American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

July 18, 2003

TO: Local Presidents
National Business Agents
National Advocates
Regional Coordinators
Resident Officers

FR: Greg Bell, Director
Industrial Relations

RE: Approved FMLA Leave Inappropriate Subject for Discussion

Enclosed you will find a regional arbitration award that held that approved FMLA leave was not an appropriate subject for a discussion under Article 16.2 (AIRS #37266, USPS #H98C-1H-C 00139847, 3/4/2002), and a court order enforcing the award in favor of the APWU and denying management's complaint seeking to vacate the award (Case No. 8:02-cv-1018-T-26EAJ; U.S. District Court, Middle District of Florida; 4/14/2003). The court decision also approved the arbitrator's conclusion that the union has a right under the National Agreement to challenge whether subjects the Postal Service raises during official discussions are proper.

This case arose after a supervisor gave a clerk an official discussion concerning an unscheduled FMLA absence. The clerk said he believed that the Postal Service's reason for giving him a warning due to a FMLA-covered absence was to restrain him from using FMLA leave in the future, and he felt intimidated by such an action. The evidence showed that the employee had a history of four unscheduled FMLA-covered absences and two emergency annual leave unscheduled absences during the three months preceding the discussion. At the arbitration hearing, the supervisor said that she placed the employee on notice regarding unscheduled absences during the discussion. However, she admitted that the employee could not be disciplined for FMLA-covered absences. Thereafter, the union filed a grievance.

The union did not challenge discipline issued or seek to have the discussion or verbal warning rescinded or expunged in this case, but rather limited its challenge to whether approved FMLA unscheduled absences are a proper subject for a discussion. The Postal Service countered that the grievance was not arbitrable because Article 16.2 specifies that discussions are not considered discipline and are not grievable. However, Arbitrator Gold rejected management's argument. She reasoned that the union was not pursuing a "disciplinary grievance, but rather a contractual one." Moreover, the arbitrator determined that the union was "questioning whether a matter raised by a Supervisor in the course of an official discussion was an appropriate subject

for consideration under the terms of the National Agreement" and therefore "[t]hat question involves an interpretation of the National Agreement and is ripe for consideration on its merits."

Regarding the merits, the Postal Service contended that since the parties agreed in Joint Questions and Answers that absences for FMLA-covered conditions can be discussed in periodic attendance reviews, they may also be discussed in formal discussions. Arbitrator Gold found no merit to this argument. She determined that a discussion was substantively different from a periodic attendance review. "While a periodic attendance review is an appropriate forum in which to address FMLA absences and, for example, their impact on the facility's operation and coworkers, an official discussion is not," according to the arbitrator. She indicated, however, that "[t]he only exception to this general rule would occur where the employee had failed to abide by the guidelines for FMLA leave, such as by exceeding the authorized frequency of absences" and there was no assertion that the grievant had not complied with FMLA guidelines.

In addition, Arbitrator Gold stressed that Article 16.2 states that discussions are for the purpose of addressing "minor offenses." She said that the supervisor discussed approved FMLA absences "in a forum that is designed specifically to advise employees how to correct deficiencies and warn them about the consequences should they fail to make that correction" and this action improperly suggested that the grievant "had committed an offense" when using leave for FMLA-covered absences. Though "periodic attendance review is an appropriate forum in which to address the impact on the Service of leaves of absence taken in accordance with FMLA procedures," the arbitrator concluded, "an official discussion designed to correct an employee's employment deficiencies is not." Arbitrator Gold thus sustained the grievance on the merits and ordered that the Postal Service cease and desist from addressing approved FMLA leave during official discussions held to consider minor offenses committed by an employee.

After Arbitrator Gold issued her decision, the Postal Service filed a complaint seeking to vacate the award. The union thereafter filed a counterclaim seeking enforcement of the Gold award. On April 14, 2003, the U.S. District Court for the Middle District of Florida rejected the Service's attempt to vacate the arbitration award and affirmed Arbitrator Gold's decision. Citing U.S. Supreme Court decisions, the federal court reasoned that an arbitration award may be unenforceable "only when the arbitrator strays from interpretation and application of the agreement and effectively 'dispense[s] his own brand of industrial justice.'" In this case, according to the court, "the arbitrator did not stray from interpretation and application of the agreement." It pointed to the fact that Arbitrator Gold "made a very specific interpretation of the Agreement in finding that 'minor offenses' do not include approved FMLA leave absences and, therefore, approved FMLA leave absences cannot form the basis of an 'official discussion.'"

