

**REGULAR ARBITRATION PANEL  
Long Island District**

|  |
|--|
| In the Matter of an Arbitration        |
| Between                                |
| UNITED STATES POSTAL<br>SERVICE        |
| And                                    |
| NATIONAL POSTAL MAIL<br>HANDLERS UNION |

Grievant: Robert Cappuccio  
Post Office: Mid Island P&DC  
USPS Case No.: **B06M-1B-C-09095810**  
NPMHU Case No. **09049**  
Before: Robert Tim Brown, Esq.,  
ARBITRATOR

Appearances:

For the Postal Service: Robert Cossaro, Labor Relations Specialist

For the Union: Robert Lussos, Branch President, Advocate

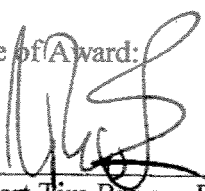
Place of Hearing: Mid Island P&DC

Date of Hearing: September 24, 2010

**AWARD: Grievance sustained in part. The Service violated the National Agreement when it notified Grievant that it deemed documentation desirable (required) if he called in to be absent on the January 16-20, 2009 weekend, and based that decision solely on his record of having taken unscheduled FMLA leave adjacent to four holidays in the prior year. Grievant suffered no monetary harm, so only an order that the Service comply with the agreement in the future is appropriate. Arbitrator retains jurisdiction.**

Date of Award:

December 2, 2010

  
\_\_\_\_\_  
Robert Tim Brown, Esq., Arbitrator

cc: Robert Lussos, Robert Cossaro, Grievance and Arbitration Processing Center, Area Labor Relations Specialist (Windsor), Kevin B. Rachel, Raymond Sokolowski.

## AWARD

This case was heard under the auspices of the Regular Arbitration Panel established to hear disputes between the National Postal Mail Handlers Union, Local 300, and The United States Postal Service (Long Island District), pursuant to the collective bargaining agreement in effect between them. Hearing in this case was held on September 24, 2010, at the Mid-Island Processing and Distribution Center, in Melville, NY. Postal Service Labor Relations Specialist Robert Cossaro represented the Service at the hearing, and Union Branch President Robert Lussos represented the Union and the Grievant. At the conclusion of the hearing the parties requested the opportunity to file post hearing briefs. The briefs arrived and the record was then closed. The Parties granted an extension of time for the issuance of this award.

**ISSUE:** Did management place Grievant on a “deems desirable” list requiring documentation for certain absences, and by doing so, violate the National Agreement, and, if so, what shall the remedy be?

### **FACTUAL BACKGROUND:**

The ELM requires that employees who are absent for more than 3 work days consecutively provide acceptable documentation for absences, and also provides, as will be detailed below, that where a supervisor “deems desirable” for the protection of the Service, he/she may require such documentation for absences of 1, 2, or 3 days as well. The latter discretionary power is limited in that it may not be used capriciously, unreasonably or arbitrarily. In the real terms of the work place and this case, the Service has a database called “eRMS,” that tracks employee attendance, and provides a means for management to be aware of absences that occur frequently or in patterns, and the Service uses that system to impose on certain employees those more restrictive requirements.

As to the “list” alleged to have been used in this case, the Service denied that such a list existed, and the Union produced no evidence that it did exist. Rather, it became clear that the Union was asserting that the Service, in this case, was using the more restrictive “deems desirable” language improperly; the service denied that it had done so.

**TESTIMONY:**

Grievant Robert Cappuccio testified that on January 15, 2009, he was told by Supervisor Paredes that for the upcoming holiday weekend (January 16-20, 2009) he was being placed on the “deems desirable list”, meaning that he would have to provide documentation if he reported absent that weekend. He said that when he asked why this was being done, Paredes told him it was because he had reported out on the previous Martin Luther King (“MLK”) holiday. At step 1, Cappuccio said, management responded more expansively, saying he was categorized as he was because of call-ins around holidays.

