

American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

Appeal to Arbitration, National Dispute

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Industrial Relations
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August 1, 2008

Via Facsimile and First Class Mail

National Executive Board

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Western Region Coordinator

Mr. Doug Tulino
Vice President, Labor Relations
U.S. Postal Service
475 L'Enfant Plaza
Washington, D.C. 20260

Re: USPS Dispute No. Q00C4QC03150730, APWU No. HQTG20036

Dear Mr. Tulino:

Please be advised that pursuant to Article 15, Sections 2 and 4, of the Collective Bargaining Agreement, the APWU is appealing the above referenced dispute to arbitration.

Sincerely,


Greg Bell, Director
Industrial Relations

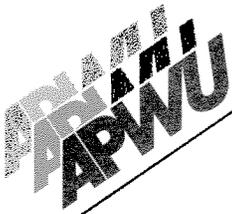
USPS #: Q00C4QC03150730
APWU #: HQTG20036

Case Officer: Greg Bell
Step 4 Appeal Date: 6/6/2008
Contract Article(s): 19, FMLA; 5, ; 10, Leave
Regulations - ELM 510 - FMLA;

cc: Resident Officers
Industrial Relations

File

GB/BW



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Article 15 - 15 Day Statement of Issues and Facts

Via Facsimile and First Class Mail

August 1, 2008

Ms. Mary Hercules, Labor Relations Specialist
U.S. Postal Service
475 L'Enfant Plaza SW
Washington, D.C. 20260

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Re: USPS No. Q00C4QC03150730, APWU#HQTG20036
USPS Refusal to except Medical Certification, Chronic
Conditions; FMLA

Dear Ms. Hercules:

On June 26, 2008, we met to discuss the above-referenced dispute at Step 4 of the grievance procedure. The parties mutually agreed to submit their written statements no later than August 1, 2008. The following represents the APWU's understanding of the issues to be decided, and the facts giving rise to the interpretive dispute.

This dispute concerns the Postal Service's refusal to accept medical certification submitted by employees for chronic conditions covered under the Family and Medical Leave Act (hereinafter referred to as FMLA or Act), if not submitted at the time of absence. It is the APWU's position that consistent with past practice, the FMLA, and the collective bargaining agreement, employees may submit a medical certification notifying the employer of a serious health condition before an absence or leave begins. Therefore, it is the APWU's position that the Postal Service does not have the right to refuse to accept medical certification submitted by an employee under the FMLA before an absence or the leave begins.

The Postal Service has taken the position that in accordance with Section 515 of the Employee and Labor Relations Manual (ELM), medical certification of a serious health condition is submitted when an employee is requesting time off. If there is no need for leave, there is no reason for the employee to submit or the employer to accept medical certification of a serious health condition. The Postal Service believes that their position is consistent with the FMLA.

However, the Postal Service failed to identify any provisions in Section 515 of the ELM, in the Act itself, or in the collective bargaining agreement that prohibits an employee from submitting medical certification notifying the employer of a serious health condition before the leave begins or before the actual date is known.

It is the APWU's position that the employee fulfills his or her obligations under the Act to provide the employer with notice of the need for leave as soon as practicable. For example, if an employee believes he or she has a serious health condition due to pregnancy or a chronic condition covered by the FMLA, the employee is entitled under the Act to submit medical certification notifying the employer of the serious health condition before the leave begins (or before the actual date is known). Moreover, medical certification related to pregnancy or a chronic condition does not require the health care provider to identify any specific dates for when leave may begin if the employee is not presently incapacitated. However, the Act requires that such medical certification must include whether the employee is presently incapacitated and an estimate of the probable number of, and the interval between, episodes.

If the employee is not presently incapacitated, the employee would not need to submit a Form 3971 (Notification of Absence). It is not until the employee actually becomes incapacitated due to pregnancy or a chronic condition that he or she would then submit a Form 3971 requesting FMLA leave.

Intermittent FMLA Leave

Consistent with past practice and the FMLA itself, an employee may submit a medical certification notifying the employer of a serious health condition due to pregnancy or a chronic condition before the leave begins (or before the actual date is known) - that would entitle the employee to FMLA-protected leave.

“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.” 29 C.F.R. §825.306(a).

In addition, “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.” 29 C.F.R. §825.306(b).

For example, an FMLA medical certification for an employee’s own serious health condition must state “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, and if so, the probable duration of such schedule.” 29 C.F.R. §825.306(b)(2)(ii).