The Postal Service has not appealed the federal court's decision and since the time limit for an appeal has passed, this decision is final.

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES POSTAL SERVICE,

Plaintiff,

v. CASE NO: 8:02-cv-1018-T-26EAJ

AMERICAN POSTAL WORKERS UNION, AFL-CIO,

Defendant.
_____/

ORDER

In light of arguments presented to the Court at the status conference on April 11, 2003,[1] this cause comes before the Court for reconsideration of Defendant's Motion for Summary Judgment (Dkt. 23).[2]

Plaintiff United States Postal Service ("the USPS") seeks to have the Court vacate an arbitration award which held that properly taken Family Medical Leave Act ("FMLA") leave cannot be addressed during an "official job discussion," between management and an employee. On April 13, 2000, Postal Clerk Billy Childs complained that on April 10, 2000, his supervisor had given him a "verbal warning/official" discussion for an

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[1] See Transcript of Status Conference.

[2] Plaintiff previously filed a Response to Defendant's Motion for Summary Judgment (Dkt. 26). The Court finds that additional briefing on the issues raised in the Motion is unnecessary.

unscheduled FMLA absence on April 7. (See Dkt. 1, Ex. C.) He wrote that he felt intimidated and believed that the reason he had been given the warning was to restrain him from using FMLA. (See id.) Defendant American Postal Workers Union, AFL-CIO, ("the Union") progressed a grievance questioning whether FLMA-approved unscheduled leaves were a proper subject of a discussion. The USPS argued that such discussions could not be grieved and the grievance was denied for that reason. (See id.)

The grievance then progressed to an arbitration hearing on February 26, 2002. (See Dkt. 1, Ex. A.) The arbitrator determined that the grievance was arbitrable, holding in relevant part:

> [T]he Union has not raised a disciplinary grievance, but rather a contractual one. It is questioning whether a matter raised by a Supervisor in the course of an official discussion was an appropriate subject for consideration under the terms of the National Agreement. That question involves an interpretation of the National Agreement and is ripe for consideration on its merits.

(See id. at pp. 2-3.)

At arbitration, the parties stipulated that an official discussion took place on April 10, 2000. (See id. at p. 3.) Ultimately, the arbitrator made the following factual determinations:

> [b]y including the topic of [Childs'] approved FMLA leaves of absence in this discussion, [Childs' supervisor] in effect was suggesting that he had committed an offense when utilizing this contractual and statutory benefit. Despite the Supervisor's disclaimer that she had told Mr. Childs that the FMLA absences would not, and could not, be used as a basis for discipline, the fact remains that she elected to discuss this topic in a forum that is

> designed specifically to advise employees how to correct deficiencies and warn them about the consequences should they fail to make that correction.
>
> ....
>
> The Postal Service has every right to be concerned about the effect of unauthorized absences -- whether approved for FMLA coverage or not – on the efficiency of its operation. This was a proper subject to be explored with an employee during a periodic attendance review. It was not appropriate to address FMLA leaves of absence taken in accordance with proper procedures in a discussion.

(See id. at pp. 4-5.) In her award, the arbitrator stated, "the Postal Service should cease and desist from addressing FMLA leaves of absence that have been taken in accordance with proper procedures in the course of formal discussions held to consider minor offenses committed by employees." (See id. at p. 6.)

The USPS argues that the award contradicts the plain language of its Collective Bargaining Agreement ("the Agreement") with the Union. Article 16, Section 2, of the Agreement ("the Agreement") states, in relevant part:

> For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable.

The USPS asserts that this portion of the Agreement clearly and unambiguously states that "discussions ... are not grievable" and, therefore, the arbitrator erred in finding that a grievance challenging an official job discussion was arbitrable. The Union maintains that its grievance sought an interpretation of whether approved leave covered by the FMLA

was a "minor offense," and, accordingly, an appropriate subject for an official job discussion.

