American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

Greg Bell
Industrial Relations Director
1300 L Street, NW
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Initiate National Dispute

April 23, 2003

Mr. Anthony J. Vegliante
Vice President, Labor Relations
U.S. Postal Service, Room 9100
475 L'Enfant Plaza
Washington, D.C. 20260

Re: APWU No. HQTG20033, Cert. No. 70022410000224006448

Dear Mr. Vegliante:

In accordance with the provisions of Article 15, Section 2 and 4 of the Collective Bargaining Agreement, the APWU is initiating a Step 4 dispute concerning the Postal Service's unilateral implementation of the Resource Management Database (RMD), its web-based enterprise Resource Management System (eRMS), and related leave policies and practices affecting wages, hours and other terms and conditions of employment. More specifically, this dispute involves, but is not limited to, management requesting the nature of illness when an employee calls in sick; FLMA second/third opinion procedures; and the requirement for medical documentation when substituting paid leave for unpaid FMLA leave. The Postal Service actions in dispute are in conflict and inconsistent with leave rules and regulations

The purpose of RMD/eRMS is to provide a uniform automated process for recording data relative to existing leave rules and regulations that were in effect prior to its implementation. The APWU contends that the implementation and/or application of RMD/eRMS (or any similar system of records) may not conflict with, alter or change, or violate existing rules, regulations, the National Agreement, law, local memorandums of understanding and agreements, past practices or grievance-arbitration settlements and awards.

1. Under existing rules, regulations and past practice consistent with the collective bargaining agreement, when an employee requests leave, such employee has to fill out *Form 3971 – Request for or Notification of Absence,* subject to the approval of his or her immediate supervisor at the work location and/or postal facility where the employee is employed.

For unexpected absences (emergencies, illness or injury), an employee has to notify appropriate postal authorities at his or her work location and/or facility, and upon returning to duty submit a request for leave on Form 3971,

along with medical or other evidence if required (subject to the approval of the employee's immediate supervisor). Notification or calls in for leave are recorded on Form 3971 by an APWU bargaining unit employee (for example an office clerk) or by management (the practice varies from facility to facility depending on local past practices or agreements).

In addition, pursuant to 513.332 of the ELM, in situations such as unexpected illness or injury, employees have to notify appropriate postal officials of their illness or injury and of the expected duration of the absence. Consistent with 513.332, existing leave rules and past practice, an employee has to notify the Postal Service that he or she will be absent due to illness or injury at the time of notification, but is not required to provide the specific nature of the illness. The individual taking the call or notification of absence records, on Form 3971, the employee's name, pay location, type of leave requested, and expected duration of the absence. The employee completes and submits Form 3971 upon returning to duty. The Postal Service has implemented a new leave policy of requiring employees to provide the specific nature of their illness or injury when they call in. The APWU contends that the new leave rule of requesting and/or requiring employees to provide the specific nature of their illness or injury when they call in is inconsistent with existing rules/regulations and violates past practice, the collective bargaining agreement and law.

However, pursuant to 513.364 of the ELM, when an employee is required to submit medical documentation, such documentation should provide an explanation of the nature of the employee's illness or injury sufficient to indicate to management that the employee was (or will be) unable to perform his or her normal duties for the period of absence. Although an explanation of the nature of illness is provided when medical documentation is submitted, a diagnosis and/or prognosis is not required.

2. Pursuant to Sec. 825.307 of the FMLA, if the Postal Service has reason to doubt the validity of a medical certification, management may require the employee to obtain a second opinion at the Employer's expense. If the opinion of the employee's and the Employer's designated health care providers differ, the Employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. However, the third health care provider must be designated or approved jointly by the employer and the employee. If the Employer elects not to require a third opinion, the Employer will be bound by the first certification. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act. If the Employer requires the employee to obtain certification from a third health care provider, the third opinion ifs final and binding.

However, the Postal service has implemented a rule that if the opinion of the employee's and Employers' designated health care providers differ, and the employee fails to request a third opinion, the Employer's second opinion is final and binding. The APWU contends that the Postal Service new rule is inconsistent with and violates the collective bargaining agreement and applicable law.

3. Pursuant to Sec. 825.306(c) of the FMLA, "If the employer's sick or medical leave plan requires less information to be furnished in medical certification than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized, only the employer's

lesser sick leave certification requirements may be imposed." Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. Once an employee provides certification for intermittent FMLA leave, no further medical certification may be required for absences due to the already-certified condition to be protected under the Act, regardless whether an employee elects to substitute paid leave for unpaid FMLA leave. Moreover, medical certification constitutes documentation for a period or periods of "incapacity" including "recurring episodes of a single underlying condition."

