick leave for the 10th.

After consulting the Union, the Grievant returned to work on March 11, 1999, again without a doctor's certification. Riddle

consulted with the acting Postmaster,[1] who told Riddle to permit the Grievant to resume his duties without further medical documentation. The Grievant thereupon resumed his duties.

On March 11, 1998, the Grievant and Riddle signed two leave slips. For the March 9, 1998 absence, the Grievant was granted sick leave; under "remarks," the entry stated "FMLA." For March 10, 1998, the Grievant was also put in a sick leave status, with the comment "Due to Mgmt's refusal to accept FMLA documentation for return to work." The documentation that the Grievant referred to in this remark was a form that he had signed and filed on March 11, 1998, entitled "Employee Certification of Own Serious Illness - FMLA." The Grievant also pointed out that his physician had filed a certification dated October 2, 1997 (on file with the medical office) that his diabetes is a covered illness under the FMLA. However, the Grievant never obtained a doctor's certification authorizing his return to work on March 10, 1998.

The Grievant filed a grievance on March 12, 1998, protesting Management's refusal to permit him to work on March 10 and the imposition of an involuntary status of sick leave on that date. The Union requested two remedies: (1) that the Postal Service "cease and desist" its policy of requiring medical clearance for

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[1] The person acting as Postmaster occupied that position for only one week. Riddle testified that the acting Postmaster later told Riddle that it had been a mistake to allow the Grievant to return to work without medical documentation. Neither the Postal Service nor the Union called the acting Postmaster as a witness.

a one day absence; and (2) that the Grievant either receive eight hours of pay for March 10, 1998 or that he have eight hours of sick leave restored to his account. The Postal Service denied the grievance at Step 3:

> It is alleged that Management violated the National Agreement when the grievant was not permitted to return to duty following a FMLA absence. It is Management's position that FMLA only guarantees an employee the right to be absent for approved conditions without suffering an adverse impact on their employment. It does not control the type of leave granted or the procedures to be followed for return to duty. The requirement for medical certification for return to duty is covered by sections 825.310, .311 and .312 of the Department of Labor regulations for enforcement of the Act. The requirement for acceptable medical documentation was consistent with Postal Service procedures and thus was appropriate. Accordingly, the grievance is denied.

The Grievant testified that, since the filing of this grievance, he has been absent briefly for reasons related to his diabetes; Management has not required a fitness-for-duty certification on those occasions.

THE UNION'S POSITION

The Union argues that the Grievant's absence was protected by the FMLA and that the statute does not require medical certification by an employee who has been absent only one day due to a covered illness. Moreover, ELM Section 513.361 states that medical documentation is not needed for absences of less than three days unless the employee is on restricted sick leave or when necessary to protect the interests of the Postal Service. Neither condition is found in this case.

To the extent that the FMLA permits an employer to request medical documentation, it can do so only "pursuant to a uniformly applied policy for similarly-situated employees." Here, there was no uniform policy of requiring medical documentation after a return from a brief FMLA illness, as evidenced by the failure to require such documentation from the Grievant before or since March 9, 1998.

The Union contends that Handbook EL-311 does not provide support for Management. It was adopted prior to passage of the FMLA and therefore does not take account of that statute's requirements. Section 342 of the Handbook does not apply to this case because it only requires a return-to-duty certification for absences of 21 days or longer.

As a remedy for the violation, the Union requests that "Management ... cease and desist the policy of requiring medical certification for a one day absence (FMLA), and ... compensate the Grievant eight (8) hours of pay at the straight time rate for absence of 3/10/98 and restore eight (8) hours sick leave to the Grievant."

THE POSTAL SERVICE'S POSITION

The Postal Service's initial position is that this case is not arbitrable. It argues that the Union is contesting the validity of Section 342 of the EL-311, but did not file a timely grievance when that provision was promulgated. This case is therefore untimely.

On the merits, the Postal Service contends that Section 342 of the EL-311 complies with the FMLA when it states a policy of requiring medical certification from all employees who return to duty after an absence related to diabetes. Section 342.2 of the EL-311 requires such certification regardless of the duration of the absence. This national policy is buttressed by the Appalachian District's Return to Duty policy, which requires an "employee returning to duty, regardless of time absent, for communicable or contagious disease, mental and nervous conditions, diabetes ... or following hospitalization."

Finally, the Postal Service argues that, even if the grievance were sustained, I have no authority to rescind or override the Service's return-to-duty policy, as enunciated in the EL-311.

FINDINGS AND CONCLUSIONS

A. Arbitrability

The Postal Service argues that this grievance is not arbitrable because the Union is protesting Handbook EL-311, Section 342, which has been in effect since 1989. The Union did not grieve the adoption of this provision and "is barred from challenging these provisions at this time at regular arbitration." Br. at 5.

The Union's position in this arbitration is not that Section 342 is per se a violation of the collective bargaining agreement. It is arguing instead that Section 342 does not apply to this case (i.e., when an employee has missed only one day of work due

to a chronic medical condition). When the Union contests the interpretation or application of a provision in the contract or in a handbook, it may file a timely grievance whenever an alleged misapplication or misinterpretation occurs. In this case, the Postal Service contended that EL-311 required the Grievant to provide medical certification prior to return to work. As soon as Management made its position known, the Union had the right to contest this interpretation of the Handbook. Accordingly, I conclude that this grievance is timely and is properly before me.

B. The Merits

An initial dispute between the parties is whether this case must be decided under the FMLA. The Union argues that this federal law controls this case; the Postal Service argues that the FMLA does not undermine its authority to promulgate internal rules governing sick leave and the procedures for returning to work after an illness.

The Grievant's leave record for March 9, 1998 states that he was granted sick leave under the FMLA. Riddle signed that leave slip. The Grievant testified without contradiction that all of his diabetes-related absences were identified as FMLA leave. He maintained medical certification on file with the Postal Service documenting his entitlement to FMLA leave. Because the Grievant's leave on March 9 was taken under the FMLA and because the Postal Service agreed to treat the absence under this statute, it must comply with that law.

The regulations issued under the FMLA address the possibility of an employer having a fitness-for-duty policy that might affect an employee's return to work.[2] Section 825.310(a) states that an employer "may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work." 29 CFR § 825.310(a). Section 825.310(b) additionally provides that an employee may be required to comply with a return-to-duty requirement that is incorporated in a collective bargaining agreement. 29 CFR § 825.310(b).

If an employer has a relevant provision in its bargaining agreement or if it notifies the employee in advance of a return-to-duty certification policy or practice, it may delay an employee's return to work until such certification is presented. 29 CFR § 825.310(c). The certification need not be a detailed

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[2] The Award by Arbitrator Parkinson in Case # D94T-1D-D 96054058 (cited by the Postal Service) is inapposite. Arbitrator Parkinson rejected the applicability of the FMLA to a case involving an employee who became violent and was diagnosed with bi-polar disorder. Arbitrator Parkinson rejected the Union's FMLA argument, in part, because the Union had failed to rely on that statute during earlier stages of the grievance process. It was thus a "new" argument at arbitration. The opposite is true in the instant case. The Step 2 appeal clearly identified the FMLA among the alleged violations. The Step 3 decision directly addressed the FMLA. Arbitrator Parkinson's Award is also distinguishable because it has no discussion of Section 825.310 of the FMLA regulations, which is the provision relied upon by the Union in this case.

medical history; all that is required is a "simple statement of an employee's ability to return to work." Id.

Although the parties jointly entered ELM Section 513.361 into evidence, that provision does not state a policy or practice applicable to this case. As quoted above, Section 513.361 permits, but does not require, supervisors to demand documentation from employees who are absent for medical reasons for three days or less. The documentation referred to in that section is proof that the employee was incapacitated during the absence. It is not documentation of the employee's ability to work after the cessation of the illness or injury.

For purposes of this grievance, the primary source of any policy regarding return to duty after an illness or injury is the EL-311, Section 342. That provision has also been incorporated into the collective bargaining agreement, pursuant to Article 19 of the contract.

Section 342 is entitled "Return to Duty after Extended Illness or Injury." The Union contends that a one-day absence cannot be treated as an extended illness and that, for this reason, Subsections 342.1 and 342.2 cannot apply to this case. The Postal Service, however, urges me to read these Subsections together: Subsection 342.1 should apply to all absences longer than 21 days, while Subsection 342.2 should apply to specified illnesses (including diabetes) regardless of duration.

There is some merit to each party's interpretation of the EL-311. The general heading for Section 342 makes the

Subsections applicable only to "extended" absences, which would seem to exclude a one-day absence. The Subheadings, in contrast, imply that Subsection 342.2 applies to absences of less than 21 days for the specified illnesses. In short, EL-311, Section 342 is ambiguous.

Whenever the language of a contract (or incorporated handbook provision) is not clear on its face, it is appropriate to consider the practices of the parties as evidence of the proper meaning to be accorded the disputed language. Comer and Moore testified that for approximately four years the policy was to require medical certification for an employee returning from diabetes-related absences, regardless of the duration. Neither Comer nor Moore provided specific examples to support this practice. Apart from the EL-311, Section 342, the Postal Service did not offer any documents showing the application of this alleged policy to any other similarly-situated employees.

The Grievant testified that, since 1991, he was never asked to provide medical certification for his brief diabetes-related absences. March 9, 1998 was the first occasion that Management requested medical certification. In other words, for seven years the Postal Service had not applied the policy described by Comer and Moore -- at least not to the Grievant.