Cappuccio testified that he had on file an FMLA dependent care certification. He reviewed attendance records in the course of his testimony, and from them he testified that he had had taken the following leave blocks in conjunction with holidays during the prior year (The unscheduled absences are underlined for clarity):

|  |  |
|--|--|
| January 21, 2008 (MLK holiday)             | 8 hours scheduled annual leave                 |
| February 18, 2008 (Presidents day)         | 8 hours scheduled annual leave                 |
| May 26, 2008 (Memorial Day)                | 8 hours scheduled annual leave                 |
| June 30-July 2, 2008 (prior to July 4)     | <u>8 hrs each day unscheduled (FMLA) leave</u> |
| July 3, 2010 (day prior to July 4 holiday) | 8 hours scheduled annual leave                 |
| September 1, 2008                          | <u>8 hours unscheduled leave</u>               |
| October 13, 2008                           | 8 hours scheduled annual leave                 |
| November 11, 2008                          | <u>8 hours unscheduled FMLA leave</u>          |
| November 27, 2008                          | 8 hours scheduled annual leave                 |
| December 25, 2008                          | 8 hours scheduled annual leave                 |
| December 31, 2008                          | <u>8 hours unscheduled FMLA leave</u>          |
| January 1, 2009                            | 8 hours scheduled annual leave                 |

The result, Grievant testified, was that of 10 paid holidays and several adjacent days also considered sensitive, he took unscheduled leave, all FMLA protected, on only 4 occasions totaling 6 days, of a total of approximating 15 (some holidays were adjacent to his rest days on one side).

Neither Paredes nor any other local supervisor testified as to the rationale for management's action. Instead, Area Labor Relations Specialist Sandra Peets, who has developed an expertise with the eRMS system and is the Labor Relations liaison with the operating areas for administration of eRMS, testified regarding the use of the system and its relationship with the "deems desirable" action that can be taken by management.

Peets testified that restricted sick leave (see ELM §513.361, 362) is no longer used, and has not been used for several years. She testified that the Service had several years ago instituted the eRMS system to track attendance throughout the Postal Service, and that the database is available to managers and supervisors. She said that when employees are absent, their absences are recorded and coded in the system and the system can identify employees who have patterns of unscheduled absences, such as those taken on and adjacent to rest days and/or holidays.

Peets testified that a supervisor will review the records of the employees within their span of supervision and, on a case-by-case basis, identify those whose absence patterns present issues. With particular relevance to this case, employees who frequently call in sick or use unscheduled FMLA leave on or around holidays and rest days are flagged by the system. If the supervisor "deems desirable" to tag that employee's computer file with a requirement that he/she produce documentation for particular sick calls, the supervisor may do so by making an entry in the computer. That entry will cause the automatic telephone response system to tell the employee, when he/she calls in, that documentation is required.

Peets said there was no "deems desirable list," although to the extent that any database is really a large list, a subset of that list will be employees for whom one of the various Postal Service supervisors has made a "deems desirable" entry in the computer. She asserted that a separate list of such employees cannot be generated (at least by a line supervisor) from the eRMS system.

Peets did not specify any of the numerical thresholds used by or in conjunction with the eRMS system to flag absence patterns, saying this was a matter of supervisory discretion.

She testified that the protection accorded by the Family and Medical Leave Act assures only that an employee will be granted leave without penalty, but not leave with

pay, when he or she takes leave consistent with an approved FMLA certification. She said that an employee for whom documentation is deemed desirable but is lacking will be denied paid leave for an absence of three days or less even if it is FMLA-approved, but the absence will not be counted as an unscheduled absence. (If FMLA, it would have to be a certification for intermittent, unscheduled absences).

The Union submitted a request for information seeking to know the reason for the “deems desirable” action, the documentation that would be acceptable, and the actual eRMS entry. The Service responded, as to the reason, “call in either before a holiday, or after,” and as to the documentation, “medical or administrative documentation.” It supplied a print-out of the eRMS entry, showing, under “deems desirable”, a check mark, and the dates January 16-20, 2009.

#### **POSITIONS OF THE PARTIES:**

**Union:** The Union argued that the eRMS system is being used to circumvent the restricted sick leave procedure set for in the ELM, and any such “deems desirable” classification must not be arbitrary, capricious or unreasonable. This issue has been confronted by the parties in the past, and the maintenance of a list of employees (even if part of the larger eRMS database) has been found to be impermissible.

The parties have agreed in writing that the eRMS system is not a new rule or regulation, and the collective bargaining agreement still rules as it did in the past. The new system cannot be inconsistent with the agreement or the ELM, and, if changed, the ELM must pass muster as being consistent with the agreement. The only acceptable way to impose this kind of restriction is through the proper use of restricted sick leave.

On the facts, Grievant called in for FMLA leave around only four holidays in the prior year, and did not call in for sick leave around any holidays. He also called in for unscheduled FMLA leave on many other occasions during the year. Given these numbers, the Service abused its authority because there was no pattern of leave around holidays.