However, if such employees wish to substitute paid leave for unpaid FMLA leave, it is the Postal Service's policy that when an employee requests sick leave for absences in excess of three days, employees are required to submit additional medical certification (pursuant to part 513.362 of the ELM), regardless of whether they already have medical certification on file. The APWU contends that the Postal Service policy is inconsistent with and violates the collective bargaining agreement and applicable law.

Article 15 provides that within thirty (30) days of the initiation of a dispute the parties shall meet in an effort to define the precise issues involved, develop all necessary facts, and reach agreement. It is requested that you or your designee contact my office to discuss this dispute at a mutually agreed upon date and time.

Sincerely,

Greg Bell

Greg Bell, Director
Industrial Relations

GB:gbc
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American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

Article 15 - 15 Day Statement of Issues and Facts

Greg Bell
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Washington, DC 20005
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Certified No. 7002 2410 0002 4762 4315

May 22, 2003

Ms. Sandra J. Savoie
Labor Relations, Specialist
Labor Relations Policies and Programs
U.S. Postal Service
475 L'Enfant Plaza
Washington, D.C. 20260

Re: USPS No. Q00C-4Q-C 03126482,
APWU No. HQTG20033,
Class Action, Washington, DC

Dear Ms. Savoie:

On May 2, 2003, we discussed the above-referenced dispute at Step 4 of the grievance procedure regarding the Postal Service's implementation of the Resource Management Database (RMD), its web-based enterprise Resource Management System (eRMS) program, and related policies and practices. Pursuant to Article 15, the following represents the APWU's understanding of the issues to be decided and the facts giving rise to the interpretative dispute.

In June 2000, the APWU was informed of the Postal Service's intent to implement the Resource Management Database program. The purpose of RMD/eRMS is to provide a uniform automated process for recording data relative to existing leave rules and regulations that *were in effect prior* to its implementation. In a pre-arbitration settlement dated March 28, 2003, in case number Q98C-4Q 01005505, the parties were able to resolve many of the issues related to the Postal Service's implementation of RMD/eRMS. However, several issues remained in dispute and the parties agreed to continue discussions related to those unresolved issues. Unfortunately, we were unable to reach a settlement of those remaining issues.

There is no disagreement between the parties that RMD/eRMS (or any similar system of records) may not alter or change existing rules and regulations, the National Agreement, law, local memorandums of understanding and agreements, or grievance-arbitration settlements and awards.

This dispute involves the Postal Service's unilateral implementation of the RMD/eRMS program and related leave rules, regulations, policies and practices affecting wages, hours and other terms and conditions of employment of APWU bargaining unit employees. More specifically, this dispute involves, but is not limited to, management requesting and requiring an employee to provide the nature of illness when calling in sick; FLMA second/third opinion procedures; and the requirement for medical documentation when substituting paid leave for unpaid FMLA leave. The issues to be decided is whether the Postal Service's unilateral implementation of RMD/eRMS and related practices/policies in dispute, are inconsistent or in conflict with, or violate the collective bargaining agreement, existing leaves rules, regulations, practices, grievance-arbitration awards/settlements, and applicable law. And, if so what shall the remedy be?

Leave rules and regulations for APWU bargaining unit employees are governed by Article 10 of the collective bargaining agreement, applicable memos of understanding and agreement between the parties. In addition, applicable provisions of handbooks, manuals and published regulations that directly relate to wages, hours or working conditions apply to bargaining unit employees provided such provisions are not in conflict or are inconsistent with or violates the National Agreement. In accordance with Article 10, the leave regulations in Subchapter 510 of the ELM remain in effect during the life of the National Agreement. Moreover, revisions or changes in Subchapter 510 of the ELM, related to wages, hours and working conditions, cannot be unilaterally made or imposed on APWU and/or its bargaining unit employees. Such leave rules and regulations are a mandatory subject of bargaining.

Article 10, Section 2.A of the National Agreement provides:

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

In addition, the collective bargaining agreement between the parties prohibits the Postal Service from taking any unilateral action affecting wages, hours and other terms and conditions of employment.

