REGULAR REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration

between

UNITED STATES POSTAL SERVICE

and

NATIONAL POSTAL MAIL HANDLERS UNION, AFL-CIO

GRIEVANT: Class Action

POST OFFICE: Des Moines, IA BMC

CASE NO.: I98M-1I-C 00178261
00213733

BEFORE: **EDWIN H. BENN, Arbitrator**

APPEARANCES:

For the U. S. Postal Service: Stephen J. Thalken, Labor Relations Specialist

For the Union: Randy Krueger, Advocate

Place of Hearing: Des Moines, Iowa

Date of Hearing: June 29, 2001

Award:

The grievance is denied. Management did not violate the Agreement or its incorporated references when it required employees to submit certain medical documentation directly to their supervisors.

Date of Award: July 9, 2001

Edwin H. Benn
Arbitrator

I. ISSUE

Did Management violate the Agreement or its incorporated references when it required employees to submit certain medical documentation directly to their supervisors? If so, what shall the remedy be?

II. FACTS

On January 13, 2000, Management instructed supervision at the Des Moines BMC as follows (Jt. Exh. 10):

* * *

> Some employees are sending medical information directly to [Occupational Health Nurse Administrator] Dawn Baber via the union. Instruct employees to turn medical in directly to you. You need this information in order to become aware of potential FMLA conditions, limitations etc. You need this information in order to interpret what the situation is, but the paper flows through you. Instruct your employees to give FMLA papers and other medical documentation directly to you.

On September 1, 2000, Management modified that requirement to exclude certain return to work clearances. That medical documentation is now to be submitted to Occupational Health Nurse Administrator Baber where "[p]reviously, we had required that these be submitted to the employee's supervisor". Jt. Exh. 24. Specifically, with respect to these types of clearances, Management stated (*id.* at 2):

> **NOTICE**
>
> Effective immediately, employees submitting return-to-work clearances may submit the medical certification directly to:
>
> Dawn Baber, RN
> Occupational Health Nurse Administrator
>
> * * *
>
> This applies to certifications submitted by employees returning to duty after 21 days or more of absence due to illness or

injury, or absence for communicable or contagious diseases, mental or nervous conditions, diabetes, cardiovascular diseases, or seizure disorders or following hospitalization as provided in Employee and Labor Relations Manual, Parts 865.1, 865.2, and 865.3.

* * *

Employees are also responsible for advising their supervisor of the planned return-to-work.

The grievance in this matter protests the requirement that employees give the medical documentation directly to their supervisors. Jt. Exh. 2.

III. DISCUSSION

This is a contract dispute. The burden therefore rests with the Union to demonstrate a violation of the Agreement or its incorporated references.

The concern of the Union in this case is that the requirement that certain medical documentation be submitted directly to an employee's supervisor rather than to the Medical Unit could result in the disclosure of personal, confidential or otherwise private information about the employee to someone who has no need to know that information. The result of the documentation requirement, according to the Union, is that the employee may be put in an embarrassing or otherwise compromising position. That is indeed a legitimate concern. However, given the scope of the documentation requirement involved in this matter, the Union cannot meet its burden in this case.

First, the initial task in this case is to determine the type of medical documentation that Management is requiring to be submitted by employees to their supervisors. From the arguments and evidence offered at the hearing, the scope of the documentation requirement does not reach the level of requiring that a medical diagnosis or prognosis be submitted by employees to their supervisors. The level of information sought by Management to be submitted to an employee's supervisor is limited to an explanation of the illness or injury

sufficient to indicate to Management that the employee was (or will be) unable to perform his or her normal duties. *See* ELM Section 513.364 [emphasis added]:

> **513.364 Medical Documentation or Other Acceptable Evidence**
>
> When employees are required to submit medical documentation, such documentation should be furnished by the employee's attending physician or other attending practitioner who is performing within the scope of his or her practice. *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 substantiation other than medical documentation if they believe it supports approval of the sick leave request.