Riddle testified that he was the Grievant's supervisor on one occasion prior to March 9, 1998 when the Grievant missed a day of work because of his diabetes. At that time, Riddle did not require certification from the Grievant's doctor prior to his

return to work. Notwithstanding Comer's and Moore's claim that, for at least four years, all diabetics were required to have return-to-duty certificates, Riddle explained that he was unaware of any such requirement prior to March 9, 1998. It was not until that date that Riddle was told by the medical office of the requirement for medical certification. Even then, the acting Postmaster overruled the medical office and permitted the Grievant to return to work without further documentation. Since that time, the Grievant has been absent on other occasions relating to his diabetes, and his return to work has not been conditioned on presentation of a medical certificate that he was fit for duty.

The Grievant's description of this treatment prior to March 9, 1998 and after that date was credible. The Postal Service did not offer documents or testimony to contradict his recollections of the past practice. The general statements of policy by Comer and Moore, unsupported by concrete examples, were not sufficiently probative to undermine the particularized testimony by the Grievant. Equally important, the Grievant's recollections were partly corroborated by Riddle. For these reasons, I find that the Postal Service failed to prove that Section 342 of the EL-311 created a clear policy or practice of requiring medical certification prior to permitting diabetic employees to return to work after a one-day absence. In fact, prior to March 9, 1998,

the practice was to not require medical certification when the Grievant had brief absences related to his diabetes.[3]

To the extent that the EL-311 qualifies as part of the collective bargaining agreement, the Postal Service failed to prove its applicability under Section 825.310(b) of the FMLA regulations. 29 CFR § 825.310(b). Specifically, the Postal Service failed to present sufficient proof to establish that the return-to-duty certification for the Grievant's one-day absence was dictated by business necessity, as required by that regulation. Id.

The Postal Service also argues that the Appalachian District "Return to Duty" policy (quoted above) is binding on employees. The Postal Service contends that the Grievant's treatment was consistent with that policy. Unlike Section 342 of EL-311, the District notice explicitly states that an employee returning to duty after a diabetes-related absence must present medical certification "regardless of time absent."

This District "policy" was not committed to writing until October 22, 1997, approximately six years after the Grievant began taking sick leave for his diabetes. There is also no evidence that this is a national policy that has been subjected

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[3] The Postal Service cited Case # C1C-4F-C 780 (Bowles, 1982). In that case, a supervisor erroneously permitted a return to work without the medical documentation required under a different contractual provision. Arbitrator Bowles concluded that this action was a mistaken deviation from established policy. The instant case, in contrast, involves a prolonged adherence to a consistent policy of not requiring medical certification for the Grievant's one-day absences. This seven-year policy cannot be characterized as a "mistake."

to the procedures of Article 19 of the contract. A local notice that has been unilaterally issued cannot override a national policy that is incorporated in either the contract or a handbook subject to Article 19. Nor can a local notice provide certainty to a provision in a national handbook (Section 342 of the EL-311) that is ambiguous. The District notice here contains language ("regardless of time absent") that is missing from Subsection 342.2 of the EL-311. If anything, the inclusion of that phrase in the local notice points up the ambiguity in the EL-311.

The Appalachian District notice also fails to satisfy the requirements of the FMLA. The FMLA permits an employer to restrict an employee's return to duty if there is a "uniformly-applied policy or practice" applicable to all similarly situated employees or if there is an appropriate provision in a collective bargaining agreement. The Appalachian District policy is not part of the collective bargaining agreement. Nor does the evidence in this record support a finding that the Appalachian District has a policy that is uniformly applied. Again, the weight of the evidence is that, for seven years, this "policy" was <u>not</u> applied to the Grievant. For these reasons, the Appalachian District policy does not satisfy the requirements of Section 825.310(a) and (b) of the FMLA regulations.

Finally, the Postal Service's Step 3 decision states that the "requirement for a medical certification for return to duty is covered by sections 825.310, .311 and .312 [of the FMLA

regulations]." However, neither party directly addressed the implications of Section 825.310(g):

> An employer is not entitled to certification of fitness to return to duty when the employee takes intermittent leave as described in § 825.203. [29 CFR § 825.310(g)]

Subsection 825.203 provides:

> (a) FMLA leave may be taken "intermittently or on a reduced leave schedule under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason....
>
> * * * *
>
> (c) Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition....
>
> * * * *
>
> (2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider. [29 CFR § 825.203.]

Because the Union did not explicitly raise Section 825.310(g) in its argument, I am not basing my decision on it. However, I would be remiss if I did not point out to the parties that Sections 825.310(g) and 825.203 arguably preclude the use of a return-to-duty certification in cases of intermittent absences relating to FMLA-covered conditions. A determination whether that argument has merit must await another case when both parties have had an opportunity to brief the issue.

C. Remedy

The Union has requested a "cease and desist" order against the Appalachian District policy, as applied to all one-day absences. That remedy would be inappropriately broad under Section 825.310(a), (b) and (c) of the FMLA regulations. Those regulations permit the adoption of policies similar to that enunciated in the Appalachian District Return to Duty notice. The problem in this case is that the Postal Service failed to prove that the alleged policy was, in fact, applied consistently by supervisors. However, a failure of proof in this one case should not result in a remedy that bars Management from exercising its lawful prerogatives in all future cases. Also, I do not believe that the Postal Service should be precluded from endeavoring to prove in future cases involving different grievants or different facts that it has a policy or practice that complies with the FMLA.

As indicated above, it is possible to argue that Section 825.310(g) bars a mandatory return-to-duty certificate for one-day, intermittent absences under the FMLA. However, the Union did not make that argument in this case. It therefore is not entitled in this case to the broad cease-and-desist remedy that might arise under Section 825.310(g). Such a remedy would not be appropriate until the Union and the Postal Service have had an opportunity to brief that contention in a future case.

As to this Grievant, this Award stands for the proposition that the Postal Service violates the FMLA when it demands a

return-to-duty certification from the Grievant after a one-day absence caused by his diabetes. Under the doctrines of res judicata and collateral estoppel, this Award should protect the Grievant in future cases involving the same facts.[4]

As a make whole remedy, it is appropriate that the Grievant have one day (eight hours) of sick leave restored to his account. This remedy takes account of the Grievant's involuntary sick leave status on March 10, 1998.

AWARD

The grievance is sustained. Eight hours of sick leave shall be restored to the Grievant.

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[4] To the extent that there may be future diabetic episodes affecting the Grievant's attendance at work, but arising out of different facts or involving lengthier absences, those matters will have to be considered on a case-by-case basis.

REGULAR REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration	( )	Grievant: Sullivan, James
between	( )	Post Office: Denver AMC
UNITED STATES POSTAL SERVICE	( )	USPS Case No. E98C-1E-C 01183509
and	( )	APWU Case No. 20010651
AMERICAN POSTAL WORKERS UNION, AFL-CIO	( )	

BEFORE: D. Andrew Winston, Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Bruce Born, Labor Support Team - Denver P&DC Jon P. Inglis, Labor Relations Specialist
For the Union:	Marilyn "Mo" Merow, National Business Agent, Clerk Division, Denver Region Harold Hammeli, Director, Industrial Relations, Denver Metro Area Local
Place of Hearing:	7500 East 53rd Place Denver, Colorado 80266
Date of Hearing:	September 25, 2001
Date of Award:	September 28, 2001
Relevant Contract Provision(s):	Articles 5 & 19; ELM §§ 513.361, 513.364, 515.42, & 515.55; 29 CFR §§ 825.207 (a) & (h), 825.308(c)(3), & Subpart G; & Publication 71.
Contract Year:	1994-1998
Type of Grievance:	Contract

ISSUE

Did the Service violate the national agreement when it requested medical documentation from James Sullivan when he applied for a Family Medical Leave Act covered condition on April 13, 2001? If so, what is the remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 5
PROHIBITION OF UNILATERAL ACTION

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

ARTICLE 19
HANDBOOKS AND MANUALS

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.

ELM 16.1, February 8, 2001

513.36 Sick Leave Documentation Requirements

513.361 Three Days or Less

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

513.364 Medical Documentation or Other Acceptable Evidence

When employees are required to submit medical documentation, such documentation should be furnished by the employee's attending physician or other attending practitioner who is performing within the scope of his or her practice. The

documentation should provide an explanation of the nature of the employee's illness or injury sufficient to indicate to management that the employee was (or will be) unable to perform his or her normal duties for the period of absence. Normally, medical documentation such as "under my care" or "received treatment" are not acceptable evidence of incapacitation to perform duties.

515.4 Leave Requirements

515.42 Leave Type

Absences that qualify as FMLA leave may be charged as annual leave, sick leave, continuation of pay, or leave without pay, or a continuation of these. Leave is charged consistent with current leave policies and applicable collective bargaining agreements.

515.55 Employee Incapacitation

An employee requesting time off that is covered by FMLA because of his or her own incapacitation must satisfy the documentation requirements for sick leave in 513.31 through 513.38 or for LWOP in 514.4.

29 CFR Part 825 (3/30/95)

29 CFR 825.207 - Is FMLA leave paid or unpaid?

(a) Generally, FMLA leave is unpaid. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute paid leave for FMLA leave.

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

§ 825.308 Under what circumstances may an employer request subsequent recertification of medical conditions?

(c) For circumstances not covered by paragraphs (a) or (b) of this section, an employer may request recertification at any reasonable interval, but not more often than every 30 days, unless:

(3) The employer receives information that casts doubt upon the continuing validity of the certification.

VII. Subpart G - How Other Laws, Employer Practices, and Collective Bargaining Agreements Affect Employees' FMLA Rights

More Generous Employer Benefits Than FMLA Requires (§ 825.700)

Nothing in FMLA diminishes an employer's obligation under a collective bargaining agreement (CBA) or employment benefit program or plan to provide *greater* family or medical leave rights to employees than the rights established under FMLA (FMLA § 402(a)), nor may the rights established under FMLA be diminished by any such CBA or plan (FMLA § 402(b)).

