



UNITED STATES POSTAL SERVICE
475 L'ENFANT PLAZA SW
WASHINGTON DC 20260

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4128

Re: H7C-NA-C 19033
W. Burrus
Washington, DC 20005

Dear Mr. Burrus:

Recently, you met with Thomas J. Valenti, Labor Relations Specialist, Contract Administration APWU/NPMHU, in a discussion of the above referenced case.

The issue in this grievance concerns the deletion of the statement [For Preemployment Exam Only. Do not Complete for Fitness-For Duty Exam] from Part C of PS Form 2485.

In full and complete settlement of this grievance, the parties agree:

That during a fitness-for-duty examination, the numeric sections of Part C may be required to be completed based on the judgment of the examining physician, in accordance with the Employee and Labor Relations Manual, Section 864.3.

Please sign and return the enclosed copy of this letter as your acknowledgment of agreement to remand case number H7C-NA-C 19033 and remove it from the pending national arbitration listing.

William Burrus
Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO

Anthony J. Negliante
Anthony J. Negliante
Manager
Grievance and Arbitration
Labor Relations

Dated: 12-14-93

Dated: 12-14-93



Medical Examination & Assessment

Privacy Act Statement

The collection of this information is authorized by 39 USC 401 and 1001. This information will be used to provide employees with necessary health care and to determine fitness-for-duty. As a routine use, the information may be disclosed to an appropriate government agency, domestic or foreign, for law enforcement purposes, where pertinent, in a legal proceeding to which the USPS is a party or has an interest; to a government agency in order to obtain information relevant to a USPS decision concerning employment, security clearances, contracts, licenses, grants, permits or other benefits; to a government agency upon its request when relevant to its decision concerning employment, security clearances, security or suitability investigations, contracts, licenses, grants or other benefits; to a congressional office at your request; to an expert consultant, or other person under contract with the USPS to fulfill an agency function; to the Federal Records Center for storage; to the Office of Management and Budget for review of private relief legislation; to an independent certified public accountant during an official audit of USPS finances; to an investigator, administrative judge or complaints examiner appointed by the

Equal Employment Opportunity Commission for investigation of a formal EEO complaint under 29 CFR 1613; to the Merit Systems Protection Board or Office of Special Counsel for proceedings or investigations involving personnel practices and other matters within their jurisdiction; to a labor organization as required by the National Labor Relations Act; to the Office of Personnel Management in making determinations related to veterans preference, disability retirement and benefit entitlement; to officials of the Office of Workers' Compensation Programs, Retired Military Pay Centers, Veterans Administration, and Social Security Administration in the administration of benefit programs; to an employee's private treating physician and to medical personnel retained by the USPS to provide medical services in connection with an employee's health or physical condition related to employment; and to the Occupational Safety and Health Administration and the National Institute of Occupational Safety and Health when needed by that organization to perform its duties under 29 CFR Part 19. Completion of this form is voluntary. If this information is not provided, the examination may be considered incomplete.

A: Completed by Examinee (Type or Print in Ink)

1. Name (Last, First, Middle)	2. Social Security Number	3. Sex	4. Date of Birth
5. Do you have any medical disorder or physical impairment which could interfere in any way with the full performance of duties of the position for which you are applying? (If your answer is "Yes", explain fully to the physician performing the examination). <input type="checkbox"/> Yes <input type="checkbox"/> No		I certify that all the information to be given by me in connection with this examination will be correct to the best of my knowledge and belief.	
		6. Signature	7. Date

B: Completed by Appointing/Referring Official Before Examination

1. Exam Type a. <input type="checkbox"/> Preemployment b. <input type="checkbox"/> Fitness-for-Duty	2. Date	Time
c. Reason for Request (complete only if you checked "Fitness-for-Duty") <input type="checkbox"/> Inadequate Medical Information <input type="checkbox"/> Excessive Absenteeism for Medically Documented Conditions <input type="checkbox"/> Behavioral Problem (Performance, Attitude) <input type="checkbox"/> Other (Specify):	Exam Appointment	Location
	3. Position Applied for or Now Holds	a. Title b. Installation
4. Circle the number preceding each functional requirement and each environment factor essential to the duties of this position. List any additional essential factors in the blank spaces. Also,	if the position involves law enforcement, attach the specific medical standards for the information of the examining physician.	

Functional Requirements

1. Heavy lifting, up to 70 pounds	16. Kneeling (hours)	26. Far vision correctable in one eye to 20/40 and to 20/100 in the other
2. Moderate lifting, 15-44 pounds	17. Repeated bending (hours)	27. Specific visual requirement (specify)
3. Light lifting, under 15 pounds	18. Climbing, legs only (hours)	28. Both eyes required
4. Heavy carrying, 45 pounds and over	19. Climbing, use of legs and arms	29. Depth perception
5. Moderate carrying, 15-44 pounds	20. Both legs required	30. Ability to distinguish basic colors
6. Light carrying, under 15 pounds	21. Operation of crane, truck, tractor, or motor vehicle	31. Ability to distinguish shades of colors
7. Straight pulling (hours)	22. Ability for rapid mental and muscular coordination simultaneously	32. Hearing (aid permitted) (hear conversational voice 15 feet — one ear)
8. Pulling hand over hand (hours)	23. Ability to use firearms	33. Hearing without aid
9. Pushing (hours)	24. Near vision correctable at 13" to 16" to Jaeger 1 to 4	34. Specific hearing requirements (specify)
10. Reaching above shoulder	25. Far vision correctable in one eye to 20/20 and to 20/40 in the other	35. Other (specify)
11. Use of fingers		
12. Both hands required or compensated by the use of acceptable prostheses		
13. Walking (hours)		
14. Standing (hours)		
15. Crawling (hours)		

Environmental Factors

1. Outside	12. Solvents (degreasing agents)	21. Unusual fatigue factors (specify)
2. Outside and inside	13. Grease and oils	22. Working with hands in water
3. Excessive heat	14. Radiant energy	23. Explosives
4. Excessive cold	15. Electrical energy	24. Vibration
5. Excessive humidity	16. Slippery or uneven walking surfaces	25. Working closely with others
6. Excessive dampness or chilling	17. Working around machinery with moving parts	26. Working alone
7. Dry atmospheric conditions	18. Working around moving objects or vehicles	27. Protracted or irregular hours of work
8. Excessive noise, intermittent	19. Working on ladders or scaffolding	28. Other (specify)
9. Constant noise	20. Working below ground	
10. Dust		
11. Fumes, smoke, or gases		



Medical Examination & Assessment

Privacy Act Statement

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Equal Employment Opportunity Commission for investigation of a formal EEO complaint under 29 CFR 1613; to the Merit Systems Protection Board or Office of Special Counsel for proceedings or investigations involving personnel practices and other matters within their jurisdiction; to a labor organization as required by the National Labor Relations Act; to the Office of Personnel Management in making determinations related to veterans preference, disability retirement and benefit entitlement; to officials of the Office of Workers' Compensation Programs, Retired Military Pay Centers, Veterans Administration, and Social Security Administration in the administration of benefit programs; to an employee's private treating physician and to medical personnel retained by the USPS to provide medical services in connection with an employee's health or physical condition related to employment; and to the Occupational Safety and Health Administration and the National Institute of Occupational Safety and Health when needed by that organization to perform its duties under 29 CFR Part 19. Completion of this form is voluntary. If this information is not provided, the examination may be considered incomplete.

A: Completed by Examinee (Type or Print in Ink)

1. Name (Last, First, Middle)	2. Social Security Number	3. Sex	4. Date of Birth
5. Do you have any medical disorder or physical impairment which could interfere in any way with the full performance of duties of the position for which you are applying? (If your answer is "Yes", explain fully to the physician performing the examination).		I certify that all the information to be given by me in connection with this examination will be correct to the best of my knowledge and belief.	
<input type="checkbox"/> Yes <input type="checkbox"/> No		6. Signature	7. Date

B: Completed by Appointing/Referring Official Before Examination

1. Exam Type a. <input type="checkbox"/> Preemployment b. <input type="checkbox"/> Fitness-for-Duty	2. Date	Time
c. Reason for Request (complete only if you checked "Fitness-for-Duty") <input type="checkbox"/> Inadequate Medical Information <input type="checkbox"/> Excessive Absenteeism for Medically Documented Conditions <input type="checkbox"/> Behavioral Problem (Performance, Attitude) <input type="checkbox"/> Other (Specify):	Exam Appointment	Location
	3. Position Applied for or Now Holds	a. Title b. Installation
4. Circle the number preceding each functional requirement and each environment factor essential to the duties of this position. List any additional essential factors in the blank spaces. Also,	if the position involves law enforcement, attach the specific medical standards for the information of the examining physician.	