Article 5 of the National Agreement provides:

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

The APWU contends that the Postal Service's unilateral implementation of RMD/eRMS and related leave practices/policies in dispute are inconsistent or in conflict with, or violate, the collective bargaining agreement, existing leaves rules, regulations, practices, grievance-arbitration awards/settlements, and applicable law. For example:

1. Nature of Illness

The Postal Service has implemented a new leave policy of requiring employees to provide the specific nature of their illness or injury when they call in due to illness or injury. The APWU contends that the Postal Service's practice and policy of requesting and/or requiring employees to provide the specific nature of their illness or injury when they call in is inconsistent with existing rules/regulations and violates past practice, the collective bargaining agreement and law. We also believe that this practice is unlawful, in that it interferes with, restrains, or denies an employee the exercise of or the attempt to exercise any right provided under the collective bargaining agreement.

Under existing rules, regulations and practice consistent with the collective bargaining agreement, when an employee requests leave, such employee has to fill out *Form 3971 – Request for or Notification of Absence,* subject to the approval of his or her immediate supervisor at the work location and/or postal facility where the employee is employed.

For unexpected absences (emergencies, illness or injury), an employee has to notify appropriate postal authorities at his or her work location and/or facility, and upon returning to duty submit a request for leave on Form 3971, along with medical or other evidence if required (subject to the approval of the employee's immediate supervisor). Section 513.332 of the ELM provides, "in situations such as unexpected illness or injury, employees have to notify appropriate postal officials of their illness or injury and of the expected duration of the absence. Consistent with Section 513.332 of the ELM, an employee has to state (make clear) that he or she will be absent "due to illness or injury" at the time of call in or request. However, the employee is not required to state or provide the nature of the illness.

Section 513.332 of the ELM provides:

> *An exception to the advance approval requirement is made for unexpected illness or injuries: however, in these situations the employee must notify appropriate postal authorities as soon as possible as to illness or injury and expected duration of absence. As soon as possible after return to duty, employees must submit a request for sick leave on Form 3971. Employees may be required to submit a request for sick leave on Form 3971. Employees may be required to submit acceptable evidence of incapacity to work as outlined in the provisions of 513.36, Documentation Requirements. The supervisor approves or disapproves the leave request. When the request is disapproved, the absence may be recorded as annual leave or, if appropriate, as LWOP or AWOL, at the discretion of the supervisor as outlined in 513.342.*

Call-ins or requests for leave are recorded on Form 3971 by an APWU bargaining unit employee (for example an office clerk) or by management (the practice varies from facility to facility depending on local past practices or agreements). However, answering the phone and recording call-ins for leave is a bargaining unit employee duty and responsibility. Upon review of Form 3971, the supervisor signs his or her signature and the date notified. After the employee

returns to work, his or her leave request (regardless of the type of leave or absence) is subject to the supervisor's approval or disapproval.

The individual taking the call or request records on Form 3971 such information as the employee's name, pay location, social security number (last four digits), scheduled reporting time, non-scheduled days, and expected duration of the absence. Under the "remarks" section of Form 3971, the individual taking the call records that the employee is calling in "due to illness or injury" and "the expected duration of the absence."

Further evidence in support of the APWU's position, that the prohibition against soliciting or requiring employees to divulge the nature of their injury or illness when they call in is consistent with the intent of 513.332 of the ELM and other applicable leave rules and regulations, can be found on Form 3971. Form 3971 specially states in the "Remarks" section "(Do not enter medical information)." In addition, this prohibition against requiring an explanation of the nature of illness when an employees calls in is consistent with the employee's rights to have their medical history and information safeguarded and protected under the Privacy Act. We also believe that the practice of attempting to obtain personal medical information from employees before it becomes part of an employee's medical records covered by the Privacy Act deprives such employee the safeguards and protection intended by the Act.

It should be noted that if an employee is calling in due to a job-related injury, it would be appropriate to enter into the Remarks" section "job-related illness or injury." If an employee calls in for Family Medical Leave Act (FMLA) leave, it would be appropriate to enter into the "Remarks" section of Form 3971 "FMLA leave" or "due to a FML condition." However, pursuant to the FMLA when the need for leave is not foreseeable, an employee should give notice to the Postal Service as soon as practicable by telephone, fax or other electronic means. Moreover, the employee or employee' s spokesperson need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. However, the employee or spokesperson will be expected to provide more information that would enable the Postal Service to determine if the leave is because of a serious health condition.

