REGULAR ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE
and
AMERICAN POSTAL WORKERS
UNION, AFL-CIO

GRIEVANT: Class Action

POST OFFICE: Des Moines IA

CASE NO: I94C-4I-C 98100055
779814374-Class Action

BEFORE: GEORGE T. ROUMELL, JR., Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Marcia Grant Labor Relations Specialist
For the Union:	Bruce Clark, Iowa State President APWU Advocate
Place of Hearing:	1165 Second Avenue Des Moines, IA
Date of Hearing:	August 2, 2001

Award: The grievance is granted in part and denied in part. The grievance is denied on the merits because the grievance is moot and, in any event, in general, the Process of Attendance Improvement was not implemented at Des Moines, Iowa, contrary to the National Agreement. The grievance is granted in that this Award incorporates by reference the comments the Arbitrator has made as to those portions of the process which the Arbitrator has concluded could be contrary to the National Agreement absent local negotiations and reaffirms this Arbitrator's decisions in Case Nos. I94-1I-C 98046977 and I94M-15-C 98050804.

Date of Award: August 13, 2001

GEORGE T. ROUMELL, JR.
Arbitrator

ARBITRATION OPINION AND AWARD

Issues Presented

Did the Des Moines Iowa management violate the National Agreement when management unilaterally issued a new attendance program in December, 1997? If so, what is the remedy?

Background

On November 21, 1997, Ron Harris, an MDO at Des Moines, IA, who had been assigned as Manager, Attendance Control, wrote a letter to Lance Coles, President, Des Moines IA APWU which, in part, read:

> Please make the necessary arrangements for you, or your designee, Vice President, and Directors for the Clerk, Maintenance and Motor Vehicle Crafts to attend a meeting November 26, 1997, at 1400. The meeting will be held in the MDO's Conference Room, room 296, located on 1M at the Plant.
>
> The meeting will last approximately two hours and the topic will be implementation of an attendance control program.

As a result, Mr. Coles and other representatives of the APWU, including James Spina and the Local President of the Mail Handlers, met with Mr. Harris on November 26, 1997. At that meeting, Mr. Harris announced that management at Des Moines was instituting a new attendance program. Upon making this announcement, Mr. Harris distributed a 27-page document entitled "Process of Attendance Improvements."

This Process of Attendance Improvements had apparently been adopted in Phoenix, Arizona and in St. Louis, Missouri. It was via these other facilities that Des Moines management became aware of the Process of Attendance Improvement document.

Either at the meeting of November 26, 1997 or in a separate memorandum, Mr. Harris advised Mr. Coles and Rick Woodard, President, Mail Handlers Local 333, of a new procedure for "progressive discipline for extended AWOL."

Local President Coles raised objections to Mr. Harris at the meeting. These objections were capsulized in a letter sent by Mr. Coles to Mr. Harris which read in part:

> This letter is to respond to your 'process of attendance improvement' and 'progressive discipline for extended AWOL.'
>
> The DMI Area Local is not in total agreement with either of these policies. We believe that chapter 5 of the ELM is the policy for attendance.
>
> A part of the policy address that the supervisor is to fill out a form address if the employee received discussion on their attendance. We believe that this form is an extension of a job discussion, and that the passing of this written form to other managers is a violation of article 16. Discussions are to be in private. The ELM addresses supervisors notes and that they should not be circulated from one supervisor to another.
>
> The flow chart on FMLA implies that an employee must request FMLA. This is not true.
>
> With the AWOL letter, we feel that the employees 'due process' rights could be violated, since all the facts are not available to properly investigate the discipline and or removal.
>
> We just want to make you aware of our position on these policies.
>
> If you have any questions please call.

In addition, the union representatives suggested that Mr. Harris, in his capacity as Manager, Attendance Control, as the intended Step 2 designee as to attendance issues was to act as prosecutor, judge and jury. Mr. Harris' response was that the "process of attendance improvement" was not intended to substitute for a job discussion provided in Article 16 of the National Agreement; that the program would be administered fairly; and that he did not see himself as prosecutor, judge and jury. The meeting ended. As already noted, Mr. Coles sent the aforequoted letter to Mr. Harris, setting forth his (Coles') objections.