Functional Requirements

1. Heavy lifting, up to 70 pounds	16. Kneeling (hours)	26. Far vision correctable in one eye to 20/40 and to 20/100 in the other
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11. Use of fingers		
12. Both hands required or compensated by the use of acceptable prostheses		
13. Walking (hours)		
14. Standing (hours)		
15. Crawling (hours)		

Environmental Factors

1. Outside	12. Solvents (degreasing agents)	21. Unusual fatigue factors (specify)
2. Outside and inside	13. Grease and oils	22. Working with hands in water
3. Excessive heat	14. Radiant energy	23. Explosives
4. Excessive cold	15. Electrical energy	24. Vibration
5. Excessive humidity	16. Slippery or uneven walking surfaces	25. Working closely with others
6. Excessive dampness or chilling	17. Working around machinery with moving parts	26. Working alone
7. Dry atmospheric conditions	18. Working around moving objects or vehicles	27. Protracted or irregular hours of work
8. Excessive noise, intermittent	19. Working on ladders or scaffolding	28. Other (specify)
9. Constant noise	20. Working below ground	
10. Dust		
11. Fumes, smoke, or gases		

Examinee's Name

SSN

C: Medical History
(Completed by Examinee Before Examination)

This section contains questions regarding your medical history and health habits. This information will be used to make a medical assessment of whether you can safely and efficiently perform the duties of the position that you now hold or for which you have applied. Detailed medical information will be handled in a confidential manner. Only information that is directly relevant to determining

your ability to function effectively in your work with the Postal Service will be released to the hiring official. It is essential that you answer all questions truthfully and completely. A history of any health problem will not necessarily disqualify you from employment. False or incomplete responses could result in an incomplete examination, or termination if hired.

1. Have you ever been refused employment or been unable to hold a job because of:	Yes	No	8. Have you ever received compensation or a cash settlement from an employer, insurance company, government or other organization for injury or disease? (If "Yes" explain)	Yes	No
a. Sensitivity to chemicals, dust, pollen, sunlight, etc.					
b. Inability to perform certain motions					
c. Inability to assume certain positions					
d. Other Medical Reasons					
			9. Is there a case pending?		
2. Have you ever required special or restricted job assignment due to illness, injury, or physical impairments? (If "Yes", list accommodations provided).			10. Have you ever had an X-ray or other special examination (e.g., electrocardiogram, CAT scan)? (If "Yes" give date and explain).		
3. Have you ever had or have you, at any time, been treated for a psychiatric disorder? (If "Yes", specify date and give details).			11. Have you served in the military?		
			12. Have you ever been rejected for, or discharged from military service because of any physical or mental reasons? (If "Yes" give date and reasons).		
4. Have you ever been treated for any medical condition other than minor illness, or had any operations?			13. Have you ever lived or been employed overseas? (If "Yes" state when and number of months. Include military service.)		
5. Have you worked for any length of time involving the handling of chemical, toxic, or dangerous materials?					
6. Have you had any known exposure to asbestos or asbestos-related products? (If "Yes" state where and when).			14. Have you ever filed a disability claim or received payment or compensation from the US government? (If "Yes", complete a, b, & c below).		
7. Have you ever worked in a noisy environment? (If "Yes" state where and when).			14a. Your Claim Number		
			14b. Percent Rating		
			14c. Cause		

Examinee's Name

SSN

C: Medical History (Continued)
(Completed by Examinee Before Examination)

Table with 4 columns: Question, Yes, No, Question, Yes, No. Contains questions 15-20 regarding exercise, tobacco, alcohol, and drug use.

21. Do You Now or Have You Ever Had Any of the Following Conditions? (Give Dates)

Table with 5 columns: Question, Yes, No, Question, Yes, No. Lists various medical conditions such as headaches, vision disturbances, chronic sinus trouble, and skin conditions.

D: Medical Findings (For Preemployment and Fitness-for-Duty Exams)

(Completed by Examining Physician)

NOTE TO EXAMINING PHYSICIAN: The person you are about to examine is being considered for a position (or, if a Fitness-for-Duty exam, has a position) which will include the functional requirements and environmental factors circled in Section B., Item 4. In conducting your examination and reporting your findings and conclusions, take these factors into consideration.

1. Examinee's Name	2. SSN	3. Height (Feet, Inches)	4. Weight (Pounds)
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5. Eyes

	Snellen (Distant Vision)	Jaeger (Near Vision)
Without Glasses	a. Right 20 _____ Left 20 _____	b. Right _____ in. to _____ in., Left _____ in. to _____ in.
With Glasses	c. Right 20 _____ Left 20 _____	d. Right _____ in. to _____ in., Left _____ in. to _____ in.
e. Is color vision normal when Ishihara or other color plate test is used? <input type="checkbox"/> Yes <input type="checkbox"/> No		f. If the answer is "No", can applicant pass lantern or other compatible? <input type="checkbox"/> Yes <input type="checkbox"/> No

6. Ears

a. Ordinary Conversation Right ear @ 15 ft. _____ Left ear @ 15 ft. _____	b. Audiometer (Attach Audiogram if indicated)
--	---

7. Blood Pressure/Pulse

a. Systolic/Diastolic	b. Two Additional Readings if Elevated	c. Pulse
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8. Urinalysis

a. Albumen (Multi-Test Stick)	b. Sugar (Multi-Test Stick)	c. Blood (Multi-Test Stick)	d. Drugs Identified if Test Indicated
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9. Physical Examination

NOTE: Routine pelvic examinations are not done by postal medical officers or contract physicians

Clinical Evaluation	Normal	Ab-normal	Clinical Evaluation	Normal	Ab-normal
a. Head, face, neck, and scalp			l. Anus and rectum (if indicated)		
b. Nose			m. Endocrine system		
c. Mouth and throat			n. Hernia (Any type)		
d. Ears			o. Upper extremities		
e. Eyes			p. Feet		
f. Ophthalmoscopic			q. Lower extremities		
g. Ocular motility			r. Spine		
h. Lungs and Chest (Breasts, if indicated)			s. Identifying body marks, scars		
i. Heart			t. Skin, lymphatics		
j. Vascular system (Varicosities, etc.)			u. Neurologic		
k. Abdomen			v. Mental status		

Examinee's Name

SSN

10: Summary of Medical Findings

(Explain in detail any abnormality noted in history or physical examination)

9a. Physician's Name (Type or Print)

- Medical Officer
- Contract Physician
- Private Physician

b. Address (Include ZIP + 4)

▶ **IMPORTANT** - Examining Physician: If you are not a Postal Medical Officer, sign and return the entire form, intact, in the preaddressed Restricted/Medical envelope within 5 days of the examination

c. Signature

d. Date

**NOTE: Insert carbon from page 1 between parts 1 & 2 of this page before completing.
E. Medical Assessment by Postal Medical Officer/Contract Physician**

Examinee's Name (Last, First, MI)	SSN
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Complete All Items Below in Lay Terms
to Observe Privacy Considerations

1. Medical History: Based upon review of Section C of this form, Examinee's Medical History, VA records (if applicable), outside medical records, etc., check appropriate box below. Note any significant past medical data that is pertinent to the physical, and medical data that is pertinent to the physical and mental requirements of the essential functions of the position applied for.

- No Significant Finding
- Significant Findings as Noted:
(Observe privacy considerations)

2. Physical Findings: Based upon a complete physical examination and mental status examination (if indicated), check appropriate box below.

- No Limitations/Restrictions
- Limitations/Restrictions as Noted:
- Specialist Exam Required with Narrative Report
Note any restrictions (inabilities) and/or limitations (partial inabilities) identified.
- Do not complete Item 4, below, until specialist's report is reviewed.)

3. Employment History: Based upon review of examinee's PS Form 2591, Application for Employment (if applicable), Supervisor's Evaluations, prior job descriptions, etc., check appropriate box below. Note any employment data that is pertinent to past or current medical conditions. Note only that employment data which supports the examinee's ability to perform the essential functions of the position for which the examinee has applied.