The Union also argued that FMLA leave is protected under federal law, and the employee should not be punished or penalized for using that leave.

**Postal Service:** In a contract case, the Union has the burden to prove that a contract violation has occurred, and has not done so here. Restricted sick leave has not been used

for many years, and the use of the eRMS system has been accepted by the Union at the national level. It has been in use for many years. It was intended to be, and is, used to automate leave management, in this case to allow a supervisor to use system statistics and still exercise discretion on a case-by-case basis to correct attendance abuse that occurs when employees frequently call in sick around holidays.

By asking the arbitrator to make a determination that absences of three days or less do not require documentation, the Union is asking the arbitrator to change the Employee Relations Manual section 513.361 and the Collective Bargaining Agreement and manuals. These sections allow a request for documentation for the protection of the service to be made so long as it is not made in an arbitrary, capricious or unreasonable manner.

The Union asserted there was a "deems desirable list," but has produced no list and there is none. Management testimony established that no list of "deems desirable" employees can even be generated by the eRMS system.

Finally, Grievant has suffered no harm by management's action, as he did not take unscheduled time off on the weekend in question, and did not have to produce any documentation. There is therefore no appropriate remedy.

## PERTINENT CONTRACT PROVISIONS

### ARTICLE 19 HANDBOOKS AND MANUALS

#### Section 19.1

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 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.

EMPLOYEE AND LABOR RELATIONS MANUAL  
513.36 Sick Leave Documentation Requirements

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.

513.39 Restricted Sick Leave

513.391 Reasons for Restrictions

Supervisors or installation heads who have evidence indicating that an employee is abusing sick leave privileges may place the employee on the restricted sick leave list. In addition, employees may be placed on the restricted sick leave list after their sick leave use has been reviewed on an individual basis and the following actions have been taken:

- a. Establishment of an absence file.
- b. Review of the absence file by the immediate supervisor and higher levels of management
- c. Review of the absences during the past quarter of LWOP and sick leave used by employees. (No minimum sick leave balance is established below which the employee's sick leave record is automatically considered unsatisfactory.
- d. Supervisor's discussion of absence record with the employee.
- e. Review of the subsequent quarterly absences. If the absence

logs indicate no improvement, the supervisor is to discuss the matter with the employee to include advice that if there is no improvement during the next quarter, the employee will be placed on restricted sick leave.

513.392 Notice and Listing

Supervisors provide written notice to employees that their names have been added to the restricted sick leave listing. The notice also explains that, until further notice, the employees must support *all* requests for sick leave by medical documentation or other acceptable evidence (see 513.364).

513.393 Rescission of Restriction

Supervisors review the employee's PS Form 3972 for each quarter. If there has been a substantial decrease in absences charged to sickness, the employee's name is removed from the restricted sick leave list and the employee is notified in writing of the removal.

USPS — NPMHU CONTRACT INTERPRETATION MANUAL

Restricted Sick Leave: Management may place an employee in "restricted sick leave" status, requiring medical documentation to support every application for sick leave, if: (a) management has "evidence indicating that an employee is abusing sick leave privileges"; or (b) if management reviews the employee's sick leave usage on an individual basis, first discusses the matter with the employee, and otherwise follows the requirements of ELM, Section 513.39.

Question: May management create a list of employees who are required to provide medical documentation for all unscheduled absences in lieu of utilizing the restricted sick leave procedure found in ELM, Section 513.39?

Answer: No. A "call-in" list of employees that are automatically required to provide

medical documentation for all unscheduled absences, even though the employees are not on restricted sick leave, should be abolished.

Source: Pre-arbitration Settlement H1C-3D-C 37622, dated June 3, 1985.

JCIM Art. 10.6 A number of disputes have occurred when a supervisor required an employee who was not on restricted sick leave to provide medical documentation for an illness or injury of three days or less. It is understood that the supervisor's request for medical documentation cannot be arbitrary, capricious or unreasonable.

**DISCUSSION:** First, it is appropriate to take note of the fact that Grievant, after being told he was placed in the "deems desirable" category, did not actually take FMLA leave time off on the ensuing holiday weekend, and was thus not actually deprived of pay or benefits for any such absence, but was on notice that documentation would be required and was thus in a restricted status, temporarily. (The Service acknowledged in its post-hearing brief that Grievant's restriction has ended.)