As previously discussed, the arbitrator ultimately rendered an interpretation of the Agreement that favored the Union's position and supported it with findings of fact. Judicial review of a labor-arbitration decision pursuant to a collective bargaining agreement is very limited. Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001). Courts are not authorized to review the arbitrator's decision on the merits despite allegations, like those raised by the USPS, that the decision rests on factual errors or misinterprets the parties's agreement. See id. (citing Paperworkers v. Misco, Inc., 484 U.S. 29, 38 (1987)). The Supreme Court holds that if an "'arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,' the fact that a 'court is convinced he committed serious error does not suffice to overturn the decision.'" See id. (citing Eastern Associated Coal Corp. v. Mine Workers, 531 U.S. 57, 62 (2000) (quoting Misco, 484 U.S. at 38.) "When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's 'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce the award." See id. (citing Misco, 484 U.S. at 38). It is only when the arbitrator strays from interpretation and application of the agreement and effectively "dispense[s] his own brand of industrial justice" that his decision may be unenforceable. See id. (citing Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

Here, the arbitrator did not stray from interpretation and application of the Agreement. The arbitrator made a very specific interpretation of the Agreement in finding that "minor offenses" do not include approved FMLA leave absences and, therefore, approved FMLA leave absences cannot form the basis of an "official discussion." As a result, there is no basis for disturbing the arbitrator's award.

ACCORDINGLY, it is **ORDERED AND ADJUDGED**:

1. Defendant's Motion for Summary Judgment (Dkt. 23) is granted. The award of the arbitrator is affirmed. The Clerk shall enter final judgment in favor of Defendant.

2. The Court's Order of March 17, 2003 (Dkt. 32) is hereby vacated.

3. Plaintiff's Cross-Motion for Summary Judgment (Dkt. 26) is denied as moot.

DONE AND ORDERED at Tampa, Florida, on April 14, 2003.

RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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Counsel of Record

REGULAR ARBITRATION PANEL

In the Matter of Arbitration	
between	Grievant: BILLY CHILDS
UNITED STATES POSTAL SERVICE	Post Office: Lakeland, FL
and	USPS Case No: H98C-1H-C 00139847
AMERICAN POSTAL WORKERS UNION, AFL-CIO	APWU Case No: 00LK48

BEFORE: CHARLOTTE GOLD, Arbitrator

APPEARANCES:

For the U.S. Postal Service: RICHARD W. KOLENDA - Labor Relations Specialist

For the Union: DENNIS L. GOOSBY, Jr. - President, Citrus Center Area Local

Place of Hearing: Lakeland, FL

Date of Hearing: February 26, 2002

Date of Award: March 4, 2002

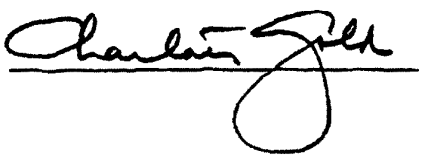
Relevant Contract Provisions: Articles 15, 16.2, and 19; FMLA, Section 825.20

Contract Year: 1998-2000

Type of Grievance: Contract

Award Summary:

This Contractual grievance was deemed arbitrable. As to the merits, while it was concluded that a periodic attendance review is an appropriate forum in which to address the impact on the Service of leaves of absence taken in accordance with FMLA procedures, an official discussion designed to correct an employee's employment deficiencies is not.



On April 13, 2000, Clerk Billy Childs complained that on April 10, his Supervisor had given him a "verbal warning/official discussion" for an unscheduled FMLA absence on April 7. He wrote that he felt intimidated and believed that the reason that he had been given the warning was to restrain him from using FMLA.

The Organization progressed a grievance questioning whether FMLA-approved unscheduled leaves were a proper subject of a discussion. The grievance was denied, with the Service alleging, among other things, that discussions cannot be grieved.

ISSUE

The parties disagreed as to the formulation of the issue. I conclude that it should be defined as follows:

(1) Is the grievance arbitrable?

(2) If so, did the Postal Service violate the National Agreement when the matter of an FMLA unscheduled leave was raised during an official discussion? If there was a violation, what shall the remedy be?

ARBITRABILITY

The Postal Service points out that Section 2 of Article 16 specifies that "...discussions are not considered discipline and are not grievable." That statement is clear and unambiguous. If the reverse were true--that is, if discussions were discipline and were grievable--we would be faced with a discipline case. In this instance, however, the Union has not raised a disciplinary grievance, but rather a contractual one. It is questioning whether a matter raised by a Supervisor in the course of an

official discussion was an appropriate subject for consideration under the terms of the National Agreement. That question involves an interpretation of the National Agreement and is ripe for consideration on its merits.