Also, if additional treatments will be required for the condition, the medical certification must state whether “the patient’s incapacity will be intermittent, or will require a reduced leave

schedule, an estimate of the probable number and interval between such treatments, actual or estimated dates of treatment if known, and period of recovery if any.” 29 C.F.R. §825.306(b)(3)(i)(B).

Finally, in cases where leave is required to care for a family member’s serious health condition, and the family member will need care only intermittently or on a reduced leave schedule basis (i.e. part-time), the medical certification must state “the probable duration of the need.” 29 C.F.R. §825.306(b)(5)(ii).

Employer’s Right to Question the Adequacy of a Medical Certification

The employer does not have the right to refuse to accept medical certification submitted (on WH-380, as revised, or on another form containing the same basic information) by an employee before the absence or leave begins. Nor does the employer have the right to require any additional information other than what is required under 29 C.F.R. §825.306.

In cases where the employer questions the adequacy of a medical certification, “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 clarification.” 29 C.F.R. §825.307(a). In addition, “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.” 29 C.F.R. §825.307(a)(2).

Employer’s Limited Right to Request Recertification

The employer also has limited rights to request recertification of the medical condition under 29 C.F.R. 825.308. However, even so, the employer still does not have the right to refuse to accept medical certification submitted by an employee before an absence or leave begins. “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.” 29 C.F.R. §825.308(b)(2).

Substitution of Paid Sick Leave for Unpaid FMLA Leave

Finally, when an employee makes a request for the substitution of paid leave for unpaid FMLA leave for absences exceeding three (3) days in accordance with Section 513.362 of the ELM, such employee is required to submit medical documentation or other acceptable evidence of incapacity for work or of need to care for a family member, even if they already submitted a completed FMLA medical certification signed by their health care provider. Nonetheless, consistent with past practice, the FMLA, and the collective bargaining agreement, employees may submit a medical certification notifying the employer of a serious health condition before an absence or leave begins.

Ms. Mary Hercules
Re: USPS#Q00C4QC03150730
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We believe that it is unlawful for the Postal Service to refuse to accept an employee's medical certification notifying the employer of the need for FMLA leave when the employee submits it before the absence/leave begins. Such refusal violates the Collective Bargaining Agreement. We also believe that the refusal to accept an employee's medical certification of a serious health condition submitted before the absence/leave begins also interferes with, restrains, and/or denies an employee's exercise of his/her rights provided under the FMLA.

It is requested that the parties expedite this dispute to be heard in arbitration.

Sincerely,


Greg Bell, Director
Industrial Relations

APWU #: HQTG20036
USPS #: Q00C4QC03150730

Dispute Date: 6/6/2003
Contract Articles: 5; 10, Leave Regulations –
ELM 510 – FMLA; 19, FMLA

cc: Industrial Relations

GB/bw



August 1, 2008

Mr. Greg Bell
Director, Industrial Relations
American Postal Workers
Union, AFL-CIO
1300 L Street, NW
Washington, DC 20005-4128

HAND DELIVERED

**Re: Q00C-4Q-C 03150730 / HQTG20036
Washington, DC 20260-4100**

On several occasions, the latest date being June 26, we met to discuss the above-captioned grievance at the fourth step of our grievance/arbitration procedures. In accordance with Article 15.2.Step4.a, this letter sets forth the Postal Service's understanding of the issues involved and the facts giving rise to these issues.

Background:

By letter dated March 19, 2003, the APWU advised that it had received information that the Postal Service was refusing to accept Family and Medical Leave Act (FMLA)-related medical certification for chronic conditions from employees in advance of an absence. The APWU requested to know whether this alleged practice was, in fact, the Postal Service's position.

By letter dated April 18, 2003, the Postal Service responded that Section 515 of the Employee and Labor Relations Manual (ELM) and the FMLA supports this practice in that "medical certification of a serious health condition is submitted when an employee is requesting time off." Furthermore, the Postal Service concluded that "if there is no need for leave, there is no reason for the employee to submit or the employer to accept medical certification of a serious health condition."

By letter dated June 6, 2003, the APWU initiated the instant dispute.

Issue Presented:

Whether it is a violation of the National Agreement and the FMLA for management to refuse to accept medical certification submitted by employees in advance of any reasonably foreseeable absence.

