



American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

Appeal to Arbitration, National Dispute

September 30, 2008

Greg Bell, Director
Industrial Relations
1300 L Street, NW
Washington, DC 20005
202-842-4273 (Office)
202-331-0992 (Fax)

VIA FACSIMILE AND FIRST CLASS MAIL

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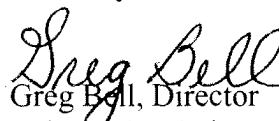
Mr. Doug Tulino
Vice President, Labor Relations
U.S. Postal Service, Room 9014
475 L'Enfant Plaza
Washington, D.C. 20260

Re: USPS Dispute No. Q00C4QC03150761, APWU No. HQTG20035,
Compensation for Time Spent Undergoing Medical Evaluation or Examinations
at Employer's Request

Dear Mr. Tulino:

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

Sincerely,

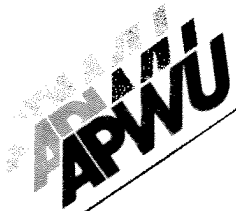

Greg Bell, Director
Industrial Relations

USPS #: Q00C4QC03150761
APWU #: HQTG20035

Case Officer: Greg Bell
Step 4 Appeal Date: 6/6/2003
Contract Article(s): 19, FMLA; 5, ; 10, Leave
Regulations - ELM 510 - FMLA;

cc: Resident Officers
Industrial Relations File

GB/bw



American Postal Workers Union, AFL-CIO

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Article 15 - 15 Day Statement of Issues and Facts

Greg Bell, Director
Industrial Relations
1300 L Street, NW
Washington, DC 20005
(202) 842-4273 (Office)
(202) 371-0992 (Fax)

September 30, 2008

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Re: USPS No. Q00C4QC03150761, APWU No. HQTG20035,
Compensation for Time Spent Undergoing Medical Evaluations
or Examinations at Employer's Request

Dear Mr. Tulino:

On September 12, 2008, we met to discuss the above-referenced dispute at Step 4 of the grievance procedure. The parties mutually agreed to submit their written statements no later than September 30, 2008. The following represents the APWU's understanding of the issues to be decided and the facts giving rise to the interpretive dispute.

This dispute involves issues concerning compensation to employees for all time spent undergoing medical evaluations or examinations at the Employer's request, including travel expenses.

The APWU's position is, but not limited to, that consistent with the parties' collective bargaining agreement, national-level settlement agreements, and past practice for over 30 years, all time spent by an employee to undergo medical evaluations or examinations requested by the Employer "constitutes hours worked," regardless of whether the time spent is during normal work hours, outside normal work hours, or on non-scheduled work-days. Moreover, employees covered by the Collective Bargaining Agreement between the APWU and USPS are entitled to be paid for all time spent undergoing medical evaluations and examinations requested by the Postal Service, including travel expenses.

By letter dated March 21, 2003, the APWU wrote the Employer in regard to complaints from the field that the Postal Service has been requiring employees to report to and undergo medical evaluations or examinations related to a serious health condition covered under the FMLA during their normal scheduled work hours, without paying employees for such time. Moreover, such employees were either required to use their annual or sick leave, or be in a leave without pay status. The purpose of the letter was to inquire as to the Postal Service's position regarding payment to employees for all time spent undergoing medical evaluations or examinations at the employer's request.

By letter dated April 18, 2003, in response to the APWU inquiry, the Postal Service provided the following response:

In accordance with the Employee and Labor Relations Manual (ELM), Section 515.545, regarding "Additional Medical Opinions," the Postal Service pays the health care provider for a second or third opinion, while the employee bears the cost of recertifications. This provision further states that "such medical opinions are obtained off the clock." This is consistent with the Family and Medical Leave Act.

There is no disagreement between the parties that all time spent by an employee to undergo medical evaluations or examinations requested by the Employer "constitutes hours worked," regardless whether the time spent is during normal work hours, outside normal work hours, or on non-scheduled work-days, and that employees are entitled to be paid for all time spent undergoing such medical evaluations and examinations, including travel expenses.

The Postal Service agrees that the second and third opinion is at the Postal Service's expense, including travel expenses. However, the Postal Service disagrees that employees are entitled to be compensated for all time spent undergoing a second/third opinion or recertification. The Postal Service contends that the time spent by the employee getting a second or third opinion is unpaid unless the employee is using their sick or annual leave. Moreover, employees may use available paid leave if the appointment must be during their tour of duty. In addition, the Postal Service contends that recertification required by the Employer is at the employee's expense. The APWU disagrees.