- No Significant Findings
- Significant Findings as Noted:

4. Risk Assessment: NOTE: Do not complete this section until specialist's report (if required) has been reviewed.

Based upon a review of findings as noted in nos. 1-3, above, indicate assessment of applicant's risk of incurring job-related injury or illness, within the next six months, due to existing or past medical conditions.

- | | |
|--|--|
| <input type="checkbox"/> No Medical Risk/Restriction: Examinee is medically qualified to perform essential functions of the position without accommodation. | <input type="checkbox"/> Moderate Risk/Restriction: Examinee would be medically qualified to perform essential function of the position only if below noted limitations/restrictions can be accommodated. (See No. 5 below.) |
| <input type="checkbox"/> Low Risk/Restriction: Examinee is medically qualified to perform essential functions of the position at the time of examination, but periodic medical follow-up is recommended. (See No. 5, below.) | <input type="checkbox"/> High Risk/Restriction: Examinee is not medically qualified to perform essential functions of the position. Accommodations will not reduce medical risk or restriction. |

5. Suggested Accommodations: (Job modifications which would allow examinee to perform essential functions of the position effectively and safely)

Signature of Medical Authority	Date	Name and Location (Type or Print)
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F. Completed by Appointing/Referring Official (HBK-EL 311,343.5)

Enter Action Taken	Name & Location (Type or Print)	
<input type="checkbox"/> Selected for Appointment <input type="checkbox"/> Fit for Duty <input type="checkbox"/> Not Selected for Appointment <input type="checkbox"/> Not Fit for Duty		
	Signature	Date

NOTE: Insert carbon from page 1 between parts 1 & 2 of this page before completing.
E. Medical Assessment by Postal Medical Officer/Contract Physician

Examinee's Name (Last, First, MI)

SSN

Complete All Items Below in Lay Terms
to Observe Privacy Considerations

1. **Medical History:** Based upon review of Section C of this form, Examinee's Medical History, VA records (if applicable), outside medical records, etc., check appropriate box below. Note any significant past medical data that is pertinent to the physical, and medical data that is pertinent to the physical and mental requirements of the essential functions of the position applied for.

No Significant
Finding

Significant Findings
as Noted:
(Observe privacy considerations)

2. **Physical Findings:** Based upon a complete physical examination and mental status examination (if indicated), check

Mr. William Burrus
 Executive Vice President
 American Postal Workers
 Union, AFL-CIO
 1300 L Street, N.W.
 Washington, DC 20005-4107

OCT 17 1988

RE: W. Burrus
 Washington, D.C. 20005
 H4C-NA-C 79

Dear Mr. Burrus:

On March 17, 1988 we met to discuss the above captioned grievance at the fourth step of our contractual grievance procedure.

The issue in this grievance is whether a postal official other than the installation head may sign Form 2485 ordering an employee to a Fitness for Duty Examination. It is the Union's position that P-11 Handbook, Section 343.3 limits the signature to the installation head only.


During our discussion we mutually agreed to settle this case based on the following understanding:

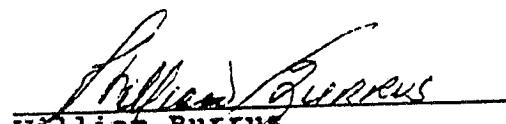
Part 343.31 of the P-11 Handbook states, "The appointing officer completes Form 2485, Certificate of Medical Examination, Section B only and the installation head signs it." We agree that the intent of this language is that the installation head will be the postal official authorizing the Fitness for Duty Examination.

This agreement does not preclude management in the future from instituting Article 19 changes, if necessary, to the P-11 Handbook.

Please sign and return a copy of this decision as acknowledgment of your agreement to settle this case.

Sincerely,


 Daniel A. Kahn
 Grievance and Arbitration
 Division

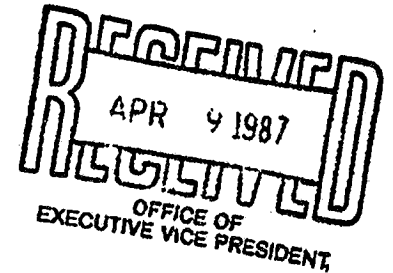

 William Burrus
 Executive Vice President
 American Postal Workers
 Union, AFL-CIO



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

April 7, 1987

Mr. William Burrus
 Executive Vice President
 American Postal Workers
 Union, AFL-CIO
 1300 L Street, N.W.
 Washington, DC 20005-4107



Dear Mr. Burrus:

This is in response to your letter of March 24 requesting clarification as to who is responsible for completing Section C of PS Form 2485, Medical Examination and Assessment.

Completion of PS Form 2485 is voluntary as stipulated in the Privacy Act Statement of the form. Part C, Medical History of PS Form 2485 is to be completed by the examinee (employee) before the examination. The information supplied by the employee is used to help make a medical assessment of whether the employee could safely and efficiently perform the duties of his/her position.

As previously stated, the completion of PS Form 2485, as it relates to fitness-for-duty examinations, is voluntary; however, this does not preclude the examining physician from asking those same questions, should it be necessary and relevant for making an appropriate medical finding. Refusal to answer pertinent questions regarding medical history may affect the outcome of the examination under Part E, Medical Assessment by Postal Medical Officer/Contract Physician of PS Form 2485.

As a reminder, PS Form 2485, Parts C and D are considered restricted medical information and limited as per Handbook, EL-806, Health and Medical Service, Section 214.3, Restricted Medical Records.

Should there be any further questions regarding the foregoing, you may contact Harvey White at 268-3831.

Sincerely,

Thomas J. Fritsch
 Assistant Postmaster General



American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

William Burrus
Executive Vice President
(202) 842-4246

March 24, 1987

Dear Mr. Fritsch:

National Executive Board
Moe Blier, President

William Burrus
Executive Vice President

Douglas C. Holbrook
Secretary-Treasurer

Thomas A. New
Industrial Relations Director

Kenneth D. Wilson
Director, Clerk Division

Wesvoda
Maintenance Division

Donald A. Ross
Director, MVS Division

George N. McKeithen
Director, SDM Division

Norman L. Steward
Director, Mail Handler Division

Regional Coordinators
Raydell R. Moore
Western Region

James P. Williams
Central Region

Philip C. Fleming, Jr.
Eastern Region

Romualdo "Willie" Sanchez
Northeastern Region

Archie Salisbury
Southern Region

In an effort to clarify the rights of the parties I have had a number of discussions and exchanges of written positions with Harvey White of your staff on the subject of referrals for Fitness-For-Duty Examinations. The most recent issue of concern is the requirement to complete Form 2485 and responsibilities of the employee. In that the Form (2485) is used for both pre-employment examinations as well as Fitness For Duty Exams local offices are applying varying interpretations to the governing P 11 language.

The specific area of concern is whether or not Section 343 of the P 11 Handbook requires that the employee complete Section C when referred for Fitness-For-Duty Examinations.

The union interprets Section 343.4 of the P 11 Handbook as placing the responsibility of competing Section C on the medical officer.

Please respond as to the Employer's position on this issue.


William Burrus
Executive Vice President

Thomas J. Fritsch
Assistant Postmaster General
Labor Relations Department
U.S. Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260

WB:mc

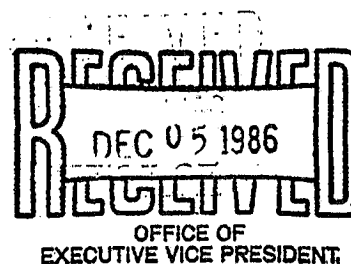
USPS CMA17



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

December 4, 1986

Mr. William Burrus
 Executive Vice President
 American Postal Workers
 Union, AFL-CIO
 817 - 14th Street, N.W.
 Washington, DC 20005-3399



Dear Mr. Burrus:

This is a follow-up to my interim response regarding your letter of September 15 concerning the use of PS Form 2485, Medical Examination and Assessment, as it relates to fitness-for-duty examinations and drug testing.

As a matter of uniformity, I will repeat your specific questions and interpretations and then provide you with the Postal Service's position.

1. Is the completion of Form 2485 required in the referral of employees for fitness-for-duty examinations?

The union interprets Section 343.3 of the P-11 as requiring the completion of Form 2485.