The key here is what is *not* required to be submitted by an employee. Under ELM Section 513.364, *no* diagnosis or prognosis is necessary in order to meet the leave documentation requirement in that section. The "... medical information .... necessary to have leave approved ..." consists *only* of "... 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." *See also*, the June 22, 1995 letter from National Medical Director David R. Reid ("Medical information which includes a diagnosis and a medical prognosis is not necessary to approve leave"); the follow-up letter of Manager Contract Administration Anthony Vegilante ("... medical information which contains a diagnosis and a medical prognosis constitute a restricted medical record ... [which] are not necessary to support a request for approved leave when required by Section 513.36 of the (ELM)"); and

Vegilante's September 12, 1996 letter ("... medical information received by an employee's supervisor that provides a diagnosis and a medical prognosis must be forwarded to the health unit or office of the contract medical provider and treated as a 'restricted medical record' ... [and d]ocuments containing diagnosis or prognosis must be returned to the employee, destroyed, or forwarded to the medical unit"). Jt. Exhs. 13, 25, 26. In the Step 3 denial in this case, the Service takes the same position ("... medical information that includes a diagnosis and a medical prognosis is not necessary to have leave approved, regardless of whether the absence is covered by the ... FMLA").[1]

Second, under Article 3 of the Agreement, Management has the right to "... maintain the efficiency of the operations entrusted to it ... [and t]o determine the methods [and] means ... by which such operations are to be conducted." The exercise of that kind of managerial prerogative is not unfettered and unreviewable. However, the scope of review by an arbitrator of a managerial action is limited to the inquiry of whether Management's action was arbitrary.[2] And, "... action is arbitrary when it is without consideration and in

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1 *See also, H90N-4H-C 94015640* (Britton, 1994) at 12 ("... the decision by management to insist upon medical documentation containing a diagnosis and prognosis as well as a statement that the Grievant could return to full duty and was not a danger to himself or others was not only arbitrary, but also far in excess of the requirements of the Employee and Labor Relations Manual"); *E94C-1E-C 98021754* (Yehle, 2000) at 8 ("... under applicable rules and regulations, supervision can make determinations based upon medical documentation that does not include medical diagnosis and prognosis or other restricted medical information").

2 Elkouri and Elkouri, *How Arbitration Works* (BNA, 5th ed.), 660 ("Even where the agreement expressly states a right in management, expressly gives it discretion as to a matter, or expressly makes it the 'sole judge' of a matter, management's action must not be arbitrary, capricious, or taken in bad faith").

disregard of facts and circumstances of a case, without rational basis, justification or excuse."[3]

So the question becomes whether Management has shown a rational basis for its requirement that employees submit the medical documentation directly to their supervisors. It has. Here, there is a rational basis for Management's decision to funnel these medical documentation submissions through the employees' supervisors. Supervisors typically in the first instance are in charge of approving or disapproving leave requests and determining the type of leave to be granted — that is, LWOP, AWOL, sick, annual, FMLA, etc. — as well as whether the leave is scheduled or unscheduled. It therefore makes sense that in order to efficiently perform that function and make those decisions that supervisors in the first instance be given the medical documentation supporting employees' leave requests. Further, it may well prove to be an administrative nightmare at the larger facilities which may use centralized leave procedures to have employees submitting documentation to places other than a supervisor at the centralized point. Additionally, supervisors are required to make certain that employees are assigned duties within any existing medical limitations. If there are restrictions on work contained in the medical documentation, an employee's supervisor should be apprised of those restrictions.

When it comes to the exercise of managerial prerogatives, whether I agree with Management's decision is irrelevant. The scope of my inquiry only can address whether there is a rational basis for Management's decision. Here, there is. The determination that employees must submit the kind of medical documentation involved in this case directly to supervisors is therefore not arbitrary.

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3 *South Central Bell Telephone Co.*, 52 LA 1104, 1109 (Platt, 1969).

Third, in light of the limitation upon what an employee must submit to meet a medical documentation requirement (that is, only "... 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" and not a diagnosis or prognosis), the Union's Privacy Act arguments are not sufficient to change the result.[4] In all of those cited provisions and regulations, there is nothing that *prohibits* Management from requiring the submission of this kind of medical documentation directly to an employee's supervisor. At best, those provisions limit what can be done with documents submitted in terms of treating those materials which may contain too much medical or personal information as subject to the Privacy Act and as restricted documents. However, there is no *prohibition* on Management's requirement for the submission of the type of documents involved in this case to be made directly to a supervisor. But, to meet its burden, the Union must show the existence of that kind of restriction. The Union cannot do so.