RELEVANT FACTS

This grievance was processed in a timely and proper manner. There was no challenge to the jurisdiction of the Arbitrator at the hearing. During the course of the arbitration hearing, all parties were afforded a full and complete opportunity to be heard, present relevant evidence, cross-examine witnesses, and develop arguments. No official transcript was made of the hearing. Witnesses appearing before the Arbitrator were duly sworn. The hearing was closed and the matter stood fully submitted as of September 25, 2001.

The facts are undisputed.

James Sullivan is a Distribution Clerk at the Airport Mail Center in Denver, Colorado.

The parties stipulated that: James Sullivan was certified for one (1) to five (5) days Family and Medical Leave Act ("FMLA"), 28 U.S.C. §§ 2601, *et seq.*, leave per month; he called in on April 13, 2001, a Friday, for sick/FMLA leave; he was told at that time by Bennie Penn, the on-duty Attendance Control Supervisor, to provide medical documentation, as well as why such documentation was being requested; Mr. Sullivan returned to work the next day, April 14, 2001, with the requested documentation; and on May 3, 2001, Mr. Sullivan was notified that his sick/FMLA leave request was approved.

Mr. Sullivan alleged in the Step 2 Grievance Appeal Form that he suffers from a chronic condition and that he called in on April 13, 2001, for eight (8) hours of FMLA sick leave due to that condition. The Service did not challenge these allegations.

Mr. Sullivan filed a grievance. A step 1 meeting was held on May 16, 2001. The grievance was denied. Mr. Sullivan appealed the step 1 decision, asserting violations of Articles 5 and 19 of the national agreement. The appeal was denied. The Union appealed the step 2 decision to arbitration as an expedited arbitration panel issue. At the hearing, the parties converted the grievance to a regular arbitration panel issue.

Lorraine Marie Rudolph, FMLA Coordinator, testified, among other things, that: Mr. Sullivan received Publication 71 (February 2001), "Notice For Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act," in an application packet he was sent after his initial request for FMLA certification; recertification requires going through the same steps as certification; sick leave is available for FMLA leave and employees can use paid leave for FMLA leave but they must meet and comply with the Postal Service's sick leave policies; and Mr. Sullivan's FMLA certification does not require that he not attend work on Fridays.

Bennie Penn, Attendance Control Supervisor, testified, among other things, that: FMLA leave can be paid leave, *e.g.*, sick leave, which would then fall under the Service's policy regarding sick leave; sick leave requirements are different than recertification for FMLA leave in that no packet needs to be filled out and submitted; rather, only medical documentation needs to be provided; sick leave requirements do not apply to FMLA leave; under ELM § 513.361, management can request medical documentation for absences of three (3) days or less when the employee is on restricted sick leave or to protect the interests of the Service, *e.g.*, when patterns arise; it does not matter if the employee is on FMLA leave; all absences are treated the same; Mr. Penn was the Attendance Control Supervisor on duty when Mr. Sullivan called in on April 13, 2001; when an employee calls in, a computer screen takes the Attendance Control Supervisor through a series of questions which track Form 3971, Request for or Notification of Absence; the computer also pulls up the employee's attendance history; Mr. Sullivan's attendance history reflects one (1) absence per month in January, February, March and April 2001; Mr. Penn opined that Mr. Sullivan's attendance history is "pretty good;" Mr. Penn requested medical documentation from Mr. Sullivan on April 13, 2001, only because Mr. Sullivan's attendance history reflected a pattern of calling in on the same day, Friday, and that such documentation was therefore necessary for the protection of the interests of the Service; it appeared to Mr. Penn that Mr. Sullivan may have been abusing sick leave; Mr. Penn has asked

other employees on FMLA leave for medical documentation; on average, Mr. Penn asks between five (5) and ten (10) employees, or between fifteen and twenty percent (15-20%), for documentation each day; Mr. Penn was aware on April 13, 2001, that Mr. Sullivan was FMLA certified; and FMLA leave is treated the same as any other attendance issue.

On cross examination, Mr. Penn testified, among other things, that: Mr. Sullivan's scheduled days off are Sunday and Monday; Mr. Sullivan's request for sick/FMLA leave on April 13, 2001, a Friday, was not in conjunction with his regular days off or a holiday; when an employee calls in to report an absence, the computer shows whether the employee is FMLA certified, the period the certification is effective and the permitted frequency of absence; Mr. Penn did not recall if he discussed the permitted frequency of FMLA absence with Mr. Sullivan; Mr. Penn requested medical documentation from Mr. Sullivan because he detected a pattern to the absences - Fridays in the middle of the month - and to protect the interests of the Service since absences impact the Service's revenue; Mr. Penn felt there was a potential that sick leave was being abused; Mr. Penn confirmed that Mr. Sullivan did not call in on every Friday, only on one (1) previous Friday in February 2001 and one (1) prior Friday in March 2001; Mr. Penn acknowledged that it is possible that an employee's medical condition might prevent him/her from attending work on a Friday; Mr. Penn also posited that the employee might have something else that keeps him/her from reporting to work, *e.g.*, a softball game; Mr. Penn never saw the medical documentation provided by Mr. Sullivan but stated that the Form 3971 reflects that he provided it; medical documentation is reviewed and accepted or rejected by the Attendance Control Supervisor on duty when it is brought in; Mr. Penn did not know when Mr. Sullivan provided the documentation; the policy is that employees are supposed to bring it with them when they return to work; it appears that the documentation was accepted on May 3, 2001; the ELM requires that the documentation state the nature of the condition and the expected duration of the absence; the medical documentation provided by Mr. Sullivan states, "[m]edical excuse provided for absence from work," and "[s]tates is ill and unable to work today re: FMLA," and appears to be signed by a registered nurse; the documentation does not give the nature of the illness; and Mr. Penn opined that he would have asked for a general statement of the nature of the illness.

On re-direct, Mr. Penn stated that he did not recall speaking to Mr. Sullivan on April 13, 2001, nor what he said to Mr. Sullivan.

The grievant did not testify.

UNION'S POSITION

The Service concedes that Mr. Sullivan's attendance history is "pretty good." Mr. Sullivan had one (1) absence each month in January, February, March and April 2001, well within the guidelines of his FMLA certification authorizing up to (5) days FMLA leave each month. The requested day off was not in conjunction with a holiday or Mr. Sullivan's regular nonscheduled days. The fact that two (2) prior absences were also on a Friday is not reason enough to cast doubt on the validity of Mr. Sullivan's request.

The documentation supplied provided no further information than the Service already had when the request for an unscheduled absence was made. Furthermore, the documentation failed to comply with the ELM. Nevertheless, the Service accepted it. However, the Service apparently did not review it and approve the request until nineteen (19) days after the fact. Therefore, the Service's conduct in this case was arbitrary, capricious, and constitutes harassment.

The Union asks that the grievance be sustained in its entirety, that the Service be directed to immediately cease and desist from asking Mr. Sullivan for medical documentation for FMLA absences, that Mr. Sullivan be made whole in all ways, including compensating him for all time used in getting the necessary documentation required for the absence of April 13, 2001, *i.e.*, one (1) hour at one and one-half (1.5) times the regular rate of pay, as well as mileage at the applicable rate for five (5) miles.

SERVICE'S POSITION

This case does not present an FMLA issue but, rather, an attendance issue. The Service permits substitution of paid sick leave for FMLA leave but when this occurs, Postal regulations regarding sick leave kick in.

Supervisor Penn requested medical documentation from Mr. Sullivan on April 13, 2001, because he detected a pattern of Mr. Sullivan calling in on Fridays in the middle of the month. The ELM gives the Service the right to enforce its policies even if the employee is FMLA certified.

The issue is not the sufficiency of the documentation but the Service's right to ask for it. Supervisor Penn's decision to request documentation was both reasonable and authorized by ELM § 515.55 and 29 CFR § 825.207.

The Union has not demonstrated a violation of the national agreement.

The Service asks that the grievance be denied in its entirety.

The Service cited and relied upon the following arbitration decisions: Arbitrator Zumas, *Case #E1N-2B-C 701 (Philadelphia, PA 1982)*; Arbitrator Zumas, *Case #E1C-2D-C 539 (Rockville, Maryland 1983)*; Arbitrator Bennett, *Case #G98M-1G-D-00081801 NH1462DA00 (Houston, TX 2001)*; and Arbitrator Gold, *Case #H98C-1H-C 99265813 99LK64 (Lakeland, FL 2000)*.

OPINION

The question in this case boils down to whether the Service was justified in requiring medical documentation from Mr. Sullivan for the unscheduled absence called in on April 13, 2001. I find that it was not.

Supervisor Penn testified that the only reason he required medical documentation from Mr. Sullivan for the April 13, 2001, absence was because he detected a pattern: three (3) months in a row with FMLA leave taken on a Friday in the middle of the month. Mr. Penn did not testify that the perceived pattern gave him any reason to question the underlying basis for Mr. Sullivan's FMLA certification.

Mr. Sullivan had FMLA certification for one (1) to five (5) days per month. There is no evidence that the certification precluded Mr. Sullivan from using FMLA leave on Fridays. As of April 13, 2001, Mr. Sullivan had used one (1) day of FMLA leave each month in January, February, and March 2001. In February and March 2001, the FMLA leave fell on Fridays. April 13, 2001, also fell on a Friday.

No evidence of any alleged past abuse of sick leave, chronic attendance problems or related discipline was presented. Rather, Supervisor Penn testified that Mr. Sullivan's attendance history was "pretty good."

Based upon this record, I conclude that while there may have been the most minimal of patterns, there was no evidence of abuse of sick leave, and the pattern was insufficient to trigger a supplemental medical documentation request. Furthermore, unless and until Mr. Sullivan exceeds his maximum FMLA leave allowance of five (5) days per month, an allotment duly accepted by the Service and so certified, the pattern, by itself, is meaningless. To hold otherwise would ignore, and permit the Service to ignore, the FMLA certification.