USPS Position

Management can order fitness-for-duty examinations at any time (864.32 ELM). The request is made through the appropriate Human Resource function, and that function is then required to complete Section B of the Form 2485.

2. What postal official is authorized to sign Form 2485 requesting an examination by the medical officer?

The union interprets Section 343.3 of the Personnel Operations Handbook (P-11) as limiting such signature to that of the installation head.

Mr. William Burrus

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USPS Position

The new Form 2485 dated February 1986 does not have a signature block (P-11, Section 343.3 requires a revision). As previously noted, the specific request for the fitness-for-duty is made by management and the Form 2485 is completed by the appropriate Human Resource function and forwarded to the medical unit along with other relevant information. After the examination, pages 1 and 6 of the Form are returned to the Human Resource function. Detailed medical information is kept in the medical unit. The Human Resource function will notify the appropriate management official who ordered the fitness-for-duty as to the results of the fitness-for-duty and employee limitations.

3. Is the employee who is referred for a fitness-for-duty examination entitled to be advised of the reasons for the examination?

The union interprets the provisions of Form 2485 as requiring the completion of Section B and, upon request, the employee is entitled to a copy of the Form indicating the reason for referral.

USPS Position

The employee is entitled to know the reason(s) for the fitness-for-duty examination.

4. Is the examining medical officer required to indicate in the report reasons why a specific test is required, and if so, is the employee entitled to a copy of the report?

The union believes that the employee is entitled to be advised why a specific test is performed during a fitness-for-duty examination.

USPS Position

The decision to require a specific test is a medical judgment, and therefore prudence on the part of the medical officer will dictate whether the employee/patient should be advised as to the purpose of the test.

Mr. William Burrus

3

5. Is the employee entitled to a copy of any note or memorandum provided the installation head regarding the fitness-for-duty examination?

The union believes that the employee is entitled to a copy of any memorandum provided the installation head regarding the fitness-for-duty examination.

USPS Position

The employee is not entitled to any specific note or memorandum that is provided to management from the examining physician.

On November 13, you supplemented the original list with these additional inquiries.

6. Can an employee refuse examination by the USPS designated physician under circumstances where the employee is willing to furnish the medical officer with the names and addresses of three to five board certified physicians who are willing to perform the examination?

The union interprets Section 568.31 and .323 of the ELM Handbook as providing employees with the above options.

USPS Position

The employee does not have the above option. Failure to report for a fitness-for-duty examination without acceptable reasons is just cause for disciplinary action (P-11, Section 343.34). Fitness-for-duty examinations are always performed by a USPS medical officer or contract physician. If necessary, the medical officer or physician may obtain a consultative specialist opinion from a local source (P-11, Section 343.1). The APWU cited reference applies to management initiated disability retirement procedures only.

7. Is a referred employee entitled to representation to act in the employee's behalf in matters related to a fitness-for-duty examination and to seek information and procedures used to insure that the results are correct?

The union interprets Section 568.322 of the ELM Handbook as permitting such representation.

Mr. William Burrus

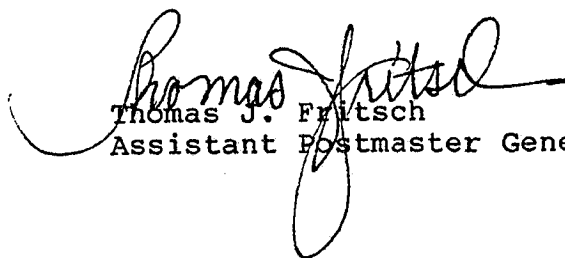
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USPS Position

The APWU cited reference applies to management initiated disability retirement procedures only. Additionally, refer to USPS position #3 and #4.

Should there be any questions regarding the foregoing, you may contact Harvey White at 268-3822.

Sincerely,


Thomas J. Fritsch
Assistant Postmaster General

APW

American Postal Workers Union, AFL-CIO

817 14th Street, N.W., Washington, D.C. 20005

November 13, 1986

William Burrus
Executive Vice President
(202) 842-4246

Dear Mr. White:

This is to supplement my list of inquiries regarding the use of Form 2485 in referring employees to fitness for duty exams.

6. Can an employee refuse examination by the USPS designated physician under circumstances where the employee is willing to furnish the Medical Officer with the names and addresses of three to five board-certified physicians who are willing to perform the examination?

The union interprets Section 588.319 and .323 of the P 11 Handbook as providing employees with the above options.

7. Is a referred employee entitled to representation to act in the employee's behalf in matters related to a fitness for duty examination and to seek information why specific tests are required and procedures used to insure that the results are correct?

The union interprets Section 588.323 of the P 11 Handbook as permitting such representation.

Sincerely,


William Burrus
Executive Vice President

Harvey White, Chairperson
Joint Labor-Management Safety Committee
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260

WB:mc

National Executive Board

Moe Blier, President

William Burrus
Executive Vice PresidentDouglas C. Hendon
Secretary/TreasurerThomas A. Neill
Medical Relations DirectorAnthony D. Weller
Care DivisionRichard J. Woodall
Director, Maintenance DivisionDonna A. Ross
Director, MVS DivisionSamuel Anderson
Director, SCF DivisionAeri Leiner
Director, Mail Handler Division

Regional Coordinators

Raydell R. Moore
Western RegionJames P. Williams
Central RegionPhilip C. Ferring, Jr.
Eastern RegionNeal Vaccaro
Northeastern RegionArche Salisbury
Southern Region

APW

Burrus has a copy

American Postal Workers Union, AFL-CIO

817 14th Street, N.W., Washington, D.C. 20005

William Burrus
Executive Vice President
(202) 842-4246

Sept. 15, 1986

Dear Mr. Fritsch:

In an effort to clarify the employer's current policy regarding the use of urinalysis screening for drug use during fitness for duty examinations the union seeks the employer's response to the following:

National Executive Board
Moe Billet, President

William Burrus
Executive Vice President

Douglas C. Holbrook
Secretary-Treasurer

Thomas A. Neill
Industrial Relations Director

Kenneth D. Wilson
Clerk Division

W. W. Wlodau
Director, Maintenance Division

Donald A. Ross
Director, MVS Division

Samuel Anderson
Director, SDM Division

Ken Lerner
Director, Mail Handler Division

Regional Coordinators

Raydel R. Moore
Western Region

James P. Williams
Central Region

Philip C. Fleming, Jr.
Eastern Region

Neal Vaccaro
Northeastern Region

Archie Salisbury
Southern Region

1. Is the completion of Form 2485 required in the referral of employees for fitness for duty examinations?
The union interprets Section 343.3 of the P-11 as requiring the completion of Form 2485.
2. What postal official is authorized to sign Form 2485 requesting an examination by the medical officer?
The union interprets Section 343.3 of the Personnel Operations Handbook (P-11) as limiting such signature to that of the installation head.
3. Is the employee who is referred for a fitness for duty examination entitled to be advised of the reasons for the examination?
The union interprets the provisions of Form 2485 as requiring the completion of Section B and upon request the employee is entitled to a copy of the form indicating the reason for referral.
4. Is the examining medical officer required to indicate in the report reasons why a specific test is required and if so, is the employee entitled to a copy of the report?
The union believes that the employee is entitled to be advised why a specific test is performed during a fitness for duty examination.

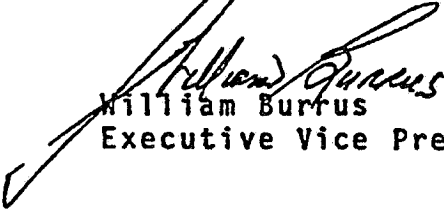
*USPS
clerk*

-2-

5. Is the employee entitled to a copy of any note or memorandum provided the installation head regarding the fitness for duty examination? The union believes that the employee is entitled to a copy of any memorandum provided the installation head regarding the fitness for duty examination.

Please respond at your earliest opportunity.

Sincerely,



William Burrus
Executive Vice President

Thomas Fritsch
Assistant Postmaster General
Labor Relations Department
United States Postal Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20260

WB:mc

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Accordingly, with the limited exceptions noted below, future submission of the merits of these cases to Washington will be at the discretion of the Regional Director.