What remains is the question whether, pursuant to the procedures established with relation to the eRMS system and the "deems desirable" classification, the Service violated the agreement when it placed an employee in that category for an upcoming period, outside of the formerly used restrictive sick leave provisions (once the supervisor makes the computer entry, the telephone system will automatically request documentation for the applicable period if the employee calls in). The Service's Advocate argued that the use of the eRMS database has been sanctioned by agreement of the parties on a national level, and this was undisputed. The Advocate also asserted, however, that the parties agreed that that database may not be used in contravention of the National Agreement.

It may be that restricted sick leave is no longer used, but the procedure is still in the agreement, along with the specific process that must be used in implementing it,

including reviewing the employee's record, consulting with higher management, giving the employee advance notice, and, eventually upon the employee's improvement, rescinding it with respect to that employee. The ELM provision provides, except where there is evidence of abuse, that restriction must follow several preliminary steps:

Supervisors or installation heads who have evidence indicating that an employee is abusing sick leave privileges may place the employee on the restricted sick leave list. In addition, employees may be placed on the restricted sick leave list after their sick leave use has been reviewed on an individual basis and the following actions have been taken:

- a. Establishment of an absence file.
- b. Review of the absence file by the immediate supervisor and higher levels of management
- c. Review of the absences during the past quarter of LWOP and sick leave used by employees. (No minimum sick leave balance is established below which the employee's sick leave record is automatically considered unsatisfactory.)
- d. Supervisor's discussion of absence record with the employee.
- e. Review of the subsequent quarterly absences. If the absence logs indicate no improvement, the supervisor is to discuss the matter with the employee to include advice that if there is no improvement during the next quarter, the employee will be placed on restricted sick leave. 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.

This provision would make no sense if its meaning was to define and regulate a means to restrict the use of sick leave by errant employees (and, of course, a means to clear that employee's restriction when improvement was shown), while at the same time conferring on a supervisor the right to act completely outside that structure, with the most loosely

defined and uncodified discretion. This is especially so in view of the fact that the Service acknowledges that it has moved completely away from the use of restricted sick leave, and has taken up the eRMS database in conjunction with the “deems desirable” device as its main method of controlling unscheduled absences.

One cannot fault the Service for the use of the database within permissible limits, especially because it provides a resource not only to automate attendance records but also to place those records in overall context, so they can be used by the Service (and the Unions) to investigate whether employees are being treated equitably. The system also provides a means to avoid guessing at whether an employee’s record is outside existing norms, and for alerting supervisors to the need for enhanced oversight. What must go hand in hand with such a system, however, is the transparency that will permit scrutiny against the “arbitrary, capricious or unreasonable” bar set out in the JCIM.

This case, unlike an ordinary unscheduled sick leave situation, involved FMLA *dependent care* leave, in which, so far as we know, the employee had been approved to use that leave in small blocks to care for a dependent. The average employee does not, it is fair to say, experience *bona fide* short term illness coincident with holiday periods more frequently than during periods not associated with holidays, save perhaps from overindulgence, and so it is not irrational for an employer who observes frequent one, two, or three day absences around those holiday periods to suspect abuse. Under the restricted sick leave provisions the employee must be warned that restriction may occur, absent improvement, and the employee must be removed from that category upon improvement.

FMLA dependent care leave is a federally sanctioned program that accords the right to employees to request such leave for care of a dependent requiring care, first providing proof of the need for that care, and obtaining the approval of management. One form of FMLA leave is intermittent leave, where the employee is spared the need to seek out medical or special need documentation for short-term episodes falling under their certification. This recognizes the fact that, for example, a person experiencing episodic asthma or migraine headaches may follow a care protocol at home and not need

to go to a health care provider for medical treatment, based on medical certification that these episodes are likely to occur.

The record in this case did not establish the reason for Grievant's dependant care certification. What was clear, however, was that no inquiry was made as to why the need episodes occurred when they did, adjacent to 4 holidays in 12 months. It is easy to see how the need for dependent care might be more pressing around a holiday when a regular caregiver is not available. It is equally easy to see how an employee might abuse such a certification. The difference between sick leave and dependent care leave is that the latter is for care of another person, and may be related not only to that person's health difficulties, but also to the absence of some other mode of care.