Such may be the ruling the Service seeks when it argues that this case does not present an FMLA issue but, rather, an attendance issue, that the Service permits substitution of paid sick leave for FMLA leave, and that when this occurs, Postal regulations regarding sick leave kick in. However, the terms and conditions of the national agreement, which, pursuant to Article 19, include the Service's polices regarding sick leave, do not supersede federal law, in this case the FMLA.[1] The national agreement recognizes as much. *See, e.g., Article 5.* Since Mr. Sullivan has FMLA certification for a maximum of five (5) days leave per month, the Service cannot interfere with, restrain, or deny the exercise of or the attempt to exercise such duly certified leave under the guise of enforcing its sick leave policies. *29 U.S.C. § 2615(a)(1).*

The arbitration cases cited by the Service are inapposite and of no assistance as they are all distinguishable on their facts.

In *Case #E1N-2B-C 701 (Philadelphia, PA 1982)*, Arbitrator Zumas held that it was not unreasonable for a supervisor to request medical documentation for an unscheduled absence due to the alleged onset of a cold in light of the employee's prior threat to retaliate against the Service for issuing a Letter of Warning. In this case, there was no evidence of any prior discipline of Mr. Sullivan or expressed desire to retaliate against the Service for any reason.

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[1] 29 U.S.C. § 2652(b) states, "The rights established for employees under this Act or any amendment made by this Act shall not be diminished by any collective bargaining agreement or any employment benefit program or plan."

In *Case #E1C-2D-C 539 (Rockville, Maryland 1983)*, Arbitrator Zumas upheld the Service's requirement of medical documentation from an employee who had requested an unscheduled day off for a dental visit which fell immediately after the employee's rest days and before a national holiday, and where there was a history of six (6) absences in the last eight (8) months, three (3) of which were in conjunction with days off. In this case, it is undisputed that Mr. Sullivan's attendance history is "pretty good" and that the requested day off did not fall in conjunction with a holiday or Mr. Sullivan's regular days off.

In *Case #G98M-1G-D-00081801 NH1462DA00 (Houston, TX 2001)*, Arbitrator Bennett denied a grievance challenging the Service's request for medical documentation for a FMLA/sick leave request where the employee was operating under a Last Chance Agreement in lieu of a Letter of Removal for chronic attendance problems and had failed to abide by the terms of the Agreement. In this case, Mr. Sullivan has incurred no such similar discipline and is not operating under any such similar agreement.

Finally, in *Case #H98C-1H-C 99265813 99LK64 (Lakeland, FL 2000)*, Arbitrator Gold upheld the Service's requirement of medical documentation from an employee found guilty in a previous arbitration of having falsified documents resulting in the approval of her FMLA leave and required for her recertification. There are no such allegations or adjudication against Mr. Sullivan in this case.

AWARD

The grievance is sustained. The Service is hereby directed to immediately cease and desist from asking Mr. Sullivan for medical documentation for absences authorized under his FMLA certification. As for the Union's request that Mr. Sullivan be made whole, no evidence was presented regarding whether or not Mr. Sullivan was required to take time off from work to obtain the requested documentation, and, if so, how much time was required to accomplish that task. Similarly, there was no evidence presented regarding what, if any, mileage was incurred and whether or not it was incurred on Mr. Sullivan's personal vehicle. In the absence of such evidence, I have no basis to award a monetary component to the remedy. Therefore, the balance of the make whole remedy request is denied.

September 28, 2001

D. Andrew Winston, Arbitrator

Regional Arbitration Panel

In the Matter of Arbitration	)	
	)	
between	)	Grievant: Walter K. Green, Jr.
	)	
United States Postal Service	)	Post Office: Jacksonville, FL
	)	
and	)	Case No: H94C-1H-C 98094229
	)	
American Postal Workers Union, AFL-CIO	)	

Before: Patricia S. Plant, Arbitrator

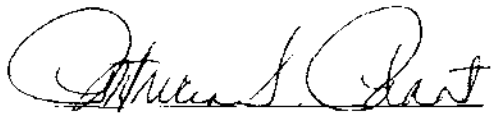
Appearances:

For the Union: Robert Bloomer, Jr. Special Assistant to the President Clerk Division-Tampa NBA Office

For the Postal Service: Ron Midkiff, North Florida District Labor Relations Specialist

Place of Hearing: Jacksonville, FL
Date of Hearing(s): December 4, 1998
Transcript received: December 18, 1998
Date of Award: January 8, 1999
Relevant Contract Provisions: Article(s) 2; 3; 5; 10; 12; 15;17;19; 31;37.
Contract Year: 1994-1998
Type of Grievance: Contract

Award Summary: The Union has taken the position that the resolution of a suspension also resolved the issue of whether or not the Grievant is properly due FMLA. This Arbitrator has found no evidence to support that conclusion. The Service questioned the adequacy of the medical certification offered by the Grievant on August 29, 1998 in conjunction with the Grievant's request for Family Medical Leave. Federal Register Vol 60, No. 4, Friday January 6, 1995 Subsection 825.307 specifically outlines the procedures an employer may use under the circumstances. This Arbitrator has reviewed the rules and regulations, the evidence and testimony and finds that none of these procedures were followed by the Service in this case. The Grievance is sustained as outlined in the discussion section of the award.



Patricia S. Plant, Arbitrator

January 8, 1999

OPINION

STATEMENT OF PROCEEDINGS:

In accordance with the parties' National Agreement [Agreement], the Union appealed the above captioned matter to arbitration. The undersigned was designated as the Arbitrator to hear and decide the matter. The Arbitrator held a hearing on and at the previously referred to date and location. The parties' representatives appeared. The Arbitrator provided the parties with a full and fair opportunity to be heard, to present evidence, argument, to examine and cross examine witnesses.

ISSUE:

Union: Did the Service violate the National Agreement by failing to charge the cited absences, August 27 through August 29, September 5 and 6, September 12 and 13 and September 18 through 20, 1996 as Family Medical Leave Act (FMLA)? If so, what is the appropriate remedy?

Postal Service: Is the Grievant and/or the Union entitled to the remedy requested under the terms and provisions of the Collective Bargaining Agreement?

Joint Stipulations

The seven (7) calendar day suspension, dated October 25, 1996, was resolved at Step 1 of the grievance procedure as remaining a part of the Grievant's record for eighteen (18) months.

PERTINENT CONTRACT LANGUAGE: (omitted in the interest of brevity)
ARTICLE 2 Non-Discrimination and Civil Rights
ARTICLE 3 Management Rights
ARTICLE 5 Prohibition of Unilateral Action
ARTICLE 10 Leave
ARTICLE 12 Principles of Seniority, Posting and Reassignments
ARTICLE 15 Grievance and Arbitration Procedure
ARTICLE 17 Representation
ARTICLE 19 Handbooks and Manuals
ARTICLE 31 Union-Management Principles
ARTICLE 37 Clerk Craft

THE AMERICAN POSTAL WORKERS UNION POSITION:(Union)

The Service has failed to appropriately designate FMLA leave for the Grievant, charging the leave as discipline. The discipline as stipulated has been resolved; however, the leave

remains inappropriately charged. The Grievant provided the Service with an APWU Form 1 to be utilized for FMLA leave requests. This wasn't even necessary since all the Grievant has to do is to tell the Service what the problem is and it's the Services' responsibility to follow up on that. The Service failed to do this. Finally a Service document was issued for the appropriate leave charge. However, the Service has never corrected the leave properly.

UNITED STATES POSTAL SERVICE POSITION: (Service)

This case involves a dispute over FMLA coverage. The Grievant seeks FMLA coverage for absences. To be entitled to FMLA coverage, the Grievant must satisfy the requirements of the FMLA rules and Regulations, specifically items (b) (1) and (2) found on page of Volume 60, No. 41-6-95, Federal Register. The Grievant did not satisfy these requirements. The form that the Grievant submitted does not contain the information required for him to have his absences covered as FMLA. The form does not state that the Grievant was incapacitated for duty; nor does it say he would miss any time off from work.

BACKGROUND:

On August 29, 1998, the Grievant's physician completed a document identified as APWU Form 1, Certification of Physician or Practitioner (Employee's Own Serious Illness). This form lists the Grievant's diagnosis as depression, the condition commencing on August 29, 1996. The physician placed a question mark as to the probably duration of the condition. Under Regiment of Treatment to be prescribed (Indicate number of visits, general nature and duration of treatment, including referral to other provider of health services. Include schedule of visits or treatment if it is medically necessary for the employee to be off work on an intermittent basis or to work less than the employee's normal schedule of hours per day or days per week), the physician wrote, "Zoloft". In answer to the question, "Is inpatient hospitalization of the employee required?, the physician answered, "No". The physician indicated that the Grievant was able to perform work of any kind; that the Grievant was able to perform the functions of his position and that the condition would lead to serious illness if left untreated.

On September 22, 1996, the Grievant submitted Form 3971 requesting FMLA sick leave from September 23 through September 25, 1996. Official action on the form was noted as "pending documentation". On September 26, 1996, the Grievant received a written respond to his

request for FML. This document noted that medical documentation on APWU FORM 1 furnished by the Grievant on August 29, 1996 was unacceptable and that the Grievant would be required to furnish medical certification of a serious health condition by October 10, 1996. While the form does not speak to the Grievant's FMLA eligibility, the document notes that the requested leave will not be counted against the Grievant's annual FMLA leave entitlement.