I. Drug Testing as a Section 8(d) Subject of Bargaining

A. Current Unit Employees

As noted above, we have concluded that drug testing of current unit employees is a mandatory subject of bargaining within the meaning of Section 8(d) of the Act. Generally, an employment requirement is a mandatory subject of bargaining under the Act if it is "germane to the 'working environment'" of the employees and if its establishment "is not among those 'managerial decisions [] which lie at the core of entrepreneurial control.'" ^{4/} We conclude that drug testing meets this critical test.

In response to a growing national concern over drug abuse and drugs in the workplace, some employers have decided to implement drug tests for their employees. In many drug testing programs, employees who refuse to submit to a test may be subject to discipline, including discharge, while employees who submit to the test and have positive results may be suspended and/or required to participate in rehabilitation programs, forced to accept a change in job duties, or subjected to discipline up to and including discharge. Thus, mandatory drug testing literally is a "condition of employment." It is a "fitness-for-duty" type requirement that may ultimately affect employment status. In our view, any such obligatory tests, which may reasonably lead to discipline, including discharge, are plainly germane to the employees' working conditions and, therefore, are presumptively mandatory subjects of bargaining within the ambit of Section 8(d) of the Act. In addition to the "fitness-for-duty" implications of testing, the test procedures, including the methods for assuring the security of the test samples and the accuracy of the test, are matters of vital concern to employees and their representatives.

^{4/} Ford Motor Co. v. NLRB, 441 U.S. 488, 498 (1979), quoting from Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 222-23 (1964)(Stewart, J., concurring). Compare First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981)(employer decision to close part of its business for economic reasons is entrepreneurial and not a mandatory subject of bargaining).

In analogous cases, the Board has found that physical examinations, 5/ polygraph testing, 6/ and safety rules 7/ are mandatory subjects of bargaining. Indeed, with respect to physical examinations and polygraphs, the bargaining obligation extends not only to whether there will be a "testing" requirement but also, if so, to the particulars of any such testing. Thus, an employer is also obligated to bargain over the content of a physical examination, the purpose for which the examination is to be used, and how test results, or the refusal to submit to a test, will affect employment. 8/ And respecting polygraph tests, the Board has held that "[t]he required bargaining . . . does not comprehend merely the magnitude or propriety of the penalty, but, as well, the content and incidents of the rule giving rise to the penalty." 9/ As physical examinations and polygraph tests are

5/ Lockheed Shipbuilding Co., 273 NLRB 171, 177 (1984); LeRoy Machine Co., 147 NLRB 1431, 1432 (1964).

6/ Medicenter, Mid-South Hospital, 221 NLRB 670, 675 (1975). The Board majority in Medicenter, adopting the ALJ's analysis, noted that "the mandatory across-the-board use of a controversial mechanical device for testing . . . employees . . . [gave] rise to a number of salient considerations and questions (apart from the severity of the punishment for refusing to submit to it) which suggest the 'amenability of such subjects to the collective bargaining process.'" 221 NLRB at 676 (citing Fibreboard, 379 U.S. at 211, footnote omitted).

7/ Gulf Power Co., 156 NLRB 622, 625 (1966), enfd. 384 F.2d 822, 825 (5th Cir. 1967); Boland Marine & Mfg. Co., 225 NLRB 824, 829 (1976), enfd. 562 F.2d 1259 (5th Cir. 1977). Cf. Womac Industries, Inc., 238 NLRB 43 (1978) (absenteeism).

8/ See Lockheed Shipbuilding, 273 NLRB at 171, 177; LeRoy Machine Co., 147 NLRB at 1432, 1438-39.

9/ Medicenter, 221 NLRB at 677-78. The Board majority also adopted the Administrative Law Judge's delineation of other salient questions, such as "the validity and integrity of the testing procedure; the breadth of the test questions; the qualifications of the persons who devise and administer the test; the weight to be attached to 'failing' the test, and the consequences of failure; and the right of union representatives or friends to be present during the administration of a potentially frightening procedure alien to the experience of most employees." *Id.*, at 676 n. 23.

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analogous to drug testing, we believe the scope of the bargaining obligation regarding the latter is as extensive as that respecting the former.

We do not believe that drug testing falls within the realm of managerial or entrepreneurial prerogatives excluded from Section 8(d) of the Act. In Gulf Power Co., ante n. 7, the Board considered and flatly rejected this argument with respect to safety regulations. In enforcing the Board's order in that case, the Fifth Circuit concluded that "the Company's contention that . . . safety was a prerogative of management was without merit." 384 F.2d at 825. Even more to the point, the Board majority in Medicenter, ante, n. 6, rejected the employer's argument that instituting a polygraph test fell within its inherent right to conduct its business. To the contrary, the Board concluded,

[t]he institution of a polygraph test is not entrepreneurial in character, is not fundamental to the basic direction of the enterprise, and does not impinge only indirectly upon employment security. It is, rather, a change in an important facet of the workaday life of employees, a change in personnel policy freighted with potentially serious implications for the employees which in no way touches the discretionary "core of entrepreneurial control." 221 NLRB at 676.

Similarly, drug testing is not a prerogative of management exempt from Section 8(d). 10/

B. Employee Applicants

The issue of whether drug testing of applicants for employment is also a mandatory subject of bargaining is more difficult. However, since the issue is an important one and since a reasonable argument can be made that the subject is mandatory, I have authorized complaints on this issue in order to place the question before the Board. Arguably, a pre-hire drug test not only establishes a condition precedent to employment for job applicants, it also settles a term and condition of

10/ See also Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Company, 620 F. Supp. 163, 169 (D. Mont. 1985), appeal pending No. 85-4138 (9th Cir.) (employee drug testing under Railway Labor Act not entrepreneurial).

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employment of current employees by vitally affecting their working environment. 11/

Regarding the first point, the Board has held that conditions of becoming employed can constitute a mandatory subject. With court affirmance, the Board held that both the agreement to use, and the internal operation of, a hiring hall are mandatory subjects of bargaining. Houston Chapter, Associated General Contractors, 143 NLRB 409, 413 (1963), enfd. 349 F.2d 449 (5th Cir. 1965), cert. denied 382 U.S. 1026 (1966) (agreement to utilize hiring hall). Pattern Makers' Assn. of Detroit (Michigan Pattern Mfrs. Assn.), 233 NLRB 430, 435-36 (1977), enfd. on this point 622 F.2d 267 (6th Cir. 1980) (internal operational processes of hiring hall). The Board in Houston Chapter, A.G.C., 143 NLRB at 412, said that "[i]t can scarcely be denied, since 'employment' connotes the initial act of employing as well as the consequent state of being employed, that the hiring hall relates to the conditions of employment." Most significantly, the Board's 1984 decision in Lockheed Shipbuilding, ante, n. 5, 273 NLRB at 171, specifically dealt with the applicant issue and held that an employer violated Section 8(a)(5) of the Act by unilaterally implementing new medical screening tests "for the purpose of denying employment to new employees" (emphasis added).

As to the second point, the Board has held that information regarding the race and sex of applicants is presumptively relevant to a union's performance of its representative duties toward current employees, because "'an employer's hiring practices inherently affect terms and conditions of employment.'" White Farm Equipment Co., 242 NLRB 1373, 1375 (1979), enfd. per curiam 650 F.2d 334 (D.C. Cir. 1980), citing Tanner Motor Livery, Ltd., 148 NLRB 1402, 1404 (1964), enforcement denied on other grounds 419 F.2d 216 (9th Cir. 1969). Based on these cases, we have argued that, just as existing unit employees have a legitimate interest in working in a racially and sexually integrated workplace, so too do they have a legitimate interest in the issue of whether steps should be taken to screen out drug users from employment, and what those steps should be.

11/ The Supreme Court has held that a proposal may be a mandatory subject of bargaining even though it relates to parties outside the bargaining unit if it "vitally affects the 'terms and conditions' of . . . employment" of bargaining unit employees. Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 179 (1971).