Fourth, any employee who has a concern about the improper disclosure of sensitive information to a supervisor should follow the Service's position stated in the APWU Step 4 in *E94C-1E-C 97118981, etc.* (December 16, 1998) that "[e]mployees, who do not want their diagnosis or prognosis disclosed, should request their health care providers to avoid providing prognosis and diagnosis on the certification."[5]

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[4] In its argument, the Union urges support of its position can be found in, for example, the Privacy Act and its rules, EEOC regulations, the ASM, ELM Section 313, the EL-860, 5 USC Section 552 *et seq.* Jt. Exhs. 3-9.

[5] I have considered the Union's concern that employees cannot always control what a busy physician puts in a medical documentation certificate with the result that unnecessary sensitive information is provided beyond what is needed. Under potential for severe discipline, an employee cannot delete or alter information on medical documentation. However, a properly drawn form

[footnote continued on next page]

Based on the above, the grievance must be denied.[6]

IV. AWARD

The grievance is denied. Management did not violate the Agreement or its incorporated references when it required employees to submit certain medical documentation directly to their supervisors.

Edwin H. Benn
Arbitrator

Dated: July 9, 2001

[continuation of footnote]
certificate with the specific limitation on what is necessary could help to alleviate some of the Union's concern. And, while perhaps a problem, there is nothing to stop the employee who is given medical documentation containing too much information from requesting the medical provider to redraft the document giving only the necessary information (that is limiting the information to "... 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" or similar information concerning restrictions on activities and not a diagnosis or prognosis).

6 There is a double-edged sword component to the result in this case. Management's position concerning the requirement of employees to submit the required medical documentation to their supervisors has been upheld. However, Management has specifically and repeatedly taken the position that the amount of information necessary is something less than a diagnosis or prognosis. Therefore, Management's position in cases which involve documentation which it contends does not meet the requirements of, for example, ELM Section 513.364, will have to be scrutinized very carefully. It will be necessary in those cases to determine whether the submitted documentation is sufficient to be something more that "'under my care' or 'received treatment'" as required by ELM Section 513.364, but something less than "a diagnosis and a medical prognosis", which the Service contends is not required to support a leave request. Similarly, in cases where supervisors are given information which falls under the protection of the Privacy Act, those individuals will be obligated to *strictly* follow the restriction provisions of that Act and its governing regulations to protect the privacy of the employees.

EXPEDITED REGIONAL ARBITRATION PANEL

In the Matter of the Arbitration	( )	Grievant: Slate, Floyd
between	( )	Post Office: Denver BMC
UNITED STATES POSTAL SERVICE	( )	USPS Case No. E00C-1E-C 02123953
and	( )	APWU Case No. 021221
AMERICAN POSTAL WORKERS UNION, AFL-CIO	( )	

BEFORE: D. Andrew Winston, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Donald J. Davis, Sr., Labor Relations Advocate
Judy Ford, Technical Advisor
Zeke Olagoke, Observer

For the Union: George Prusak, President, Colorado State Chapter
Cindy Reynolds, Technical Advisor

Place of Hearing: 7755 East 56th Avenue
Denver, Colorado 80238

Date of Hearing: October 8, 2002

Date of Award: October 10, 2002

Relevant Contract Provision(s): Articles 5, 10 & 19; ELM § 511.4

Contract Year: 2000-2003

Type of Grievance: Contract

ISSUE

Did the Service violate the National Agreement when it recorded Floyd Slate's sick leave taken on March 27 and 28, 2002, as an unscheduled absence? If so, what is the appropriate remedy?

RELEVANT FACTS

This grievance was processed in a timely and proper manner. There was no challenge to the jurisdiction of the Arbitrator at the hearing. During the course of the arbitration hearing, all parties were afforded a full and complete opportunity to be heard, present relevant evidence, cross-examine witnesses, and develop arguments. No official transcript was made of the hearing. The witnesses appearing before the Arbitrator were duly sworn. The hearing was closed and the matter stood fully submitted as of October 8, 2002.

Mr. Slate is a Distribution Clerk on Tour 2 at the Denver BMC, reporting for duty at 6:15 a.m. He has approximately twenty five (25) years with the Service.