On December 10, 1997, James Spina, on behalf of the APWUA, presented a class action grievance at Step 1, challenging the implementation of the process, setting forth the following statement of the grievance:

> The union contends that the policy being implemented on 'the process of attendance improvement' is a unilateral action changing

the established absence control policies, and is in conflict with the ELM and CBA. That this policy establishes a minimum sick leave balance that would trigger discipline. That the reviewing authority will also be the issuing supervisor for discipline, and will also be the authority that will discuss the discipline at Step 2.

The Union's Step 3 appeal succinctly sets forth the its position, reading in part:

> The Union contentions are as follows: That the policy implemented in the Des Moines installation on, 'the process of attendance improvement' is a unilateral action changing the established absence control policies, and is in conflict with the ELM and Collective Bargaining Agreement. That this policy establishes a minimum sick leave balance that would trigger discipline. That the reviewing authority will also be the issuing supervisor for discipline, and will also be the authority that will discuss the discipline at Step 2.
>
> The Union contends that Chapter 5 of the ELM is the policy for attendance. Changing the policy without any input from the Union is a unilateral action changing the established absence control policies, which the union feels has been a past practice in this installation since this steward started at the Postal Service since 1973.
>
> The Union contends that this policy establishes a minimum sick leave balance and that this would trigger discipline. Management is instructed to conduct an OAD (Ongoing Attendance Discussion) with each and every employee every AP. Supervisors are also to conduct an OAD after any sick leave usage. When an OAD is conducted a form is filled out and sent to the Absence Control Manager. The union feels this is a form of job discussion and is in violation of Article 16. Discussions are to be in private. The ELM addresses supervisors notes and that they should not be circulated from one supervisor to another. The Absence Control Manager is the reviewing authority, but also will be the issuing supervisor for discipline, and also be the Step 2 management designee for all attendance related discipline. Performing OAD's after each and every sick leave occurrence (scheduled or not) is a form of harassment of all employees.

Discussion

It is a given that employees in the Postal Service are expected to maintain their assigned schedule. Article 19 of the National Agreement incorporates Postal manuals; 511.43 of the ELM reads, in part, "employees are expected to maintain their assigned schedule..." The National Agreement also provides in Article 5 that the Service is prohibited from taking unilateral action "which would violate the terms of this agreement or are otherwise inconsistent with this obligation of the law." The Union maintains that when Mr. Harris announced the implementation of the Process of Attendance Improvement, he was not engaging in bargaining; that at best, the meeting could be described as an informational meeting, but not bargaining. This Arbitrator agrees.

On the other hand, Article 3 of the National Agreement, Management Rights, does provide management with the right to implement an attendance program or policy so long as it is not inconsistent with the National Agreement. Thus, the Service at Des Moines could implement a new attendance program provided the policy or program did not violate the National Agreement.

The situation before the Arbitrator is somewhat intriguing. This grievance was not presented to the Arbitrator until August 2, 2001, some three and one-half years after implementation of the Process of Attendance Improvement. As of January 2001, the Des Moines Post Office is no longer implementing the Process of Attendance Improvement but has adopted another program. Mr. Harris is no longer involved as Manager, Attendance Control. This raises the question of whether or not the grievance is now moot.

The response of the Union's advocate was the Union, in effect, wanted guidance as to the issues raised for future reference. The Award that will follow is somewhat convoluted because of the circumstances as just enumerated.

The Arbitrator notes that, during the hearing, the parties debated whether the process of attendence improvement was a policy or a program. In the view of the Arbitrator, this debate was a play on words. Whether designated a program or a policy, the same analysis applies. If the program or policy violates the National Agreement, regardless of what it is called, the violation is there. Likewise, if the policy or program did not violate the National Agreement,

whether called a policy or program, there will be no contractual violation.

Across the entire spectrum of the dispute is an elementary fact: Ron Harris, who was responsible for implementing the process of attendance improvement, did not follow the process as outlined. The essential point made by Mr. Harris in explaining his deviation from the written Process of Attendance Improvement as obtained from Phoenix and St. Louis was that, in administering the process, the individual supervisors in Des Moines made the decisions, not Mr. Harris or any other upper management person; that the so-called ongoing attendance discussion (OAD) was to be considered separate and distinct from the Article 16, Section 2 "discussion" provisions along with the recognition that such discussions "shall be in private between the employee and the supervisor....Such discussions are not considered discipline." In fact, Mr. Harris emphasized this point at the November 26, 1997 meeting when questioned by the Union representative.