II. Drug Testing As A Substantial Change In Working Conditions.

In cases where an employer has an existing program of mandatory physical examinations for employees or applicants, an issue arises as to whether the addition of drug testing constitutes a substantial change in the employees' terms and conditions of employment. In general, we conclude that it does constitute such a change. When conjoined with discipline, up to and including discharge, for refusing to submit to the test or for testing positive, the addition of a drug test substantially changes the nature and fundamental purpose of the existing physical examination. Generally, a physical examination is designed to test physical fitness to perform the work. A drug test is designed to determine whether an employee or applicant uses drugs, irrespective of whether such usage interferes with ability to perform the work. In addition, it is our view that a drug test is not simply a work rule -- rather, it is a means of policing and enforcing compliance with a rule. There is a critical distinction between a rule against drug usage and the methodology used to determine whether the rule is being broken. Moreover, a drug test is intrinsically different from other means of enforcing legitimate work rules in the degree to which it may be found to intrude into the privacy of the employee being tested ^{12/} or raise questions of test procedures, confidentiality, laboratory integrity, etc. The implementation of such a test, therefore, is "a material, substantial, and . . . significant change in [an employer's] rules and practices . . . which vitally affect[s] employee tenure and conditions of employment generally." ^{13/}

^{12/} See, e.g., IBEW Local 1900 v. PEPCO, 121 LRRM 3071, 3072 (D. C. 1986) (TRO granted under Section 301 LMRA pending arbitration against extensive drug testing program involving "invasions of privacy which are almost unheard of in a free society. . ."). Cf. O'Brien v. Papa Gino's of America, Inc., 780 F.2d 1067, 1072 (1st Cir. 1986) (use of mandatory polygraph examination to investigate employee off-duty drug use found "highly offensive" and invasion of plaintiff's privacy).

^{13/} Murphy Diesel Co., 184 NLRB 757, 763 (1970), enfd. 454 F.2d 303 (7th Cir. 1971). See also Miller Brewing Co., 166 NLRB 831, 832 (1967), enfd. 408 F.2d 12, 15 (9th Cir. 1969) (employer obligated to bargain before changing work rules, even though changes allegedly mere codification of past practice, where new rules subject employees to different procedures or impose more serious penalties for their

There can be no quarrel with an employer's desire to ensure a drug-free work force or a drug-free working environment. We simply conclude that, upon request, an employer must bargain in good faith with its employees' Section 9(a) representative about a decision to institute drug testing and the content, procedures and effects of such a program. See generally NLRB v. Katz, 369 U.S. 736 (1962); Womac Industries, Inc., ante, n. 7, 238 NLRB at 43. Thus, assuming that the issue is an open one for bargaining -- e.g., during contract hiatus or during the term of a labor agreement if the agreement does not mention drug testing and if the parties never discussed the issue in contract negotiations ^{14/} -- the employer would be required to notify the union of its intention to initiate drug testing and, upon request, to bargain to an agreement or a good faith impasse before implementing any such program. The notice must be sufficient to provide the union a meaningful opportunity for bargaining. ^{15/}

breach). Compare Rust Craft Broadcasting of New York, Inc., 225 NLRB 327 (1976) (change from sign-in sheet to time clock not a substantial change in past practice).

^{14/} See Jacobs Mfg. Co., 94 NLRB 1214 (1951), enfd. 196 F.2d 680 (2d Cir. 1952). If a current labor contract already contains a specific clause dealing with drug testing that the employer wants to change mid-term, or if the subject was fully explored during contract negotiations or the contract has a "zipper clause," see Jacobs Mfg. Co., 94 NLRB at 1220, n. 13, the union may have a right under Section 8(d) not to bargain over the subject during the term of the agreement. The employer would then be barred from implementing any proposal during the term of the contract even after notice to the union. See C & S Industries, Inc., 158 NLRB 454 (1966); St. Marys Hospital, 260 NLRB 1237, 1245-46 (1982). Cf. GTE Automatic Electric Inc., 261 NLRB 1491, 1492 n. 3 (1982). Such 8(d) contract modification cases should be submitted to Advice.

^{15/} See, e.g., J.P. Stevens & Co., Inc., 239 NLRB 738, 743 (1978), enfd. on this point 623 F.2d 322 (4th Cir. 1980), cert. denied 449 U.S. 1077 (1981). Accord: ILGWU v. NLRB (McLaughlin Mfg. Corp.), 463 F.2d 907, 919 (D.C. Cir. 1972). Moreover, regular Board policies concerning Section 10(b) and "hidden" violations will apply. See, e.g., Uniglass Industries, A Division of United Merchants & Mfrs., 276 NLRB 345, 349 (1985), enfd. 123 LRRM 2591 (2d Cir. 1986); Don Burgess Construction Corp., 227 NLRB 765, 766 (1977), enfd.

III. Union Waiver of its Bargaining Rights

Union waiver of the right to bargain over drug testing has emerged as an important issue in many of the cases we have considered. We have concluded that regular Board policies regarding waiver should apply to drug testing cases. Thus, any waiver by the union of this statutory right to bargain, either by contract, past practice or by inaction, is not to be lightly inferred and must be "clear and unmistakable". 16/

A. Waiver by Contract or Past Practice

A waiver by contract may be found where the language of the agreement is specific, and/or the history of prior contract negotiations suggests that the subject was discussed and "consciously yielded". 17/ Waiver will not be inferred from the contract's silence on the subject, 18/ from a generally worded management prerogatives clause 19/ or from a "zipper" clause. 20/

596 F.2d 378 (9th Cir. 1979); Russell-Newman Mfg. Co., 167 NLRB 1112, 1115 (1967), enfd. 406 F.2d 1280 (5th Cir. 1969).

16/ Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708 (1983). See generally Owens-Corning Fiberglas Corp., 282 NLRB No. 85 (5 January 1987); Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) and cases cited therein.

17/ See, e.g., Press Co., Inc., 121 NLRB 976, 977-78 (1958); Proctor Mfg. Corp., 131 NLRB 1166, 1169-70 (1961); NL Industries, Inc., 220 NLRB 41, 43-44 (1975), enfd. 536 F.2d 786 (8th Cir. 1976); Southern Florida Hotel & Motel Assn., 245 NLRB 561, 567-68 (1979).

18/ See, e.g., Elizabethtown Water Co., 234 NLRB 318 (1978); T.T.P. Corp., 190 NLRB 240, 244 (1971).

19/ See, e.g., Ciba-Geigy Pharmaceuticals Division, ante, n. 16, 264 NLRB at 1017; Merillat Industries, Inc., 252 NLRB 784, 785 (1980).

20/ Suffolk Child Development Center, Inc., 277 NLRB No. 158, JD slip op. at 11 (30 December 1985).

Similarly, waiver by past practice must clearly encompass the program at issue. 21/

Applying the above principles, we have concluded that, in the absence of clear bargaining history to the contrary, broad management rights clauses giving an employer the right "to issue, enforce, and change Company rules", or to "make and apply rules and regulations for production, discipline, efficiency and safety," or requiring employees to observe the employer's existing rules and regulations, do not, standing alone, constitute a waiver of the union's right to bargain over drug testing. Such clauses refer only to employer rules and regulations generally and do not refer clearly and specifically to drug testing. And, as previously observed, drug testing is not a "rule or regulation" but, rather, is a unique and distinctive means of enforcing rules regarding drug use.

For essentially the same reasons, we have concluded that a union's acquiescence in a past practice of requiring applicants and/or current employees to submit to physical examinations that did not include drug testing, or in a rule prohibiting the use or possession of drugs on company premises, does not constitute a waiver of the union's right to bargain over drug testing. 22/ This would be true even where such past practices exist in conjunction with the kind of general, non-specific management rights clauses discussed above. 23/ Similarly, acquiescence in drug testing "for cause" does not by itself waive a union's right to bargain over random drug testing because such expansion of an existing drug testing program constitutes "a material, substantial, and . . . significant change. . . ." Murphy Diesel Co., supra, 184 NLRB at 763.

21/ Compare Continental Telephone Co., 274 NLRB 1452, 1453 (1985) with Beacon Piece Dyeing & Finishing Co., Inc., 121 NLRB 953, 956-959 (1958).

22/ Murphy Diesel Co., ante, n. 13, 184 NLRB at 763; Owens-Corning Fiberglas, ante, n. 16, 282 NLRB No. 85, slip op. at 3.

23/ Murphy Diesel Co., supra; Ciba-Geigy Pharmaceuticals Division, 264 NLRB at 1016-1017; Lockheed Shipbuilding Co., ante, n. 5, 273 NLRB at 177.