In situations where it is necessary for the Postal Service to inquire further to determine if the leave is because of a serious health condition, example of appropriate information concerning such medical condition that would be sufficient to enable the Postal Service to make such a determination would be (1) due to inpatient hospital care; (2) due to pregnancy or prenatal care; (3) due to chronic condition: (4) due to a permanent or long term condition requiring supervision; (5) due to condition requiring treatments for restorative surgery; (5) due to condition in which the absence of medical intervention or treatment may result in incapacitation of more than 3 days; or (6) to care for a spouse, parent, son or daughter. If the employee fails to provide such information, the leave may not be protected under the FMLA. *However, the nature of the illness is not necessary and not required to be provided to determine that leave is because of a serious health condition under the Act.* The Postal Service would therefore provide the employee notification of the employer's expectations and obligations and the consequences of a

failure to meet these obligations, including medical certification to support the need for such leave.

Consistent with part 513.361 of the ELM, an employee's statement explaining that an absence is due to "illness or injury" is acceptable for periods of absences of three days or less. However, 513.361 of the ELM permits the Postal Service to require medical documentation or other acceptable evidence of incapacity for work when an employee is either on "restricted sick leave" or when the supervisor deems documentation desirable for the protection of the interest of the Postal Service. The parties agree that a supervisor's determination that medical documentation or other acceptable evidence of incapacitation is desirable for the protection of the interest of the Postal Service must be made on a case by case basis and may not be arbitrary, capricious, or unreasonable.

Section 513.361of the ELM provides:

Three Days or Less

For periods of absence of 3 days or less, supervisors may accept the employee's statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work is required only when the employee is on restricted sick leave (see 513.37) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service.

Part 513.371 of the ELM provides:

Restricted Sick Leave

Reasons for Restriction

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

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

For absences for periods of 4 days or more, Section 513.362 of the ELM permits the Postal Service to require employees to submit medical documentation or other acceptable evidence of incapacity for work.

> ***Section 513.362 of the ELM***
>
> ***Over Three Days***
>
> *For absences in excess of 3 days, employees are required to submit medical documentation or other acceptable evidence of incapacity for work.*

However, when and if medical documentation is required, the APWU agrees that Section 513.364 permits the Postal Service to require an employee to submit medical documentation from the employee's doctor, including an explanation of the nature of employee's illness or injury. The parties mutually agree that although an explanation of the nature of illness is provided when medical documentation is submitted, a diagnosis and/or prognosis is not necessary or required.

Where the parties intended to permit the employer to obtain information beyond the mere existence of an illness or injury, they explicitly stated that intent in the ELM. And in this case, the parties did so. Accordingly, Section 513.364 of the ELM provides:

> **Medical Documentation or Other Acceptable Evidence**
>
> When employees are required to submit medical documentation pursuant to these regulations, such documentation should be furnished by the employee's attending physician or other attending practitioner. The documentation should provide an explanation of the nature of the employee's illness or injury sufficient to indicate to management that the employee was (or will be) unable to perform his or her normal duties for the period of absence. Normally, medical statements such as "under my care" or "received treatment" are not acceptable evidence of incapacitation to perform duties. Supervisors may accept proof other than medical documentation if they believe it supports approval of the sick leave application.

The above-referenced section 513.364 of the ELM explicitly states that when documentation is required, that documentation "should provide an explanation of the nature of the employee's illness or injury." Had the parties, or Section 513.332, intended to require employees to provide information as to the nature of their illness, it would have stated this requirement, as it did in Section 513.364.

2. Medical Documentation for Substituting Paid Leave for Unpaid FMLA Leave

Pursuant to Sec. 825.306(c) of the FMLA, "If the employer's sick or medical leave plan requires less information to be furnished in medical certification than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized, only the

employer's lesser sick leave certification requirements may be imposed." Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. Once an employee provides certification for intermittent FMLA leave, no further medical certification may be required for absences due to the already-certified condition to be protected under the Act, regardless whether an employee elects to substitute paid leave for unpaid FMLA leave. Moreover, medical certification constitutes documentation for a period or periods of "incapacity" including "recurring episodes of a single underlying condition."

However, if such employees wish to substitute paid leave for unpaid FMLA leave, it is the Postal Service's policy that when an employee requests sick leave for absences in excess of three days, employees are required to submit additional medical certification (pursuant to part 513.362 of the ELM), regardless of whether they already have medical certification on file.