On October 11, 1996 the Grievant prepared a written statement. He states that he presented his supervisor with a note of incapacitation as well as APWU Form 1. He notes that the supervisor questioned the authenticity of the form, saying that the form was not the form to be used. The Grievant notes that he checked with the Local union president and clerk craft director and concluded, after these conversations, that the form was adequate. He states that during the first week of September, he re-approached the supervisor and asked him to submit the FMLA form to the MDO. He notes that he was contacted by the MDO and told that the MDO could not accept the paperwork, who told the Grievant to take the document to the Attendance Control Supervisor.

The Grievant's notes that on September 27, 1996 a due process hearing was held concerning his attendance. Among those present was the Attendance Control Supervisor (ACS). A copy of APWU Form 1 was faxed to the ACS. On October ----, the Grievant received a note indicating that the Service required more information from his physician regarding the specificity of his condition. The Grievant questions the need for this additional information and the qualifications of the ACS in requesting it. He states he is filing this grievance on the grounds of harassment in the form of the rejection of his APWU FMLA Form 1.

On October 25, 1996 the Grievant received notice of disciplinary action in the nature of a suspension from duty without pay for seven (7) consecutive calendar days for failure to maintain a regular work schedule [This Arbitrator presumes this to be the subject of the joint stipulation]. A Grievance was filed on November 2, 1996 stating:

> On October 18, 1996, the Grievant's APWU FMLA form was submitted to the medical unit and ACS. The medical unit notified the MDO that the grievant submitted documentation -----that he is covered under family medical for an acute condition commencing August 19, 1996, for an indeterminable duration. If

management questions the adequacy of the medical certification even though the grievant submitted a complete certification signed by the health care provider, management may not request additional medical information. If there are further questions, a health care provider representing USPS may contact the grievant's provider only with the grievant's permission. The medical united stated in writing the grievant is covered by FMLA.

Management violated the Federal Law by not accepting the grievant's APWU Form #1. Since further discussion with the Union, supervisors have been made aware that APWU FMLA forms are acceptable. The grievant made his first attempt to submit the APWU Form on August 30, 1996, but was given the run around. Management failed to confirm in writing no later than the following payday that the grievant's leave will be counted toward the 12 week entitlement for FMLA. Therefore, the grievant should be protected from any discipline issued covering his condition.

A Step 1 meeting was held on November 2, 1996 and on November 7, 1996, the Grievance was denied. The Service stated its position as:

The Grievant took paperwork to the medical unit who informed him that it was unacceptable. Upon his insistence the clerk at the medical unit gave the Grievant a written receipt for the FMLA. The Grievant was twice told his FMLA was unacceptable.

On November 9, 1996, the Service issued a response to the Grievant's request for FMLA leave. This time the form indicated that he was eligible for leave under the FMLA and that he was required to furnish medical certification of a serious health condition by November 24, 1996. On November 9, 1996, the Grievance was advanced to Step 2 and denied on November 22, 1996:

...The form provided was not filled out completely by the physician. The Grievant needs to provide the necessary information so that the employer can determine if the Grievant qualifies for FMLA. Management's position is that the Medical Unit Nurse does not determine if the documentation qualifies an employee for FMLA. The Grievant could be covered under FMLA because he has

worked the necessary hours and may have a condition that qualifies but Management will not know until the documentation is filled out completely.

*** The ACS is trying to get the Grievant to present a complete FMLA form that allows Management to make a determination if an absence should be counted towards the 12 week entitlement for FML. There is no harassment in this instance and in this particular incident, if the Grievant does not submit complete FMLA forms Management can not count the absences toward the FMLA entitlement. It is the employees responsibility to provide complete documentation to the employer in order to have absences counted toward the FMLA entitlement.

The Grievance advanced to Step 3 and was denied on September 26, 1997, "The Grievant failed to provide the necessary medical documentation."

DISCUSSION:

From the Federal Register, Vol. 60, No. 4, January 6, 1995/ Rules and Regulations page 225:

(b) Form WH-380, as revised, or another form containing the same basic information, may be used by the employer; however, no additional information may be required. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists. The form identifies the health care provider and type of medical practice (including pertinent specialization, if any), makes maximum use of checklist entries for ease in completing the form, and contains required entries for:

(1) A certification as to which part of the definition of "serious health condition" (see subsection 825.114), if any, applies to the patient's condition, and the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition.

(2) (i) The approximate date the serious health condition commenced and its probably duration, including the probably duration of the patient's present incapacity (defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treat therefore, or recovery therefrom) if different.

(ii) Whether it will be necessary for the employee to take leave intermittently or to work on a reduced leave schedule basis (i.e., part-time) as a result of the serious health condition (see subsection 825.117 and subsection 825.203), and if so, the probably duration of such schedule.

(iii) If the condition is pregnancy or a chronic condition within the meaning of subsection 825.114 (a) (2) (iii), whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

(3)(i)(A) If additional treatments will be required for the condition, an estimate of the probable number of such treatments.

(B) If the patent's incapacity will be intermittent, or will require a reduced leave schedule, an estimate of the probably number and interval between such treatments, actual or estimated dates

of treatment if known, and period required for recovery if any.

(ii) If any of the treatments referred to in subparagraph (i) will be provided by another providers of health services (e.g., physical therapist),a the nature of the treatments.

(iii) If a regimen of continuing treatment by the patient is required under the supervision of the health care providers, a general description of the regimen (see subsection 825.114 (b)).

(4) If medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy, or a chronic condition), whether the employee:

(i) Is unable to perform work of any kind:

(ii) Is unable to perform any one or more of the essential functions of the employee's position, including a statement of the essential functions the employee is unable to perform (see subsection 825.115), based on either information provided on a statement from the employer of the essential functions of the position or, if not provided, discussion with the employee about the employee's job functions; or

(iii) Must be absent from work for treatment.

(5)(i) If leave is required to care for a family member of the employee with a serious health condition, whether the patient requires assistance for basic medical or personal needs or safety, or for transportation' or if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patients recovery. The employee is required to indicate on the form the care he or she will provide and an estimate of the time period.

(ii) If the employee's family member will need care only intermittently or on a reduced leave schedule basis (i.e., part-time), the probably duration of the need.

(c) If the employer's sick or medical leave plan requires less information to be furnished in medical certifications than the certification requirements for these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized (see subsection 825.207, only the employee's lesser sick leave certification requirements may be imposed.

Subsection 825.307 What may an employer do it if questions the adequacy of a medical certification?

(a) If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.

(1) If an employee is on FMLA leave running concurrently with a workers' compensation absences, and the provisions of the workers' compensation statute permit the employer or the employer's representative to have direct contact with the employee's workers' compensation health care provider the employee may follow the workers' compensation provisions.

(2) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and

may be treated as paid or unpaid leave under the employer's established leave policies. The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. See also subsection 825.305 (a)(3).

(b) The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (e.g., a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider, again at the employer/s expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. ***[In the interest of brevity, the example good faith example is omitted].

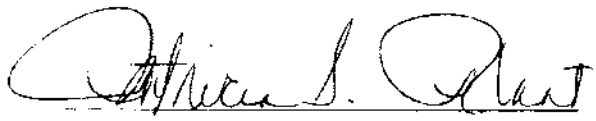
(d) The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the [wherein the exhibit known as Management 1 ends].

The Union has taken the position that the resolution of the suspension also resolved the issue of whether or not the Grievant is properly due FMLA. This Arbitrator has found no evidence to support that conclusion. The Service has questioned the adequacy of the medical certification offered by the Grievant on August 29, 1996. The Federal Register as enumerated provides the procedures outlining what the Service as an employer may do when it questions the adequacy of a medical certification. This Arbitrator has reviewed the rules and regulations, the evidence and testimony and finds that none of those procedures were followed by the Service in the instant case. Therefore this grievance is sustained to the extent that the Service shall within seven (7) days from the receipt of this award follow the procedures as specifically outlined in Federal Register Vol. 60, No.4 Friday, January 6, 1995 Subsection 825.307 to determine whether or not the Grievant is entitled to FMLA leave for the dates August 27 through August 29, 1996; September 5 through September 6, 1996; September 12 through September 13, 1996 and September 18 through September 20, 1996. At the conclusion of Subsection 825.307 procedures, if the Grievant is found to be eligible for and entitled to FMLA leave for the dates at issue, such

leave shall be changed to FMLA leave.

AWARD:

The Grievance is sustained as outlined in the discussion section of this award.



Patricia S. Plant, Arbitrator

January 8, 1999

Regular Arbitration Panel

In the Matter of Arbitration	)	
	)	
between	)	Grievant: C. Lamson
	)	
United States Postal Service	)	Post Office: Tampa, Florida
	)	
and	)	Case No:
	)	H98C-1H-C00245483
American Postal Workers Union	)	100600RA-01

Before: Robert B. Hoffman, Arbitrator

Appearances:

For the Postal Service: Gerald E. Keegan

For the Union: Pat Davis-Weeks

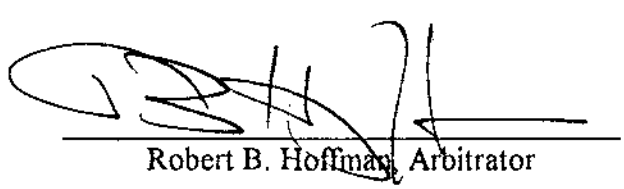
Place of Hearing: Tampa, FL

Date of Hearing: October 22, 2002

Date of Award: October 25, 2002

Summary

The stated purpose for requiring medical documentation in ELM 513.362 is to prove incapacity for work relating to an absence over three days. Using this rule to require documentation, when management has already accepted FMLA certification for serious health condition showing incapacity for the absence, is improper. The documentation was not being requested to prove fitness to return to work. The grievance is sustained.