B. Waiver by Union Inaction

Where an employer gives a union advance notice of an intention to change a term or condition of employment, the union must make a reasonably timely request for bargaining over the matter to avoid a finding of waiver or acquiescence. 24/ Further, the union must actually make it reasonably clear it desires to bargain; simply protesting the change may not be enough to preserve the right to bargaining. 25/ However, the employer's notice must be sufficiently in advance of implementation to allow for bargaining and must be more than a mere announcement of a fait accompli. 26/

IV. Remedies to be Sought From the Board

As a remedy for an unlawful, unilateral implementation or modification of a drug testing program, the Regions should seek an order requiring the employer to revoke all aspects of the new policy and to bargain with the union to agreement or to a good faith impasse before again implementing a drug testing program. 27/ In addition, the Regions should seek reinstatement or rescission of discipline, with appropriate backpay, for any employees discharged or disciplined for refusing to submit to the

24/ See, e.g., Kansas National Education Assn., 275 NLRB 638, 639 (1985); Citizens National Bank of Willmar, 245 NLRB 389, 389-90 (1979), enfd. 106 LRRM 2816 (D.C. Cir. 1981); Meharry Medical College, 236 NLRB 1396 (1978). But see Southern Newspapers, Inc., d/b/a The Baytown Sun, 255 NLRB 154, 161 (1981); Allen W. Bird II; Caravelle Boat Co., 227 NLRB 1355, 1358 (1977).

25/ See American Buslines, Inc., 164 NLRB 1055, 1055-56 (1967).

26/ See, e.g., Ciba-Geigy Pharmaceuticals Division, 264 NLRB at 1018; Intersystems Design & Technology Corp., 278 NLRB No. 111, slip op. at 2-4 (28 February 1986).

27/ If the violation entails a contract modification under Section 8(d), see n. 14, supra, then the remedy would include a prohibition on any implementation for the life of the current agreement without the union's consent. See C & S Industries, Inc., ante, n. 14, 158 NLRB at 461.

drug test. 28/ However, it is not clear that such a remedy would be appropriate for an employee disciplined or discharged for testing positive under a drug test. 29/ The Regions should submit any cases involving the latter issue to the Division of Advice.

V. Interplay Between Deferral to Arbitration and Section 10(j) Injunctive Relief

The Regions should apply the established Board criteria in determining whether to defer cases under Collyer or Dubo. Thus, if a dispute arguably raises issues of contract interpretation cognizable under the grievance provision of the parties' collective-bargaining agreement and subject to binding arbitration, it may be appropriate to defer the case. 30/ However, deferral to arbitration is discretionary under Section 10(a) of the Act. 31/ Since issuance of a complaint is a jurisdictional prerequisite to Section 10(j) injunctive relief, deferral would be inappropriate if Section 10(j) injunctive proceedings are otherwise warranted. Hence, the Section 10(j) issue, if raised, must be considered in deciding whether to defer to the parties' arbitration procedures.

28/ See Murphy Diesel Co., 184 NLRB at 765; Boland Marine & Mfg. Co., ante, n. 7, 225 NLRB at 824-25; Ciba-Geigy Pharmaceuticals Division, 264 NLRB at 1019; Alfred M. Lewis, Inc. v. NLRB, 587 F.2d 403, 412 (9th Cir. 1978).

29/ See Taracorp, Inc., 273 NLRB 221, 222-24 (1984).

30/ See Arbitration Deferral Policy Under Collyer - Revised Guidelines, released 10 May 1973 and GC Memorandum 84-5, "Guideline Memorandum concerning United Technologies Corp., 268 NLRB No. 83," dated 6 March 1984. Thus, for example, deferral would not be appropriate where the employer is unwilling to waive time limits on the filing and processing of a grievance relating to the implementation of the disputed program. See The Detroit Edison Co., 206 NLRB 898 (1973). Deferral is an affirmative defense that must be timely raised by the charged party. Cf. Alameda County Assn., 255 NLRB 603, 605 (1981).

31/ See Collyer Insulated Wire, 192 NLRB at 840. See also Lectromelt Casting & Machinery Co., 269 NLRB 933, 934 (1984); NLRB v. Walt Disney Productions, 146 F.2d 44, 48 (9th Cir. 1945), cert. denied 324 U.S. 877 (1945).

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A Section 10(j) order enjoining an employer from subjecting current unit employees to an unlawful, unilaterally implemented drug testing program may be warranted where such implementation is demonstrably undermining the union's ability to function effectively as the employees' bargaining representative. 32/ Accordingly, to evaluate the need for Section 10(j) relief, the Regions should inquire into any actual effect of an unlawfully implemented drug testing program on the union's representational capacity.

Section 10(j) relief may also be indicated where implementation of a drug testing program is unlawfully motivated 33/ or a program is unlawfully, discriminatorily applied -- for example, to union officers or other officials involved in grievance adjustments. 34/

Even in cases where there is no evidence of discriminatory motivation or other irremediable adverse impact on the union, Section 10(j) proceedings may be warranted if a Board order in due course will be unable to undo or provide an effective remedy for employees' compelled submission to unlawful drug testing. Thus, injunctive relief could be appropriate if an employer were to unlawfully implement a highly invasive, random or universal drug testing program under which all or a substantial number of the employer's current employees would be imminently affected. 35/

32/ See, e.g., Morio v. North American Soccer League, 632 F.2d 217 (2d Cir. 1980).

33/ Cf. Arcamuzi v. Continental Airlines, Inc., 819 F.2d 935 (9th Cir. 15 June 1987).

34/ Cf. Gottfried v. Samuel Frankel, 818 F.2d 485 (6th Cir. 1 May 1987).

35/ Conversely, if the program involved only testing "for cause" or on some other limited basis, or if few or no current employees were at risk of being tested, Section 10(j) relief would probably not be warranted. Similarly, even where the program is extensive, Section 10(j) proceedings may be unwarranted, and deferral to arbitration appropriate, if the employer is willing to suspend the program pending arbitration or if the arbitration process can be quickly completed. Thus, in evaluating this aspect of a case, the Regions should inquire into 1) the current impact on unit employees, i.e., how many employees have been or are likely

If the Charging Party has not requested Section 10(j) relief, and the Region concludes that Section 10(j) relief is not warranted under the criteria set forth above, and the case is otherwise deferrable, the Region should defer under Dubo and/or Collyer, and apply regular post-arbitral Board policies. ^{36/} If Section 10(j) relief has been requested and appears warranted, or the Region sua sponte concludes that Section 10(j) relief may be warranted, the Region should stay its action on the charge and submit the matter to Advice on the Section 10(j) issue, regardless of whether the case otherwise would be deferrable. ^{37/}

VI. Future Submissions to the Division of Advice

As stated in General Counsel Memorandum 87-4 (2 July 1987) the Regions are no longer required to submit all cases involving drug testing to the Division of Advice. Henceforth, cases should only be submitted in the following circumstances:

1. The case presents novel or complex legal issues that are not resolved by this memorandum (see, e.g., ns. 14 and 29, *supra*, and accompanying text).

2. The Charging Party requests Section 10(j) relief, the investigation reveals *prima facie* merit to the charge, and the Region believes that Section 10(j) is warranted. However, if the Regional Director believes that 10(j) relief is clearly unwarranted, a meritorious case need not be submitted to Advice; rather, the Region may obtain telephonic clearance to deny the Charging Party's request from the Division of Operations-

to be tested imminently; and 2) whether arbitration will expeditiously resolve the dispute.


^{36/} See Olin Corp., 268 NLRB 573 (1984); Armour & Co., 280 NLRB No. 96 (24 June 1986). Compare Badger Meter, Inc., 272 NLRB 824 (1984) with Alfred M. Lewis, Inc., 229 NLRB 757 (1977), *enfd.* 587 F.2d 403 (9th Cir. 1978).

^{37/} Of course, a Region must fully investigate the case and evaluate the merits of the charge before submitting a drug testing case to Advice with its 10(j) recommendation. The clarity of the violation is an element in evaluating the appropriateness of Section 10(j) proceedings.

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Management. 38/ Where there is a close question as to the warrant for 10(j) relief, the case should be submitted to Advice.

3. A meritorious case presents circumstances posing the danger of irreparable injury, and the Region accordingly recommends sua sponte Section 10(j) relief.


Rosemary M. Collyer
General Counsel

Distribution:

Regional - All Professionals
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38/ Casehandling Manual (ULP) Section 10310.1, paragraph 2. Of course, a non-meritorious case even with a 10(j) request does not have to be submitted to Advice. Id., at paragraph 5.