On March 26, 2002, Mr. Slate called Attendance Control approximately one and one-half (1½) hours before his tour was scheduled to begin. He spoke with Gustavo Garza, Supervisor, Distribution Operations, then recently detailed as an Attendance Control Supervisor at the GMF. Mr. Slate reported to Mr. Garza that he was ill with the flu and could not work that day. Mr. Slate requested twenty four (24) hours sick leave. Mr. Garza asked Mr. Slate to provide medical documentation upon his return to work. Mr. Garza then recorded Mr. Slate's verbal notice on three (3) separate Forms 3971 as unscheduled absences.

ELM § 511.41 defines "unscheduled absences" as "any absences from work that are not requested and approved in advance."

Mr. Slate returned to work on March 29, 2002, and provided the Service with a note from his doctor, dated March 26, 2002, stating that Mr. Slate "[H]as been under care for illness 03/26/02 through 03/28/02[.] May return to work on 03/29/02." The leave request was disapproved on March 29, 2002, by Van Walker, the appointing official, citing as the reason that Mr. Slate "failed to provide acceptable doc[umentation,] charge to LWOP."

Mr. Slate filed two (2) grievances: one (1) challenging the denial of pay for the sick leave taken and one (1) for classifying the leave as unscheduled as opposed to scheduled. The first grievance was settled. The second grievance is before this Arbitrator.

Mr. Slate has two (2) previous instances of attendance-related discipline: a Letter of Warning from his immediate supervisor, dated April 25, 2001, for being absent without official leave (AWOL) and failure to be regular in attendance, and another instance in September 2001 resulting in a seven (7)-day suspension. Both disciplinary actions were grieved and settled, and are scheduled to be expunged from Mr. Slate's personnel file in December 2002 provided there are no further instances of attendance-related discipline.

To date, Mr. Slate has not been disciplined for the absences of March 26-28, 2002.

Mr. Slate testified that it has been the Denver BMC's past practice that when an employee called in sick, the first day missed was recorded as an unscheduled absence but subsequent days were recorded as scheduled absences. When Mr. Slate noticed the Forms 3971 noted the absences were unscheduled, he spoke with his acting supervisor, Marty Martinez, who reportedly told Mr. Slate "that's just how the GMF does it."

John Joseph "Joe" Buckley, Manager, Distribution Operations for the Colorado/Wyoming Cluster with oversight of the Integrated Resource Management Office, testified that a corollary of the ELM's definition of "unscheduled absence" is that a scheduled absence must be both requested and approved in advance. When an employee calls Attendance Control to report that s/he is sick and requests to be absent for a number of consecutive days, the absences are unscheduled and are deemed one (1) incident. The onus is on the employee to contact his/her supervisor directly to obtain prior approval of some or all of the absences. Mr. Buckley has not instructed his department to so advise employees when they call in sick. Indeed, Mr. Slate testified that he received no such instruction from Mr. Garza. Mr. Buckley asserted that employees, including Mr. Slate, should have received "stand ups" on the appropriate procedure for avoiding unscheduled absences when calling in sick. Mr. Buckley insisted that pursuant to the ELM, supervisors could not appropriately change the classification of leave after the fact; scheduled leave, by definition, must be requested and approved prior to it being taken. This was contradicted by Mr. Garza.

AWARD

The grievance is sustained. I find that Mr. Slate gave the Service appropriate notice of his illness and impending absences, as required. The Service had no advance notice of the absence of March 26, 2002, and the Union concedes that particular absence was appropriately recorded as unscheduled. The Service was, however, provided advance notice of the March 27 and 28th absences. As the issue of a past practice was not raised at prior steps of the grievance procedure, I can not now consider that argument. Nevertheless, Mr. Slate was not advised by the Service that it was his obligation, after having contacted Attendance Control, to take the additional step of conferring with his immediate supervisor in order to avoid the balance of the sick leave being classified as unscheduled. The Service's failure to so advise Mr. Slate lulled him into a potentially career threatening complacency and violated ELM § 511.42(a), Management Responsibilities, which provides that "[t]o control unscheduled absences, postal officials ... [i]nform employees of leave regulations."

The Service is hereby directed to modify the classification of Mr. Slate's absences of March 27 and 28, 2002, from unscheduled to scheduled, and further, to make Mr. Slate whole in all ways.

October 10, 2002

D. Andrew Winston, Arbitrator