There were also e-mails making reference to the fact that any attempt to substitute decision making of supervisors by higher management personnel on attendance policies was discouraged and, in fact, prohibited.

There was an emphasis on monitoring the activities of supervisors, apparently to assure that the supervisors were consistent in implementing the attendance program. There is little question that the process was designed to keep a record on supervisors "who failed to comply with procedures and policies and who rescind or do not issue corrective action documents." There were provisions for auditing the activities of the supervisors. There was a requirement to have ongoing attendance discussions. These ongoing attendance discussions involved both employees who had no attendance issues and those who were absent and would occur at least once a month. Supervisors were expected to discuss attendance with employees. Those employees who were not absent were to be complimented and encouraged. Those employees who were absent were encouraged to improve their attendance. Likewise, if an employee was absent at any time during the month, on each occasion, there was to be an ongoing attendance discussion.

There was set forth at page 9 a Process of Attendance Improvement form, to be filled out by the supervisor, concerning ongoing attendance discussion recommendations. A reading of

this form could be interpreted as coming from the Attendance Control Manager to the supervisor, rather than the other way around. Page 8 of the process reads, in part:

> Daily Auditing Procedures of Auditor (Leave Coordinator)
>
> 1. Review the employees PS3971 for correctness. Review all medical documents submitted for accuracy and compliance with USPS policy. Report any doctored or altered statements to the Inspection Service.
>
> 2. Review the employee's PS3972 and determine what actions are necessary. Attach an OAD form if employee warrants a discussion and/or more formal corrective action. If no action is required return the PS3971 to supervisor for signature and filing.
>
> 3. If corrective action is indicated from review of the employee's PS3972 check the next step of progressive corrective action on the OAD form and return to the supervisor for concurrence.

Although the Daily Auditing Procedure, when read closely, would suggest that the OAD form comes from the supervisor, the form as practiced came from Mr. Harris, who asked the supervisor to fill out the form. However, Mr. Harris emphasized that the decision to implement any discipline was the supervisor's, not his; that he made recommendations but, as he explained, less than 25% of the time were these recommendations followed. Mr. Harris emphasized that decisions were made by the employees' supervisors.

Paragraph 2 of the above Page 8 quoted material contains the phrase, "if employee warrants a discussion and/or more formal corrective action." This may lead one to believe that the concept of discussion in Article 16, Section 2 has been merged with the ongoing attendance discussions. However, Mr. Harris maintained this was not the case.

In Des Moines, albeit with the National Mail Handlers Union, this Arbitrator has addressed some of the issues raised here. *See*, Case Nos. I94-11-C 98046977; I94M-15-C 98050804 (1998). The emphasis in 98046977 was on the progressive discipline for extended for AWOL and, insofar as this is an issue here, this Arbitrator stands by his award issued in Case No. I94-1I-C 98046977. Likewise, insofar as there was a challenge to Mr. Harris serving as the

Step 2 designee, this Arbitrator reaffirms his decision in Case No. I94M-15-C 98050804 because, based on the analysis in that case, the decision to discipline came from the employee's supervisor, who made the initial decision under the process. Mr. Harris operated at Step 2 as the Service's designee.

As discussed in the Mail Handlers' decisions and confirmed by the testimony in this case, Mr. Harris more often than not granted the grievances at Step 2. This only confirms that Mr. Harris, as the Step 2 designee, was operating as contemplated by the National Agreement and the grievance procedure set forth in Article 15. There was no pre-judgment. In this respect, this grievance here fails.

In reviewing the overall process, insofar as that process implements a system of monitoring the supervisors' activities in implementing the attendance policy of the Des Moines plant, there is no contractual violation because it is a management right to enforce the requirement for regular attendance. The process did provide that the officer in charge, namely the Plant Manager, would manage "the program assuring compliance with established leave policy and procedures with the supervisors." But this is a management tool. For example, if one supervisor is permitting excessive absenteeism while other supervisors are taking steps to correct such behavior, certainly management should have a means of addressing the issue with what might be seen as an erring supervisor. On this basis, the process does not violate the National Agreement and is merely a management technique permitted by Article 3 directed toward supervisors, not employees.