The intent of Section 513.362 of the ELM is clear and unambiguous. The requirement for medical documentation or some other acceptable evidence is to substantiate an employee incapacity for work for absences in excess of 3 days due to illness or injury regardless of whether an employee is using paid sick leave, annual leave or leave without paid (LWOP). The purpose of requiring medical documentation is not because an employee is being granted paid leave. An employee who is absent in excess of 3 days due to illness or injury is required to submit documentation or other acceptable evidence of incapacitation for work whether the employee was on paid leave (annual or sick) or unpaid leave (LWOP). It is improper to require an employee who has already submitted medical certification of incapacity for work and is simply exercising his or her right to substitute paid leave for unpaid FMLA leave to submit additional medical evidence. We also believe that by requiring an employee to obtain the same medical documentation that the Postal Service already has, management is in effect using ELM 513.362 improperly to recertify each absence that an employee's health care provider has already certified for her continuing condition and treatment. The APWU contends that the Postal Service policy is inconsistent with and violates the collective bargaining agreement and applicable law. We also believe that it is unlawful, in that it interferes with, restrains, or denies an employee the exercise of or the attempt to exercise any rights under the FMLA.

3. Second/Third Opinion

Pursuant to Sec. 825.307 of the FMLA, if the Postal Service has reason to doubt the validity of a medical certification, management may require the employee to obtain a second opinion at the Employer's expense. If the opinion of the employee's and the Employer's designated health care providers differ, the Employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. However, the third health care provider must be designated or approved jointly by the employer and the employee. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act. If the Employer requires the employee to obtain certification from a third health care provider, the third opinion is final and binding. However, if the Employer elects not to require a third opinion, the Employer will be bound by the opinion of employee's medical certification. The APWU contends that the Act was never intended to

permit the Employer the right to unilaterally impose its designated health care provider's opinion on its employees as final and binding.

However, the Postal Service has implemented a rule that if the opinion of the employee's and Employers' designated health care providers differ, and the employee fails to request a third opinion, the Employer's second opinion is final and binding. The APWU contends that the Postal Service new rule is inconsistent with and violates the collective bargaining agreement and applicable law. We also believe that this practice is unlawful, in that it interferes with, restrains, or denies an employee the exercise of or the attempt to exercise any right provided under the FMLA.

Time limits were extended by mutual consent.

Sincerely,

Greg Bell, Director
Industrial Relations

APWU #: HQTG20033
USPS #: Q00C4QC03126482

Dispute Date: 4/23/2003
Contract Articles: ;

cc: Industrial Relations

UNITED STATES
POSTAL SERVICE

May 15, 2003

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

Re: Q00C-4Q-C 03126482
Class Action
Washington, DC 20260-4100

Dear Mr. Bell:

On April 30, 2003, the APWU initiated a dispute concerning the Postal Service's Resource Management Database (RMD/eRMS). In accordance with Article 15, the APWU identified the issues in dispute as: "management requesting the nature of illness when an employee calls in sick; Family and Medical Leave Act (FMLA) second and third opinion procedures; and the requirement for medical documentation when substituting paid leave for unpaid FMLA leave."

On May 2 the parties discussed these disputes and determined that they were unable to reach agreement. In accordance with Article 15.4.D of the National Agreement, the following is the Postal Services' understanding of the issues involved and the facts giving rise to such issues.

The Postal Service does not agree that the issues in this grievance involve a dispute concerning RMD/eRMS. The Postal Service agreed in case # Q98C-4Q-C 01005505 that RMD/eRMS may not alter or change existing rules, regulations, the National Agreement, law, local memorandums of understanding and agreements, or grievance-arbitration settlements and awards. The issues in this case involve disputes over the interpretation of language in the applicable handbooks, manuals and published regulations, most notably, interpretation and application of the FMLA statute, as stated below.

The first issue concerns management asking an employee for the nature of their illness when an employee notifies the Postal Service that he or she will be absent due to illness or injury. The APWU claims that the Postal Service implemented a new leave policy of requiring employees to provide the specific nature of their illness or injury when they call to report an absence due to illness or injury. The Postal Service has not implemented a new leave policy. The Postal Service asked employees for the nature of their illness, or other questions of this nature, prior to RMD/eRMS, based on but not limited to, the following policies in the Employee and Labor Relations Manual (ELM):

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- Section 513.332 of the ELM, states that "the employee must notify appropriate postal authorities of their illness or injury." This language does not say that the employee notifies postal authorities that they are ill or injured, but rather "of their illness or injury," which the Postal Service continues to reasonably interpret to mean, the employee informs the agency of the nature of their illness or injury.

- Section 513.361, states that "*supervisors may accept the employee's statement explaining the absence*". Use of the word "may" gives the supervisor the option of accepting an employee's statement explaining the absence. The Postal Service continues to reasonably interpret this to mean that the employee informs the agency of the nature of their illness or injury.