Position of the Parties:

It is the APWU's position that the Postal Service's refusal to accept FMLA-related medical certification for chronic conditions and pregnancy, if not, submitted in conjunction with a reasonably foreseeable absence or need for leave, violates the National Agreement and the FMLA. In sum, the APWU states that "an employee is entitled under the Act [FMLA] to submit medical certification notifying the employer of the serious health condition before the leave begins (or before the actual date is known.)" Furthermore, the APWU opines that "the Act requires that such medical certification must include whether the employee is presently incapacitated and an

estimate of the probable number of, and the interval between, episodes. If the employee is not presently incapacitated, the employee need not submit a Form 3971 (Notification of Absence).” In the APWU’s view, the Postal Service’s “refusal to accept an employee’s medical certification of a serious health condition interferes with, restrains, or denies an employee the exercise of or the attempt to exercise any right provided under the FMLA.”

The Postal Service disagrees. First, to clarify its position, the Postal Service does not have a practice to deny, across the board, certifications submitted in advance of an absence. Rather, the practice is to deny ONLY if there is no reasonably foreseeable absence. It is understood that sometimes, actual incapacitation is not something that can be predicted with either certainty or regularity. Rather, the Postal Service will accept certifications in advance of an actual absence if the absence falls within a reasonably foreseeable time. This practice will help to ensure a more exact assessment of eligibility as well as recognize that not all medical conditions are easily predictable.

Furthermore, in the Postal Service’s view, neither the Collective Bargaining Agreement nor the FMLA obligates the Postal Service to accept a medical certificate in advance of an unforeseeable absence. Submitting a FMLA-related medical certificate just to have it on file and without a request or reasonably foreseeable need for leave is not adequate notice of the leave. This contention is supported by the FMLA and case law. For example, in Bailey v. Amsted Industries, 172 F.3d 1041, 1046 (8th Cir. 1999), the court held,

“[a]n attempt to satisfy the notice requirements by an indication that he [plaintiff Bailey] might have to be absent at some unforeseen time in the future satisfies neither the requirement of notice of ‘the anticipated timing and duration of the leave,’ 29 C.F.R. § 825.302(c), nor the requirement of notice ‘as soon as practicable if dates... were initially unknown,’ 29 C.F.R. § 825.302(a).”

See also, Moran v. Nevada System of Higher Ed., 2007 U.S. Dist. Lexis 27796 (D. Nev.) (where a certification submitted to care for employee’s husband with cancer but which lacked an estimated date of leave was found to be insufficient notice of the need for FMLA absence 5 months later.); Barngrover v. W. W. Transport, 2003 U. S. Dist Lexis 13145 (S.D. Iowa) (citing Bailey as precedent in holding that an employee did not give adequate where she [plaintiff Barngrover] merely implied that she may need FMLA leave sometime in the future if her medical restrictions were exceeded); Seaman v. Domino’s Pizza, 179 F.3d 297 (5th Cir. 1999) (where notice to the employer of possible bipolar disorder and the need to have time off for doctor’s visits was found to be insufficient FMLA notice since the employee never requested leave for a certain day or period.)

Moreover, the management designee is required to make an eligibility determination based upon an assessment whether the employee has 1250 hours of service during the 12 month period immediately preceding the start of the leave. 29 C.F.R. 825.110(a)(2). However, when an employee submits a medical certification without including the actual date of the need for leave, an eligibility determination cannot be properly assessed. For example, an employee may be eligible at the time of submission of the medical certification, but may not be eligible three months later when the actual absence occurs. Furthermore, Section 515.5 of the Employee and Labor Relations Manual (ELM) outlines the documentation requirements to support an employee’s request for a FMLA-related absence. ELM Section 515.51 states, in part: “[a]n employee must provide a supervisor a PS Form 3971 [Request for or Notification of Absence] together with documentation supporting the request, at least 30 days before the absence if the need for leave is foreseeable. If 30 days notice is not practicable, the employee must give notice as soon as practicable.” The submission of blanket certifications without reference to a specific need for leave does not comport with this rule.

Therefore, for the foregoing reasons, there is no violation of the FMLA or the Collective Bargaining Agreement for the Postal Service to refuse a blanket medical certification for a FMLA-related chronic condition that is not connected to an actual or reasonably foreseeable absence.

Step 4 time limits were waived by mutual agreement with the understanding that the 15-day position statements would be submitted no later than August 1, 2008.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary Hercules", written in a cursive style.

Mary Hercules
Labor Relations Specialist
Contract Administration (APWU)