Likewise, the fact that there might be some suggestion of goals toward more regular attendance, so long as they are goals and not absolute standards, there is no violation of the National Agreement. The Arbitrator reemphasizes the last statement – goals are one thing; absolute standards are another matter which may result in a contractual violation because each individual employee's situation must be judged on its own merits to determine whether the discipline actions comport with the just cause standard.

Mr. Harris maintained emphatically that, although the process provided for ongoing attendance discussion, at Des Moines, under the Harris management, OADs were kept separate and distinct from job discussions contemplated by Article 16.2; that when Mr. Harris sent the

OAD form, there was no provision concerning information about discussions because, as Mr. Harris pointed out, under the National Agreement said discussions were "private."

The fact that there are ongoing attendance discussions in and of itself does not seem to be a violation, except as will be noted below. In fact, the process was designed more as an awareness program, including discussions for positive attendance.

With these comments, the Arbitrator would echo the comments of Arbitrator Parkinson in Case No. D94N-4D-C 99266155 (2000), when at pages 8-9, he wrote:

> ...In short, there has been no evidence establishing that the guidelines are used in any capacity other than offering mere advice on how to identify and address attendance situations. Likewise, there has been no showing that there are 'hard and fast' rules which must be rigidly enforced. As such, given the language of the guidelines and the testimony regarding their implementation, it is my considered opinion that the evidence does not establish that the attendance guidelines violate the Agreement.
>
> As a final matter, the Union has argued that the Postal Service improperly instituted the attendance guidelines because it did not provide the Union adequate notice of their implementation. It is noted that under Article 19 of the Agreement, the Postal Service must give the Union sixty days notice of proposed changes that directly relate to wages, hours or working conditions prior to issuance. However, as discussed above, it is determined that the attendance guidelines did not effectuate any change in the working conditions. Instead, they simply provided guidance to supervisors regarding attendance control. The guidelines did not obviate the just cause standard regarding discipline for unscheduled absences that was in place prior to their distribution. For this reason, it is my opinion that the postal service was not required to give sixty days notice before promulgation of the attendance guidelines.
>
> The postal service has a legitimate need to control the attendance of its employees and minimize unscheduled absences. Without some controls, both productivity and customer service would obviously suffer. In an attempt to provide instruction to its supervisors regarding unscheduled absences, the postal service distributed attendance guidelines. Undoubtedly, any discipline imposed by the postal service must still adhere to the just cause standard set forth in Article 16.1 of the agreement. While the

> guidelines propose certain discipline for specific conduct, they nevertheless are consistent with the just cause standard due to their accommodation of mitigating factors and consideration of the unique facts presented in each case. For all these reasons, it is my considered opinion that the grievance must be denied.

In other words, listening to Mr. Harris, the implementation of a process at Des Moines is more in the guise of guidelines. Mr. Harris was not imposing from the top down. Arbitrators have set aside discipline when the initiating supervisor is not making the decision but is being directed to act. *See, e.g., Case No. E1N-2B-D 15278* (Zumas, 1985).

That is not what happened here. Mr. Harris was honoring the provisions of Article 16. He was not operating as might be implied by the literal language of the process. The process was being used as a guideline. The OAD was not considered the private discussion set forth in Article 16. Thus, if this grievance involved the way Des Moines was implementing the process it would be denied, for the same reasons Arbitrator Parkinson denied the grievance before him.

However, the Arbitrator notes that there may be some misapplication as to the FMLA provisions set forth in the process including the matter of whose obligation it may be to inform the employee of the FMLA provisions. It would prolong this opinion to discuss the FMLA. Suffice it to suggest that the process should be reviewed for compliance with the FMLA. In this respect, see this Arbitrator's comments in *Case No. I98C-1-D 99271299* (Roumell, July 20, 2001).

The problem this Arbitrator sees with the process is that particularly when one reads pages 8 and 9 and the so-called form, it is unclear whether or not the supervisor is initiating the discipline or whether the Manager of Attendance Control or some higher supervisor is initiating the discipline. The language is ambiguous and unclear in this respect.