- Furthermore, the Postal Service needs to know the nature of the illness in order to make determinations required by the following ELM regulations:

    - Section 513.38, states that "*when the reason for an employee's sick leave is of such a nature as to raise justifiable doubt concerning the employee's ability to satisfactorily and/or safely perform duties, a fitness-for-duty is requested through appropriate authority.*" This section is further indication that the employee is expected to explain the reason for their request for sick leave, and would be unenforceable if the Postal Service is not permitted to request the nature of the illness.

    - Section 515 of the ELM covers the Family and Medical Leave Act (FMLA). In order to determine whether an absence may be protected by FMLA, management needs to know the reason for the absence, or the nature of the illness.

    - Section 865.21 (also relevant to FMLA as explained in section 515.56) requires that employees who return to work after an absence for certain conditions must submit a detailed medical report to the Postal Service physician or contract medical provider to determine suitability for return to duty. Management must know the nature of the illness in order to determine if an employee must follow the ELM 865 return to work procedures.

The Postal Service position is that it is management's right and obligation to ask employees about the circumstances of their absence in order to make determinations such as: whether an absence is FMLA; whether an absence is for a condition covered by ELM 865; whether management deems documentation desirable for the protection of the interest of the Postal Service; or whether a fitness for duty is necessary to determine the employee's ability to satisfactorily and/or safely perform duties.

The second issue concerns the process by which management implements ELM Section 515.54, "Additional Medical Opinions." The parties agree that the Postal Service may require the employee to obtain a second opinion. The parties agree that if the opinion of the employee's health care provider and the second opinion differ, the employer may require the employee to obtain a third opinion. The union alleges that the Postal Service has implemented a rule that if the opinion of the employee's and employers' designated health care providers differ, and the employee fails to request a third opinion, the Employer's second opinion is final and binding. The Postal Service has not written or implemented such a rule, but rather has established a procedure to comply with the statute.

The regulations cited by the union, Section 825.307, states at (c): "*The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider.* "..."*If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification.*" When a second medical opinion is received that disagrees with the employee's health care provider, the employee is informed that they can accept the 2nd opinion or call within the specified timeframe to arrange for a jointly agreed-upon health care provider for a third opinion. If the employee does not call to arrange for a jointly agreed-upon third opinion, the agency considers this a failure to cooperate and considers the second opinion as binding. The employee actually has the option of accepting the second opinion, by not cooperating in the selection of the agreed-upon third opinion. This process simply gives the employee the opportunity to accept the second opinion. This procedure is consistent with Section 515 of the ELM and the FMLA.

The third issue is whether the Postal Service may require employees to submit documentation in accordance with the ELM when they substitute paid leave for unpaid FMLA leave.

The Postal Service's position is that FMLA provides for unpaid leave for covered conditions of eligible employees. In accordance with ELM Section 515.42, "*Absences that qualify as FMLA leave may be charged as annual leave, sick leave, continuation of pay, or leave without pay, or a combination of these. Leave is charged consistent with current leave policies and applicable collective bargaining agreements.*" In order to receive paid leave, the current leave policies require documentation in certain situations.

The APWU relies on FMLA Section 825.306(c), which states, "*if the employer's sick or medical leave plan requires less information to be furnished in medical certifications than the certification requirements of these regulations, and the employee or employer elects to substitute paid sick, vacation, personal or family leave for unpaid FMLA leave where authorized, only the employer's lesser sick leave certification requirements may be imposed.*" The Postal Service position is that the Department of Labor (DOL) regulations cannot override what Congress established as an acceptable baseline for obtaining FMLA protection for leave (29 USC Section 2613).

The parties agree that when an employee has submitted a FMLA certification of a serious health condition for intermittent unpaid leave, in accordance with the regulations, no further certification of the serious health condition is required for each and every unpaid absence covered by the certification, except for re-certifications in accordance with Section 825.308 of the FMLA.

The disagreement occurs when an employee asks to substitute paid leave for unpaid leave under FMLA. It is the position of the Postal Service that the documentation requirements, such as those in Section 513.362, require less information than the certification requirements of the regulations, and therefore these lesser sick leave certification requirements may be imposed in order for the employee to receive the paid leave under agency regulations. The consequences of not supplying the documentation would be the disapproval of paid sick leave. However, the unpaid absence would be approved based on the FMLA certification, and receive all the protections of the FMLA.

Sincerely,

Sandra J. Savoie

Sandra J. Savoie
Labor Relations
Contract Administration