The Family Medical Leave Act, and its associated regulations both within and without the Postal Service, provide procedures for pursuing suspicions of abuse, and limitations as to how this may be accomplished. The Service took the position at this hearing that the leave is granted even if the employee has been placed in "deems desirable" status but the right to take paid leave might be restricted. There was no indication that such a detailed conversation took place with Grievant, and the supervisor did not testify. Grievant testified that he was just told he was on a "deems desirable list" and needed documentation if he took unscheduled time off.

It appeared from Peets' testimony that the eRMS attendance control program is administered in such a way as to permit a supervisor, based on data in the eRMS system, to classify an employee certified to take intermittent FMLA leave as being required to submit medical documentation for an unscheduled FMLA leave absence on an upcoming holiday, without a substantive inquiry as to the reasons for the particular leave requested (such an inquiry would have to be made with due respect, of course, to the FMLA regulations not in issue here).

Such conduct is directly contrary to the language of §513.361 for absences of 3

days or less,<sup>1</sup> and defeats the intent of the FMLA intermittent leave certification. It is contrary to the §513.361 language, that is, unless the second part of the sentence in that section is intended to mean that the “deems desirable” language confers on management a superseding right to exercise discretion, measured against no disclosed standard, without a full inquiry into circumstances, to require documentation anyway. Such a reading of the language defies logic. The language suggests that the “deems desirable” decision arises out of special circumstances, and the JCIM specified that such a decision must not be arbitrary, capricious or unreasonable. Those three words imply that the decision will be made based on known, well explored circumstances, because without that, the decision is likely to be seen as arbitrary or capricious.

That language does confer a right to exercise such discretion providing that it is not arbitrary, capricious or unreasonable, but what is being done here, as the Union urges, is placing the employee on a sort of restricted FMLA leave, analogous to restricted sick leave but outside of the agreement, so that the employee will be told that if he takes FMLA dependent care leave on an upcoming holiday, documentation will automatically be required, without regard to the circumstances of that leave. There will inevitably be circumstances in which neither the employee nor the Service can know in advance whether or why that need will arise, and such an advance classification violates the National Agreement.

The FMLA’s requirements for the methods used to scrutinize the legitimacy of such leave requests were not placed before me, and this was not a sick leave case. Additionally, the distinction drawn by Peets between paid and unpaid FMLA leave was not in issue here, because there it was undisputed that Grievant was simply told that if he took unscheduled leave during the upcoming holiday period, documentation would be required. That directive was not, so far as can be told from this record, limited to FMLA dependent care leave, but Grievant had not taken any other kind of leave on the four occasions in issue here.

---

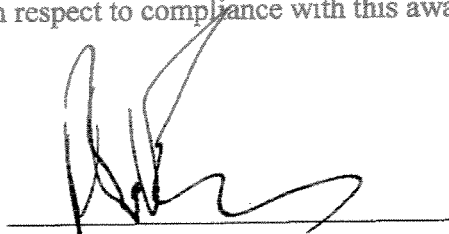
<sup>1</sup> Four instances of unscheduled FMLA dependent care leave adjacent to holidays over a 12-month period cannot, given the variables involved, be viewed as evidence that the employee is “abusing sick leave privileges” pursuant to the first part of that section.

It is well known that discipline can result from frequent unexcused (undocumented) absences.

I have reviewed several awards that have broadly held the Service's use of the "deems desirable" device in violation of the agreement. I limit my holding in this award to the circumstances presented to me, in a narrower framework than is presented in those awards.

**CONCLUSION:** In the case of an employee with a valid FMLA dependent care intermittent leave certification, the imposition of a blanket advance requirement embedded in a computer database, based on a supervisor's review of eRMS attendance records alone, that that supervisor "deems documentation desirable for the protection of the interests of the Postal Service," for unscheduled FMLA dependent care absences for a particular future period, violated the National Agreement. I do not hold that such a violation would occur if the supervisor made an informed, non-arbitrary decision based on a full and proper inquiry as to a particular absence, because that appears to be the intent of the language in the agreement. I make no holding with regard to non-FMLA unscheduled sick leave, nor with regard to a distinction that might be drawn with regard to whether an FMLA-protected leave may be restricted to unpaid leave based on a "deems desirable classification."

**REMEDY:** As already stated herein, Grievant suffered no harm other than the formal, temporary imposition of the requirement, as he took no unscheduled leave on the weekend in question. The Service is directed to comply with the applicable requirements of the National Agreement and the ELM in the future, and I retain jurisdiction to hear any dispute with respect to compliance with this award.



Robert Tim Brown, Esq., Arbitrator

Dated December 2, 2010.