Furthermore, the form at page 9 seems to ignore the possibility of a job discussion. In making this comment, the Arbitrator appreciates that job discussions are private. But, the page 9 form contains the statement "no action necessary - employee has good attendance record." Does this form consider that there has been a discussion - then why the statement, "good attendance record." The form might suggest "no discipline action recommended at this time."

There is nothing inherently violative of the National Agreement for a Manager of

Absence Control sending the form to a supervisor seeking to establish whether or not the supervisor is monitoring attendance in his or her section. That is not the problem. The problem is that the Page 9 form, particularly when read with page 8 as partially quoted in this opinion, might give the impression that it is the Manager of Absence Control who is dictating the discipline. Secondly, the reported form seems to ignore the possibility that there could be a job discussion. The implication is that there is no discipline action necessary because the employee has good attendance. There may be no discipline necessary because the matter had been addressed by a job discussion.

The Arbitrator emphasizes that job discussions are private. Ron Harris was correct that the form should not list a job discussion. However, the implication of the form is that the only reason no discipline is necessary is because there is good attendance. The fact is, no discipline may be necessary because there had been a "private job discussion." Thus, both page 8 as partially quoted here and the page 9 form, if the process had been continued, should have been revised to avoid confusion on the issues raised here. Likewise, there should be clear notations in the process that the OAD is not to be considered a job discussion and is not to be substituted for the job discussion procedure set forth in Article 16.2. The process does not make that clear even though Mr. Harris operated the program in Des Moines by maintaining this distinction. In maintaining the distinction, the written program or policy, whatever name one wants to give it, should clarify this point.

The Arbitrator appreciates that, during the hearing, the APWU advocate went through the documents page by page, raising certain objections, in the best tradition of advocacy. What the Arbitrator has done is zero in on the portions of the process that may run afoul of the National Agreement. In doing so, the Arbitrator has tread most carefully, recognizing that the process has been implemented elsewhere. The Arbitrator has no knowledge of how the process was implemented elsewhere or whether said implementation has been challenged before other arbitrators. As already noted, at least part of the process has been challenged by the Mail Handlers in Des Moines before this Arbitrator.

Nevertheless, the Arbitrator has addressed the issue presented to him.

In summary, this Arbitrator finds that insofar as the process is designed to attempt to have

uniformity in administering attendance policies or programs amongst supervisors at Des Moines, including accountability, there is no violation of the National Agreement because it is a management tool permitted under management rights.

The concept of an ongoing attendance discussion is not violative of the National Agreement so long as there is a clear distinction between the OAD and the Article 16.2 job discussion. The fact that there is mention of scheduled sick leave does not mean that the matter cannot be discussed, so long as such leave is not the basis for discipline.

The fact that the process also refers to the postal inspector is not fatal, so long as the postal inspectors are limited to investigating fraudulent use of sick leave. Obviously, there is no role for the postal inspectors in administering an attendance program.

On the other hand, particularly with reference to page 8 and the form on page 9, this Arbitrator, for the reasons already stated, believes that these pages contain material that may violate the National Agreement without local negotiations. The process should, in clear language, advise all that there is a distinction between job discussions and ongoing attendance discussions. This should be spelled out in detail in any issued written document.

The Arbitrator has already addressed the issue of the extended AWOL as well as the participation of the Attendance Control Manager as the Step 2 designee. Similarly, the Arbitrator raises questions as to whether the process correctly describes the application of the FMLA.

It is difficult to issue a precise Award in this matter because the grievance is moot, and the policy as objected to was not implemented in Des Moines. In addition, this Arbitrator has already issued two decisions addressing the policy and the extended AWOL issue. Thus, the best the Award can provide is to incorporate the discussions in the previous opinions and awards and the discussion in this opinion as guidance to the parties at Des Moines in matters such as this for future reference.

AWARD

The grievance is granted in part and denied in part. The grievance is denied on the merits because the grievance is moot and, in any event, in general, the Process of Attendance Improvement was not implemented at Des Moines, Iowa, contrary to the National Agreement.

The grievance is granted in that this Award incorporates by reference the comments the Arbitrator has made as to those portions of the process which the Arbitrator has concluded could be contrary to the National Agreement absent local negotiations and reaffirms this Arbitrator's decisions in Case Nos. I94-1I-C 98046977 and I94M-15-C 98050804.

GEORGE T. ROUMELL, JR.
Arbitrator

August 13, 2001