Robert B. Hoffman, Arbitrator

Opinion and Award

Issues:

Did management violate the National Agreement when it required the grievant to submit medical documentation for an FMLA absence in excess of three days? If so, what is the remedy?

Facts:

The grievant is a SPBS operator at the Tampa, Florida P&DC. On May 12, 1999, her physician completed and signed an APWU form called "Certification by Employee's Health Care Provide for Employee's Serious Illness – FMLA." Directly below this title is the following instruction: "This form is to be completed by employee's Health Care Provider when employee is requesting FMLA and medical documentation is required pursuant to 512.41, 513.36 and 515.5 of the ELM. Form PS 3971 must be completed by employee." The form requires a "description of serious health condition."

The grievant's health care provider described a "lifetime" serious health condition that began in 1993. She suffered from a chronic disease involving "muscuilo-skeletal pain" that would require her to be off work intermittently, "usually monthly (although erratic and unpredictable), lasts 4-14 days." Her doctor certified that she was able to perform the functions of her job. On November 15, 1999, this physician signed a script requesting the "FMLA letter" be continued until November 2000.

During a four-day period in September 2000 the grievant requested, on a daily basis before her begin time on tour 1, absences covered by FMLA. She first called in on September 26 (for September 27) and requested FMLA sick leave for herself. The following day she made the same request during her call-in to the attendance clerk. For day three the grievant requested "FSWOP" during her call almost four hours before her start time.

For the fourth day, the "attendance control call-in sheet" shows that the grievant requested FMLA sick leave and that documentation was requested. The grievant testified that she actually requested FSWOP again because she closely manages her LWOP and sick leave in light of her medical condition, which causes the intermittent absences. She related that she had "FMLA on file." The supervisor who took the call stated that that documentation did not matter, she would still be required to bring in documentation for an absence in excess of three days. She signed two 3971's that reflect sick leave FMLA for the first 16 hours and SWOP

FMLA for the remaining 16 hours. The box for "pending documentation" is checked on both forms.

Upon the grievant's return to work she provided documentation from a doctor at an osteoporosis clinic. The signed script stated: "This pt suffers from Fibromyaleia and has recently had a flare up of her condition. Due to this she was unable to return to work from 9/27 through 10/1/00." In her grievance she maintains that management already had documentation for this absence. It had accepted her FMLA certification in the past, and as such, additional documentation cannot be required.

Positions:

The Union maintains that the grievant had pre-approved FMLA leave for her serious health condition at the time of the calls in September 2000. Management has never questioned her coverage. The documentation specifically stated that she could be absent anywhere from four to 14 days for her condition. The document that management required was no different than what management already had on file for her. It referred to the same condition. Contrary to management's position that ELM 513.362 requires documentation, there is no showing that the documentation was needed for the protection of the Service, one of the requirements for documentation under 513.361. There is nothing in this record to establish that the grievant had a pattern of absences associated with days off that would warrant this rule being applied. Documentation is proper after three days to require documentation if she had taken sick leave without any FMLA coverage. If the rule is applicable here, there is compliance with the second part of 513.362 -- "other acceptable evidence of incapacity for work." Her FMLA certification would meet that requirement.

Management's reliance on FMLA regulation 825.310 (b) is misplaced, according to the Union. This rule involves a return to work certification where medical clearance is required. It does not involve intermittent leave, when an employee is absent off and on for a condition. The grievant did not have one of the seven categories of conditions under the ELM that requires documentation for return to duty after 21 days.

Management contends that an employee absent for more than three days has no choice. ELM 513.362 in no uncertain terms states that "employees are required to submit" documentation. FMLA regulations recognize this law does not supercede a parties' collective bargaining agreement. Section 825.310 (b) provides that "if State or local law or the terms of a collective bargaining agreement govern an employee's return to work, these provisions shall

be applied. . . . " This means that the grievant's return to work is governed by this ELM provision inasmuch as the ELM is covered by Article 19. The Union claim that the documentation is already on file is not the same as a requirement "to submit" documentation. The wording clearly means that a new document must be submitted. Documentation can only be submitted after something happens.

Management further argues that FMLA documentation certifies a covered condition and what absences could occur. But it does not give the employee protection from documentation required by the ELM. The Union argument that management has purposefully applied this rule to control FMLA usage is belied by the fact that this rule has been in existence for many years before the advent of FMLA.

Conclusions:

At issue is the interaction between the FMLA and the Service's ELM regarding the need for medical documentation when employees are absent. On one hand the law provides that employees may obtain certification from a health care provider for absences caused by a serious health condition. This certification, according to DOL regulations, serves as documentation for a period or periods of "incapacity" including "recurring episodes of a single underlying condition." 19 CFR 825.114, 305, 306. The absences can take many different forms, such as permanent, partial or intermittent. Intermittent leaves may be covered as a serious health condition if they are described in the certification. 19 CFR 825.306.

Management's own medical documentation rules have been in place long before FMLA. There is documentation required for establishing an FMLA serious health condition under ELM 515.5. Here management contends that even though the grievant has a certification on file for incapacity, it has the absolute right under ELM 513.362 to require employees to submit documentation if they are absent in excess of three days. This rule provides:

> For absences in excess of 3 days, employees are required to submit medical documentation or other acceptable evidence of *incapacity for work*. (emphasis added)

To be clear, this is a rule requiring "medical documentation" or some "other acceptable evidence. The last three words state the purpose for this evidence – "incapacity to work." It is documentation that is clearly meant to be evidence that the employee did not have the capacity to work during the absence. It is not for the purpose of proving that the

employee is fit to return to work. The wording of the rule makes no mention of fitness or being able to return to work.[1] Nor is there any evidence that management sought to have this documentation so it could determine whether the grievant was fit to return to work.

Rather the purpose for this rule appears to be support for verifying that the absence was due to incapacity. Management makes no claim here that it sought documentation for any other purpose than what is stated in the rule. It is evident from the rule and those others found in 513.36 that this verification is used to determine the validity of paying sick leave. This is best seen in ELM 513.365. If no documentation is submitted pursuant to 513.362 management can change the absence to annual leave, LWOP or AWOL. The change is obviously from sick leave.

ELM 513.362 on its face thus requires no more or less than what this grievant already provided in her FMLA serious health condition certification from her physician. This certification unmistakably advises management of her incapacity to work during intermittent times in the four to 14 day range and the medical basis for this need. Significantly, it is evidence that management has had for over a year and that has been renewed by the grievant's doctor with a simple statement on a signed script that it be continued for a one-year period. There is no evidence that management ever questioned this evidence, or that it doubted the grievant's condition or her absences pursuant to this certification. The record suggests that management has not only accepted this as evidence of her incapacity, but the grievant has utilized this evidence for similar absences in the past, without being instructed to obtain "evidence of incapacity for work."

Moreover, the certification itself, as accepted by management, states explicitly that it is the medical documentation "required pursuant to . . . 513.36. . . ." As seen, this section is the ELM provision that contains 513.362, the same rule relied on by management to support its position that employees are required to submit new documentation, even if they have current FMLA certifications.

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[1] Management does not rely on ELM 515.56, a rule that appears in the ELM version in 2001, after this grievance was filed, relating to a return to work after an FMLA-covered absence, or 29CFR 825.310 concerning the circumstances an employer may require submission of medical documentation that the employee is able to return to work. (Also see footnote 2 infra.)

By requiring the grievant to obtain the same information it already has, management is in effect using ELM 513.362 as a means to recertify each absence that the grievant's health care provider has already certified for her continuing condition and treatment. Management wanted her doctor to again state that she was incapacitated during this four-day absence to comply with ELM 513.362. This is what her doctor eventually told management in a signed script. It is difficult to understand why this documentation is any different than what her doctor gave management in November 1999 to continue her certification for one year. It strongly suggests that management is seeking a recertification during the certification term. If not so directly, the effect is the same. Management is requiring the grievant to seek her doctor's advice about the same condition that is already a live certification.

Most noteworthy is that at the National level the parities have agreed that this type of documentation cannot occur. On April 15, 1998 Union President Burris and Vice President Labor Relations Potter for the Service agreed to some 41 questions and answers regarding FMLA. In this joint document, question and answer 31 is relevant. It provides:

Q. Is recertification required for each absence when a health care provider has certified that the employee is receiving continuing treatment?
A. Excluding pregnancy, chronic conditions, and permanent long-term conditions, recertification is not required for the duration of the treatment or period of incapacity specified by the health care provider, unless:

a. the employee requests an extension of the leave;
b. the circumstances have changed significantly from the original request;
c. the employer receives information that casts doubt on the continuing validity of the certification;
d. the absence is for a different condition or reason.

This agreement states no more than what the FMLA regulations require in 29 CFR 825.308. Although the parties did not refer directly to intermittent leaves, as the grievant was certified here, this regulation makes specific reference to such leaves in 825.308(b)(2). An employer cannot request recertification in less than the minimum time period for the certification unless one of the above conditions applies.

As seen, there is no evidence that any of these conditions apply to this grievant. Management never raised any objection to her absence that covers them. Still, it argues that the regulations allow it to enforce its own rules made pursuant to a collective bargaining

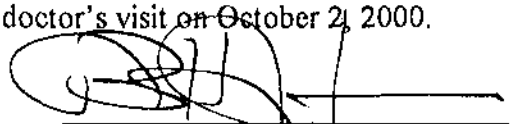
agreement.[2] One of the rules is the long used rule on requiring the submission of documentation for absences over three days. No reason is needed, management contends, unlike the preceding rule for documentation where the absence is less than three days. Simply put, the Service maintains that it does not have to give excuses for invoking this rule.