ELM Provisions Under Challenge

It should be noted that the above-referenced ELM provisions that the Postal Service is relying on in support of its position has been challenged by the APWU and is pending arbitration. It is the APWU's position that prior to August 2000, the leave regulations in Subchapter 510, Section 515.54, provides the following:

515.54 Additional Medical Opinions

A second medical opinion by a health care provider who is designated and paid for by the Postal Service may be required. In case of a difference between the original and second opinion, a third opinion by a health care provider may be required. The third health care provider is jointly designated or approved by management and the employee, and the third opinion is final. The Postal Service pays the health care provider for the third opinion. A health care provider selected for the second or third opinion may not be employed by the Postal Service on a regular basis. Recertifications of a medical condition may also be required during absences.

Moreover, Article 10 of the parties' collective bargaining agreement prohibits the Postal Service from making any changes to leave regulations in Subchapter 510 of the ELM during the life of the National Agreement. Accordingly, Article 10, Section 2.A provides:

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

In addition, Article 5 of the National Agreement prohibits the Postal Service from taking any unilateral actions affecting wages, hours or working conditions.

The records show that in 2000 the Postal Service unilaterally changed the provisions of Section 515.54 of the ELM to read as follows (changes highlighted):

A second medical opinion by a health care provider who is designated and paid for by the Postal Service may be required. A health care provider selected for the second opinion may not be employed by the Postal Service on a regular basis. In case of a difference between the original and second opinion, a third opinion by a health care provider may be required. The third health care provider is jointly designated or approved by management and the employee, and the third opinion is final. The Postal Service pays the health care provider for the third opinion. ~~A health care provider selected for the second or third opinion may not be employed by the Postal Service on a regular basis.~~ Recertifications of a medical condition, for which the employee bears the cost, may also be

required ~~during absences~~. Such medical opinions are obtained off the clock.

The above-referenced changes were unilaterally made by the Postal Service in violation of the collective bargaining agreement, and cannot be used as a basis in support of its position.

Statutory Provisions

In support of its position, the Postal Service also relied on the statement in Section 825.307 of the Code of Federal Regulations which states:

The Department has considered these comments carefully, but has concluded that Congress did not intend that employees on unpaid FMLA leave be paid for the time spent obtaining second and third medical opinions.”

In addition, the Postal Service is relying on Section 825.308(e) of the FMLA which states:

(e) Any recertification requested by the employer shall be at the employee’s expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

However, it the APWU’s position that an employee covered by the collective bargaining agreement is entitled to be compensated for all time spent undergoing a medical evaluation or examination regardless of whether it is related to a serious health condition covered under the FMLA. Employees’ entitlement to compensation for all time spent undergoing a medical evaluation or examination under the collective bargaining agreement is greater than those established by the FMLA. Although, an employee may not be entitled to compensation for the time spent undergoing a medical evaluation or examination requested by the Employer under the FMLA, such employees are entitled to payment under the collective bargaining agreement between the parties. Moreover, FMLA requires that the Postal Service must observe any employee’s rights greater than the rights established by the FMLA. Title 29 U.S.C. Section 2652(a) of the FMLA provides the following:

2652. Effect on existing employment benefits

(a) More protective

Nothing in this Act or any amendment made by this Act shall be construed to diminish the obligation of an employer to comply with any collective bargaining agreement or any employment benefit

program or plan that provides greater family or medical leave rights to employees than rights established under this Act or any amendment made by this Act.

In addition, Title 29 U.S.C. Section 2653 of the FMLA provides the following:

2653. Encouragement of more generous leave policies

Nothing in this Act or any amendment made by this Act shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under this Act or any amendment made by this Act.

It is the APWU's position that the Postal Service's actions are inconsistent with and violate the parties' collective bargaining agreement, national-level settlement agreements, and past practice – that all time spent by an employee to undergo medical evaluations or examinations requested by the Employer “constitutes hours worked,” regardless whether the time spent is during normal work hours, outside normal work hours, or on non-scheduled work-days. Moreover, employees covered by the Collective Bargaining Agreement between the APWU and USPS are entitled to be paid for all time spent undergoing medical evaluations and examinations requested by the Postal Service, including travel expenses.

Sincerely,


Greg Bell, Director
Industrial Relations

APWU #: HQTG20035
USPS #: Q00C4QC03150761

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

cc: Industrial Relations

GB /LB



September 30, 2008

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

HAND DELIVERED

**Re: Q00C-4Q-C 03150761 / HQTG20035
Washington, DC 20260-4100**

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

Background:

By letter dated March 21, 2003, the APWU made a written inquiry as to the Postal Service's position "regarding payment to employees for all time spent undergoing medical evaluations or examinations at the employer's request." Specifically, the APWU's inquiry pertained to those medical evaluations or examinations requested by the Postal Service that are related to a serious health condition covered by the Family and Medical Leave Act (FMLA); i.e. second and third opinions.