MERITS OF THE CASE

The parties have stipulated that an official discussion took place on April 10, 2000, and that the Grievant had FMLA documentation on file.

The testimony of the Supervisor as to what was mentioned during the discussion went unrefuted. She said that she put the Grievant on notice regarding unscheduled absences. Between January 1 and April 10, the Grievant had four FMLA unscheduled absences and two Emergency Annual Leave unscheduled absences. She noted that the Grievant could not be disciplined for the FMLA-covered absences.

The Postal Service argues, among other things, that since the parties have agreed that absences for conditions covered by the FMLA can be discussed in periodic reviews concerning the importance of regular attendance, they may also be discussed in formal discussions. The Service cites the Joint APWU & USPS FMLA Questions and Answers, signed on April 15, 1998, for its authority in regard to periodic attendance reviews.

The Service also looks to an internal USPS document issued by Chief Field Counsel Mary Anne Gibbons on June 22, 1994, in which the Service concluded that leave designated as FMLA may be discussed when sick leave is reviewed quarterly , "...to ensure the employee is aware of problems caused by the absences and to discuss possible ways required absences would have the least effect on operation."

The argument that a periodic attendance review is the same as a discussion, however, is without foundation. While a periodic attendance review is an appropriate forum in which to address FMLA absences and, for example, their impact on the facility's operation and coworkers, an official discussion is not. The only exception to this general rule would occur where the employee had failed to abide by the guidelines for FMLA leave, such as by exceeding the authorized frequency of absences. In this instance, the Grievant's Supervisor acknowledged that she did not engage in an attendance review during the period at issue here. She held only a formal discussion. There was also no assertion that Mr. Childs was not acting in compliance with proper FMLA guidelines.

In accordance with Article 16.2 of the National Agreement, discussions are held to address "minor offenses" by an employee. The USPS/APWU Contract Administration agreement for the SE/SW areas specifies that to be considered a discussion, the following elements should be present:

1. Employee placed on notice of an employment deficiency.

2. Employee advised of how to correct the employment deficiency.

3. Employee advised of the consequences if correction does not occur.

The clear implication of the Supervisor's decision to hold a discussion, rather than an attendance review, with Mr. Childs on April 10, 2000, was that she was addressing employment deficiencies and minor offenses that he had committed. By including the topic of his approved FMLA leaves of absence in this discussion, she in effect was suggesting that he had committed an offense

when utilizing this contractual and statutory benefit. Despite the Supervisor's disclaimer that she had told Mr. Childs that the FMLA absences would not, and could not, be used as a basis for discipline, the fact remains that she elected to discuss this topic in a forum that is designed specifically to advise employees how to correct deficiencies and warn them about the consequences should they fail to make that correction. It is little wonder that the Grievant was led to believe that it was possible that his FMLA absences might be used against him in the future.

The Postal Service has every right to be concerned about the effect of unauthorized absences--whether approved for FMLA coverage or not--on the efficiency of its operation. This was a proper subject to be explored with an employee during a periodic attendance review. It was not appropriate to address FMLA leaves of absence taken in accordance with proper procedures in a discussion.

In this particular case, the Grievant called in five hours before his start time to say that he would be unable to come to work. His Supervisor noted that because he did not request a leave, but rather simply stated that he was laying off for an FMLA-covered problem, and because she did not arrive for work until the same start time and thus had no opportunity to make alternate coverage arrangements, the absence was designated as unauthorized. As the Union pointed out, because of the simultaneous begin tour time, it would never be possible for the Grievant to have authorized leave if he called in even longer in advance on the same day prior to the beginning of his shift.

I would not go so far as to say that the absence was inappropriately designated as unauthorized, especially since this subject was not addressed by the parties during the grievance procedure. I am merely highlighting the quandary that Super-

visors may find themselves in when dealing with leaves that have been authorized or approved previously by a bona fide Postal Service official to be taken on a periodic basis. This is but another reason why such leaves should not be raised in discussions designed to correct deficiencies.

For all of the reasons stated above, the grievance is sustained.

AWARD

The grievance is arbitrable. It is sustained on the merits. The Postal Service should cease and desist from addressing FMLA leaves of absence that have been taken in accordance with proper procedures in the course of formal discussions held to consider minor offenses committed by employees.

Charlotte Gold
Arbitrator

March 4, 2002