It is true that management does not have to give reasons for requiring medical documentation under ELM 513.362. It is a strict requirement for absences over three days. But to the extent that this rule imposes a requirement that is already met, its enforcement would be improper. ELM 513.362 is derived from a pre-FMLA period when there was no such document as an FMLA certification for pre-existing serious medical conditions that spelled out the duration of time needed for incapacity. The requirement for incapacity information before FMLA was a necessity; there was no other evidence on file for the absence showing any type of medical documentation. Clearly it made sense to have documentation that backed up the employee's sick claim for absences occurring over three days. It gave the appearance of an absence that was serious and thus needed proof to substantiate.

Where management requires medical documentation per a rule relating to incapacity for work, it would be improper to mandate that the employee document what has already been documented. This is not the intent of the FMLA regulations or the ELM rules cited above.[3]

Award:

Based on the above and the entire record, the grievance is sustained. The employee shall be made whole for any lost pay and reimbursed for her doctor's bill and any other reasonable expenses associated with her doctor's visit on October 2, 2000.



Robert B. Hoffman, Arbitrator

[2] But the regulation cited by management refers to those instances when a return to duty is the issue and documentation is sought. 19 CFR 825.310. The heading reads: ("Under what circumstances may an employer require that an employee submit a medical certification that the employee is able (or unable) to return to work ('i.e., a fitness-for-duty' report)?" Management relies on the provision that the terms of the parties' collective bargaining agreement "govern an employee's return to work." But as seen above, the return to work or fitness issue is not the issue regarding documentation. It is, by the terms of the rule invoked by management, the incapacity during the absence.

[3] Not to be overlooked are FMLA regulations that define documentation for incapacity to work due to a serious health condition. They provide that "only an employer's less stringent sick leave certification requirements may be imposed." 29 CFR 825.305(e) and 825.306(c)).

REGULAR REGIONAL ARBITRATION PANEL
ARBITRATION IN THE MATTER OF

UNITED STATES POSTAL SERVICE, Employer,	Grievant:	Denise DeMauro [now: Denise Carnevale]
and	Post Office:	Manasota, Florida
AMERICAN POSTAL WORKERS UNION, AFL-CIO, Union.	Case Nos.	H98C-1H-C 99248329, 9B004

BEFORE PATRICK HARDIN

For the Employer:	Gerald E. Keegan Labor Relations Specialists
For the Union:	Bud Hissam National Arbitration Advocate
PLACE OF HEARING:	Manasota, Florida
DATE OF HEARING:	March 19, 2002
DATE OF AWARD:	May 9, 2002
CONTRACT PROVISIONS:	Articles 2, 3, 5, 16, and 19
CONTRACT YEAR:	1998 - 2000
SUMMARY OF AWARD:	The grievant left work before the end of her tour because of a FMLA-qualified condition. When she returned for the start of her next scheduled tour she was told she could not return without documentation. By the time she secured documentation satisfactory to her supervisors, she had been excluded from work for 8 weeks. The grievance is sustained and the grievant is made whole.

Patrick Hardin, Arbitrator

PROCEEDINGS

This matter came on for hearing before the arbitrator on March 19, 2002, at Manasota, Florida. The parties appeared as shown above and were afforded full opportunity to present evidence and argument. At the conclusion of the hearing the parties presented closing argument and the arbitrator took the matter under consideration.

ISSUE PRESENTED

The parties agree that the issue submitted for resolution by the arbitrator is:

Did the Postal Service violate the National Agreement by refusing to allow the grievant, Denise Carnevale, to report for work on July 16, 1999, and thereafter until she provided documentation that explicitly stated that she was not a threat to self or others? If so, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

Articles 2, 3, 5, 16, and 19 of the National Agreement between the parties are pertinent to the resolution of this dispute.

FACTS

The grievant in this matter, Ms. Denise Carnevale, was employed by the Postal Service in 1993. At the time of the events here at issue, Ms. Carnevale (then known as Denise DeMauro) was assigned as a flat sorter machine operator at the Manasota, Florida, Post Office. At that time, she was properly certified under the Family and Medical Leave Act (FMLA) for the use of intermittent leave for treatment of an emotional or psychological condition.

On Tuesday, July 13, 1999, Ms. Carnevale was scheduled to attend an investigative interview with her supervisor, Alex Jackson, at the start of her tour. She was accompanied at the interview by union steward Bud Hissam, the Union's advocate in this matter. At the conclusion of the interview, Ms. Carnevale was upset and in tears. According to her testimony, she decided before or during the meeting that she would be too upset to work the remainder of her tour and prepared a 3971 leave form for submission to Jackson at the end of the meeting. When the

meeting ended, she testified, she handed the 3971 to Jackson, left the room, clocked out, and went home.

She returned for her next scheduled tour on Friday, July 16, the intervening Wednesday and Thursday having been her regular non-scheduled days. When she attempted to clock in, her card was not in the rack. She went to the Data Site, where her card was normally held following such an absence, but was not given her card. Instead, she was told that she must see a supervisor. Supervisor Harry Lockart was summoned and told Carnevale that she would not be permitted to return to work until she submitted medical documentation acceptable to the medical unit at Tampa.

Ms. Carnevale had an appointment scheduled with her treating physician, Dr. Daniel Sputo, on July 28. She knew from experience that she would be unable to see him any earlier than that, and told Lockart that it would be the 28th before she could obtain documentation. Lockart repeated that she could not report until she cleared through Tampa. At that point, angry, she asked for assistance of a union steward. After telephoning Dan Tanberg, Manager of Distribution Operations, Lockart refused, saying that she was not permitted in the building until she got medical clearance. Ms. Carnevale then went home.

On July 28, Ms. Carnevale saw Dr. Sputo and obtained his signature on a form saying that she was returned to work with no restrictions. She promptlyfaxed that release to the Tampa unit. When she returned home from that errand, she had a message to call supervisor Dan Tanberg, and did so. Tanberg informed Ms. Carnevale that the release from Dr. Sputo was not acceptable because it did not say explicitly that she was not a threat to herself or others. Ms. Carnevale knew that Dr. Sputo had left the country for a month. Her efforts to get such a statement from the physician who was covering emergencies for Dr. Sputo was unavailing, as he had never examined or treated her.

Ms. Carnevale did not get the statement demanded by Mr. Tanberg until September 1, after Dr. Sputo returned. She faxed that to Tampa and returned to work on the Tuesday after Labor Day. The union filed this grievance to contest the refusal of the Postal Service to allow Ms. Carnevale to return to work on July 16, and to make her whole for her loss of pay thereafter. The parties were unable to compose their differences in the grievance procedure and placed the matter before the arbitrator for final and binding resolution.

POSITION OF THE AMERICAN POSTAL WORKERS UNION

The refusal of the Postal Service to allow Ms. Carnevale to report to work on July 16 was improper under the National Agreement. She was FMLA-certified for intermittent leave, and had properly used such leave when she had to be absent from part of her tour an July 13. She had used such leave many times in the past and had not been required to provide documentation upon her return to work. Moreover, she was given no advance warning that she would be required to provide documentation when she returned, and that lack of advance notice violated a specific provision of the joint Union/Management memorandum on contract administration. Ms. Carnevale should be made whole for all losses between July 16 and her return to work on September 3, 1999.

POSITION OF THE U. S. POSTAL SERVICE

The Employee and Labor Relations Manual (ELM) and the Tampa area policies on attendance control allow Management to demand a specific assurance that an employee returning to work after an absence for "mental and nervous conditions" is not a hazard to self or others. That was done in this case after Ms. Carnevale had incurred just such an absence. Moreover, she was informed before she left work on July 13, by her supervisor, Alex Jackson, that medical documentation would be required when she returned. The Union has not carried its burden to show that there has been any kind of violation of the Agreement and the arbitrator should deny the grievance.

ANALYSIS AND CONCLUSIONS

1. Under FMLA, an employee whose: (a) personal health; or (b) obligations to care for a family member, require frequent short absences from work may be certified to use leave without pay for such a purpose without penalty in regard to attendance standards. In this case, Ms. Carnivale was certified to use such leave when she absented herself from the completion of her tour on July 13, 1999. Ms. Carnevale had used such leave often in the past. Her testimony that she had never before been required to provide documentation for such an absence was not contested by the Postal Service.

The evidence offered by the Postal Service did not disclose why the Service decided that Ms. Carnavale's partial absence of July 13 would require documentation when other such absences had not required it. The Postal Service did introduce an excerpt from the ELM (Mgt. Ex. 1), and an undated memorandum concerning return to work clearance at the Manasota P&DC (Mgt. Ex. 3). But the ELM provision has been in effect, unchanged, for many years, and there is no evidence that some recent change in the Manasota policy was the reason why Management made a first-time-ever demand to Ms. Carnevale for documentation it had not needed in the past.

There is a further flaw in the position of the Service: neitehr the ELM nor the Manasota policy *require* such documentation. At best, they appear to give Management the discretion to require it. The ELM excerpt is a subsection, 342.2, of Section 342, "Return to Duty After Extended Illness or Injury." Thus, on its face the ELM provision relied on by Management sets the rules for employees returning to work after "extended" absences brought on by serious health conditions. The Manasota clearance policy is nothing more than a restatement of those ELM provisions in an abbreviated form.

Why the documentation provisions for "Extended Illness" should be applied to a FMLA-certified absence from a partial tour, the Postal Service did not explain. And, most likely, it could not have done so. A requirement that employees like Ms. Carnevale provide for each such absence an explicit, evaluative, prognosis from a physician, supplying in detail the information required of an employee returning from extended leave for serious illness, and in a form acceptable to a Postal Service medical unit, would effectively nullify the FMLA right to use such intermittent leave. No mere Postal Service employee would be able to afford the time and expense to obtain such documentation for numerous short absences, especially where the physician is a busy psychiatrist.