SENIOR ASSISTANT POSTMASTER GENERAL
Human Resources Group
Washington, DC 20260-4000

August 6, 1986

ARTICLE	19
SECTION	ELM
SUBJECT	URINALYSIS

MEMORANDUM FOR FIELD DIVISION GENERAL MANAGERS/POSTMASTERS

Subject: Urinalysis Testing

Recently, it has come to our attention that drug testing is being used in the field as part of the initial issuance and renewal of the SF-46, Operator's Identification Card, and in Accident Repeater Programs.

Across-the-board drug testing and/or random drug testing of present employees is prohibited under any circumstances. However, on a case-by-case basis, during fitness-for-duty examinations, drug tests may be administered, depending on the specific reasons for the examination as stated by the referring official and/or in the judgment of the examining medical official (see Attachment A). Additionally, drug testing in conjunction with medical assessments and evaluations as part of the Employee Assistance Program is within established procedures (see Attachment B). Furthermore, we will be issuing a policy statement on drug screening of applicants for employment in the near future.

If you have further questions regarding this matter, you may contact either Harvey White of the Labor Relations Department at 268-3822 or Stephen A. Moe of the Employee Relations Department at 268-3793.


David H. Charters
(Acting)

Attachments

cc: Regional Postmasters General
Mr. Fritsch



MEDICAL EXAMINATION AND ASSESSMENT

Privacy Act Statement

collection of this information is authorized by 39USC 401. This information will be used to provide employees with necessary health care and to determine fitness for duty. As a routine use, this information may be disclosed to the Office of Personnel Management, and other Federal agencies responsible for Federal benefits programs, to an appropriate law office enforcement agency for investigation of prosecutive purposes, to a Congressional office at your request, to the Office of Management and

Budget for review of private relief legislation, to any agency where relevant to hiring, contracting, or licensing, to a labor organization as required by the NLRA, and where pertinent, in a legal proceeding to which the Postal Service is a party. Completion of this form is voluntary, however, if this information is not provided, the individual may not receive the requested benefits or employment.

A: Completed by Examinee (Type or Print in Ink)

1. Name (Last, First, Middle)	2. Social Security Number	3. Sex <input type="checkbox"/> Male <input type="checkbox"/> Female	4. Date of Birth
5. Do you have any medical disorder or physical impairment which could interfere in any way with the full performance of duties of the position for which you are applying? (If your answer is "Yes", explain fully to the physician performing the examination). <input type="checkbox"/> Yes <input type="checkbox"/> No		I certify that all the information to be given by me in connection with this examination will be correct to the best of my knowledge and belief.	
		6. Signature	7. Date

B: Completed by Appointing or Referring Office Before Examination

1a. Exam Type <input type="checkbox"/> Preemployment <input type="checkbox"/> Fitness-for-Duty	2. Exam Appointment	Date	Time
		Location	
b. Reason for Request <input type="checkbox"/> Inadequate Medical Information Excessive Absenteeism for Medically Documented Conditions <input type="checkbox"/> Behavioral (Performance, Attitude) <input type="checkbox"/> Other (Specify):	3. Position Applied for or Now Holds	a. Title	
		b. Installation	

4. Circle the number preceding each functional requirement and each environmental factor essential to the duties of this position. List any additional essential factors in the blank spaces. Also, if the position involves law enforcement, attach the specific medical standards for the information of the examining physician.

Functional Requirements

1. Heavy lifting, up to 70 pounds	16. Kneeling (hours)	26. Far vision correctable in one eye to 20/40 and to 20/100 in the other
2. Moderate lifting, 15-44 pounds	17. Repeated bending (hours)	27. Specific visual requirement (specify)
3. Light lifting, under 15 pounds	18. Climbing, legs only (hours)	28. Both eyes required
4. Heavy carrying, 45 pounds and over	19. Climbing, use of legs and arms	29. Depth perception
5. Moderate carrying, 15-44 pounds	20. Both legs required	30. Ability to distinguish basic colors
6. Light carrying, under 15 pounds	21. Operation of crane, truck, tractor, or motor vehicle	31. Ability to distinguish shades of colors
7. Straight pulling (hours)	22. Ability for rapid mental and muscular coordination simultaneously	32. Hearing (aid permitted) (hear conversational voice 15 feet - one ear)
8. Pulling hand over hand (hours)	23. Ability to use firearms	33. Hearing without aid
9. Pushing (hours)	24. Near vision correctable at 13" to 16" to Jaeger 1 to 4	34. Specific hearing requirements (specify)
10. Reaching above shoulder	25. Far vision correctable in one eye to 20/20 and to 20/40 in the other	35. Other (specify)
11. Use of fingers		
12. Both hands required or compensated by the use of acceptable prostheses		
13. Walking (hours)		
14. Standing (hours)		
15. Crawling (hours)		

Environmental Factors

1. Outside	13. Solvents (degreasing agents)	23. Working with hands in water
2. Outside and inside	14. Grease and oils	24. Explosives
3. Excessive heat	15. Radiant energy	25. Vibration
Excessive cold	16. Electrical energy	26. Working closely with others
Excessive humidity	17. Slippery or uneven walking surfaces	27. Working alone
Excessive dampness or chilling	18. Working around machinery with moving parts	28. Protracted or irregular hours of work
7. Dry atmospheric conditions	19. Working around moving objects or vehicles	29. Other (specify)
8. Excessive noise, intermittent	20. Working on ladders or scaffolding	
9. Constant noise	21. Working below ground	
10. Dust	22. Unusual fatigue factors (specify)	
11. Silica, asbestos, etc.		
12. Fumes, smoke, or gases		

343.3 Obtaining Fitness for Duty Examination Appointments

.31 Form 2485. The appointing officer completes Form 2485, *Certificate of Medical Examination*, Section B only and the installation head signs it. Form 2485 is sent to the examining physician.

.32 Other Information

.321 The supervisor should attach enough information concerning the employee's duties and working environment to enable the medical officer to make a well informed decision. This information must include physical requirements of the job.

.322 Any statements made by employees concerning their condition should be attached.

.33 Notification

The medical officer will advise the installation head as to the date and time of examination. This information is provided to the employee.

.34 Failure to Report. Failure to report for a fitness for duty examination without acceptable reasons is just cause for disciplinary action. Repeated refusal is grounds for separation.

343.4 Medical Officer's Statement

.41 Upon examination, the medical officer completes Form 2485 and returns Part I to the installation head. Any comments on the form will not contain detailed medical information, but rather will discuss limitations on performance.

.42 In highly unusual cases, as deemed necessary by the medical officer, limited medical information may be provided in the form of a note or memorandum (in addition to Part I of Form 2485).

343.5 Management Decision

.51 Temporary Action. The installation head establishes work return dates and job assignments based upon the medical statement. Determinations are not limited to the employee's regular duties, but must be based on whether the employing installation has any temporary alternative work available which is not medically contraindicated.

.52 Permanent Action. If the fitness-for-duty examination corroborates that an employee who has less than the 5 years service requirement for disability retirement is unable to perform the duties of the positions, the employee may be separated, consistent with procedures contained in collective bargaining agreements, OWCP and EEO regulations.

.53 OWCP Case. If a claim has been filed with the Office of Worker's Compensation Program (OWCP), refer to the Injury Compensation Instructions in ELM 540.

344 Disability Retirement

In installations where there is a postal medical officer or contract physician, that person should be consulted on all requests for disability retirement to determine if there is a position in the local facility in which the employee can be placed, based on the duties the employee is currently capable of performing. If no such placement occurs, appropriate records are forwarded through usual channels to the area or regional Office of Personnel Management medical officer for adjudication.

Employee and Labor Relations Manual
864 Physical Examinations

- 864.32 Management can order fitness-for-duty examinations at any time and repeat, as necessary, to safeguard the employee and coworker. Specific reasons for the fitness-for-duty should be stated by the referring official.
- 864.33 A specific test or consultation may be required in the judgment of the examining medical officer. The indications will be documented as part of the report.

Employee and Labor Relations Manual
870 Employee Assistance Program (EAP)

872.41 In drug abuse cases, EAP personnel will further refer employees to the postal medical officer or contract physician for an initial medical assessment and evaluation.