In response, by letter dated April 18, 2003, the Postal Service advised that pursuant to Section 515.54 of the Employee and Labor Relations Manual (ELM) and consistent with FMLA, "such medical opinions are obtained off the clock."

By letter dated June 6, 2003, the APWU initiated the instant national Step 4 dispute.

Issue Presented:

Does the Collective Bargaining Agreement require payment for all time spent when an employee is sent for a second or third medical opinion for a serious health condition covered by the FMLA?

Position of the Parties:

In sum, it is the APWU's position that the provisions of the Collective Bargaining Agreement require the Postal Service to compensate employees for time spent undergoing any medical evaluation or examination, for FMLA or non-FMLA covered conditions, that is directed by the Postal Service, including travel expenses. In its view, this direction from the Postal Service "constitutes hours worked" regardless of whether the examination/evaluation is conducted during the employee's regularly scheduled tour of duty, outside the regularly scheduled tour of duty, or on the employee's non-scheduled day. In addition, while the APWU acknowledges that the FMLA does not require payment for the time spent in these circumstances, it opines, however, that the FMLA requires the Postal Service to "observe any employee's rights greater than the rights established by the FMLA." Furthermore, the APWU believes that it is "unlawful [not to compensate employees for all time spent undergoing second and third opinions] in that it interferes with, restrains, or denies an employee the exercise of or the attempt to exercise any right provided under the FMLA."

The Postal Service disagrees. While the APWU asserts that the National Agreement requires the Postal Service to pay employees for all time spent while undergoing any medical evaluations/ examinations, it failed to identify the specific provisions of the Agreement, the FMLA, rule or regulation which requires such pay or supports its position¹.

With respect to second and third opinions for FMLA-covered conditions, it is the Postal Service's position that pursuant to the express terms of the FMLA, the Postal Service pays for the medical evaluation/examination, including reasonable out-of-pocket travel expenses incurred while obtaining the opinion. However, time spent by the employee getting a second/third opinion is unpaid, unless the employee opts to utilize his/her accrued sick or annual leave. This position is supported in 29 C.F.R. 825.307(e), which states, in pertinent part:

"If the employer requires the employee to obtain either a second or third opinion the employer must reimburse an employee or family member for any reasonable 'out of pocket' travel expenses incurred to obtain the second and third medical opinions..."

In light of this language expressly providing for compensation for travel, the absence of any additional provision for paying the employee for his/her time underscores the fact that the Department of Labor did not contemplate paying employees for the time spent on second and third opinions. Indeed, WH Publication 1419 states, "[t]he Department has concluded that Congress did not intend that employees on unpaid FMLA be paid for the time spent obtaining second and third medical opinions."

Furthermore, Section 515, *Absence for Family Care or Serious Health Condition of Employee*, of the Employee and Labor Relations Manual (ELM)², states, in part that the purpose of this section is to provide policies to comply with the FMLA. (See ELM Section 515.1). In addition, the applicable provision of the ELM, Section 515.54, *Additional Medical Opinions*, was published and has been in effect since August 2000, which is approximately three years prior to the initiation of this instant dispute. It states:

"A second medical opinion by a health care provider who is designated and paid for by the Postal Service may be required a health care provider selected for the second opinion may not be employed by the Postal service on a regular basis. In case of a difference between the original and second opinion, a third opinion by a health care provider may be required. The third health care provider is jointly designated or approved by management and the employee, and the third opinion is final. The Postal Service pays the health care provider for the third opinion. Recertification of a medical condition, for which the employee bears the cost, may also be required.
Such medical opinions are obtained off the clock." /emphasis added/

Therefore, for the foregoing reasons, there is no violation of the FMLA or the Collective Bargaining Agreement for employees to be compensated for all time spent while obtaining second or third medical opinions for a serious health condition covered by the FMLA.

¹ The Postal Service observes that under its rules for Fitness-for-Duty Examinations (FFDE), this type of examination is "performed at no expense to the employee and are on the clock. Payment includes reimbursement for any authorized travel expenses incurred." See MI EL-860-2000-7. However, the instant dispute pertains to second and third opinions for FMLA-related conditions and is distinguishable from the criteria, requirements, and conditions for requiring a FFDE.

² See ELM 16, August 2000 edition.

Step 4 time limits were waived by mutual agreement with the understanding that the 15-day position statements would be exchanged no later than September 30, 2008.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary Hérules", with a long horizontal flourish extending to the right.

Mary Hérules
Labor Relations Specialist
Contract Administration (APWU)