Under these circumstances, the sudden demand for extensive medical documentation of the sort required for return from an extended illness was arbitrary conduct by the Postal Service. The grievance should be sustained on that ground alone.

2. That is not the only ground on which the grievance might be sustained. The evidence also revealed that Mr. Jackson did not inform Ms. Carnevale on July 13 that she would be required to provide detailed documentation, or indeed any documentation, when she returned. Both Ms. Carnevale and Mr. Hissam testified that she passed the 3971 to Jackson at the

conclusion of the interview on July 13, and that Jackson accepted it without any comment concerning documentation. The testimony of Jackson to the contrary, that he approached her on the work floor after the meeting and told her then, was, I find, based on faulty memory.

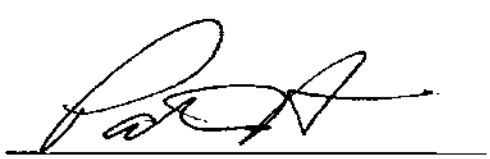
The most telling fact is that Ms. Carnevale returned to work on July 16 expecting to go through her usual return to work routine. She went to the data site and asked a clerk for her card. Instead of the card, she got the message that she would have to see a supervisor. When she realized that she would not be permitted to work, she got angry and asked for a steward. These were not the actions of an employee who had been told three days earlier that she would not be permitted to report without extensive documentation.

The failure of the Postal Service to give notice to Ms. Carnevale before she reported on July 16 violated the Joint Memorandum on Contract Application of July 2, 1998, p. 64, Question 1. That entry says that the employee should be notified before returning to work.

For both of the reasons explained above, the grievance must be sustained.

AWARD

The grievance is sustained. Ms. Carnevale shall be made whole for all loss of pay and benefits for the period July 16 through September 3, 1999, and her records of attendance shall be adjusted accordingly.



Patrick Hardin, Arbitrator

Knoxville, Tennessee
May 9, 2002

37.manasota.ab1

Regular Arbitration Panel

In the Matter of Arbitration	)	
	)	
between	)	Grievant: B. Brookins
	)	
United States Postal Service	)	Post Office: West Palm Beach, FL
	)	
and	)	Case No:
	)	H98-C-1H-C00055962
American Postal Workers Union	)	099P06396

Before: Robert B. Hoffman, Arbitrator

Appearances:

For the Postal Service: William Miranda

For the Union: Marie Robbins

Place of Hearing: West Palm Beach, FL

Date of Hearing: November 8, 2000

Hearing Closed: November 9, 2000

Date of Award: November 17, 2000

Summary

The grievance is sustained. Any conflict in dates should have been resolved when the updated certification was first received by the Health Unit during the grievant's recovery period. The earlier certification made prior to surgery was clearly an estimation. In these circumstances a request for another updated certification only five days before her return date was redundant and caused the delay in the grievant's return to work.

Opinion and Award

Issue:

Did the Postal Service violate the National Agreement by delaying the grievant's return to duty? If so, what is the remedy?

Facts:

The grievant, a clerk since 1974, asked her supervisor on September 29, 1999, to provide her with the documentation she would need to return to work after her surgery. She received a "family leave form," which consisted of a Certification by Employee's Health Care Provider and FMLA regulations. This is a form created by the APWU that is commonly used at this facility. The grievant had surgery some five or six times in the past and had submitted documentation to be returned to work after each surgery. She noted that in one instance in 1997 she was delayed in her return. After filing a grievance the matter was resolved with management paying her for the delay.

Six weeks after her surgery in 1999, on November 2, 1999, she gave her doctor the FMLA certification. He examined her and stated on the form that her "probable duration of condition" and "duration of incapacity" would be two months. He noted an exact return to work date of November 29, 1999. This certification was faxed to the District's Health Unit in Orlando, Florida. It was received on the same date or the following day. It also appears that her doctor had completed a Certificate for Return to School or Work, dated September 23, 1999, one week prior to her surgery. On this form he stated that the grievant could return to work on December 6, 1999.

On November 24 the grievant called the Health Unit. She was concerned because she had not heard about being cleared for the November 29 date. She was informed that she needed a different return to work form than the certification form she had submitted on November 2. The grievant went to the plant and obtained a USPS form called "Medical Certification and/or Return to Work." MDO Graham told her that she had received the wrong form back in September. Her doctor completed the USPS form with a return date of November 29 and mailed it to the Health Unit. It was received on December 2 and the grievant returned to work on December 3.

Positions:

The Union maintains that any so-called confusion from the two different return dates must be resolved in favor of the November 29 date. Before the surgery the doctor used the December 6 return date. The November 29 date occurred after the surgery. The grievant had done well enough to permit the doctor to agree to this earlier date. On November 2, this new date was faxed to the Health Unit on the very form management supplied to the grievant. It

took management 22 days to tell her that she had to use another form. She only received this information because she called. Neither the Health Unit nor management called her. The form she obtained on November 24 actually has less information than the APWU certification form. FMLA regulations only require a "simple" statement" in the certification for the employee to return to work. Moreover, the Service is obligated by FMLA regulations to notify employees in writing if they fail to meet their obligations, within a reasonable time. This was not done here. The grievant should have been returned on November 29 and not December 3.

Management contends that its Health Unit had conflicting information about when the grievant was to return to work. Was it December 6 or November 29? This case is not about wrong forms. It concerns the Unit getting the correct return to work information – the right date from the grievant's doctor. It is the Services' Health Unit and its doctor that determine if the documentation is sufficient. The certification to return to work is governed by Article 19 of the CBA, and ELM 342. The certification after 21 days provides that medical evidence be submitted of the employee's ability to return to work, with evaluation by the medical officer. There must be sufficient data to make this determination, according to the ELM.

Conclusions:

Implicit in the handbooks and National agreement is the concept that management not unreasonably delay the return to work of an employee who is fit for duty. This arbitrator has recently applied this principle in three other cases involving this same facility in West Palm Beach, Floirda (H94C-1H-C99220665, where the bulk of the delay in returning the employee to work was caused by the grievant's own delay in providing needed medical information); (H98C-1H-C99150837, where the delay was unreasonably caused by the Service's Health Unit and Medical Officer); (H94C-1H-C99220675, no delay occurred where additional medical documentation was needed relating to the grievant's illness.)

The issue here is whether there was an ambiguity in the information sent by the grievant's doctor. There were two certifications from the grievant's doctor – one for a return date of December 6 and the second one for November 29. Was this reason sufficient for the Health Unit to request another form that resulted in delaying her return to work? It is curious that there was no mention to the grievant on November 24 that there was any type of confusion based on two different return dates. No one from management testified at this hearing. There is no documentation from the Health Unit stating that they were confused or

that the discrepancy had to be cleared-up. By the same token there is no evidence and no contention by management that the Unit required more medical information. Thus, it can be concluded that the only information in need of clarification was the actual return date.

Management is correct that the ELM provides for its medical officer evaluating the submitted information. But this evaluation is of the "sufficient data . . . that the employee can return to work without hazard to self or others." (ELM 342.3) Again, there is no issue over the supporting data or lack of it. The Health Unit had a certification dated one week before the surgery for the December 6 return. However, after the surgery, some six weeks later, it had a second certification, on the very form management provided to the grievant, listing November 29 as the return date. This form was provided *after* the September 23 certification that listed the later December 6 return date. November 29 is a date based on the grievant's medical condition *after* the surgery. Undoubtedly the first certification made before surgery was an estimation. Only after the surgery would it make sense to evaluate the patient's recovery. Doing this some six weeks after the operation is reasonable and clearly more accurate than one made a week before surgery. Thus, it would be reasonable for the Health Unit to have concluded that the most recent certification would be the most timely and relevant to her return.

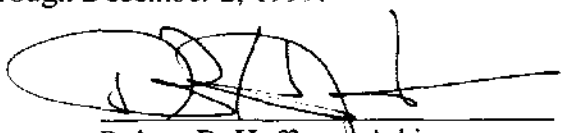
Moreover, if it the Health Unit was so confused with the dates, it had the information on November 3, well in advance of the return dates. It did not have to wait until November 24 and a call from the grievant to act upon this conflict. The Health Unit could have easily contacted the grievant or the plant on November 3 and asked for clarification. There were still several weeks left before the grievant would return to work on the earlier date. But waiting until November 24, when the grievant chose to contact the Health Unit, only five days before November 29, ran the risk of delaying her return. The information was redundant given the fact that the Unit had same return date information from November 2 based on her post-surgery examination. In the often-cited National pre-arbitration settlement in H1C-NA-C 65 (1984), it was concluded that the Service's medical officer must avoid undue delay by reviewing documentation and making a decision the same day it is submitted. There is nothing in this record even remotely suggesting why it would take this unit 22 days to ask for a simple clarification of the two dates.

When the unit finally did inform the grievant that it wanted another form, it failed to explain to her that the form was needed to clarify the date. She assumed that she had received the wrong form, a view that was confirmed by the MDO. Thus, she obtained another form even though the Unit had the updated information it needed. As seen, it should have been obvious to the Unit that another form with a return date would be the same as the November 2 form. But if the reason for the delay was the need to use the USPS certification form rather than the APWU form to ascertain a correct return date, a comparison of the forms shows that there is no difference in the requested date information.

In short, the record shows that the Health Unit had the updated information by November 3. If the Unit was confused as to the date, it had an obligation to clarify it with the grievant when it received the second certification on November 2; it should not have waited until November 24. The fact that the grievant obtained yet another certification at the Unit's request, with the same return date, which was not received until December 2, does not relieve management from its obligation to have acted upon the relevant and timely November 2 certification.

Award:

Based on the above and the entire record, the grievance is sustained. The grievant shall be made whole from November 29 through December 2, 1999.



Robert B. Hoffman, Arbitrator