

LAMPS ARBITRATION PANEL

This award shall not be cited as precedent in any future arbitration proceedings accruing outside of this test office. it may, however, be cited as precedent in any future arbitration proceeding accruing within this test office.

In the Matter of the Arbitration)	GRIEVANT: Lisa Solinger
between)	POST OFFICE: Des Moines, Iowa
UNITED STATES POSTAL SERVICE)	CASE NO. C7C-4K-C 77032
and)	
AMERICAN POSTAL WORKERS UNION)	

BEFORE Frank J. Murphy ARBITRATOR

APPEARANCES:

For the U. S. Postal Service: David A. Jones, Acting Manager, Labor Relations

For the Union: Barbara J. Ver Steegh, President, DMI-APWU

Place of Hearing: 1165 Second Avenue, Des Moines, Iowa

Date of the Hearing: October 15, 1989

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ISSUE

Did management violate the National Agreement, specifically Articles 10 and 19, and/or Employee and Labor Relations Manual, Part 513.32, by denying the grievant's request for sick leave covering the period June 21, 1989, through June 24, 1989?

BACKGROUND

On October 21, 1989, the grievant, Lisa Solinger, a machine distribution clerk employed ten years in December, requested sick leave to care for her son who had chicken pox (Joint Exhibit No. 4). Her supervisor denied her request for sick leave and approved annual leave for the twenty-four hour period. A grievance was filed over the denial of sick leave and the matter was processed by the parties through their grievance procedure to arbitration (Joint Exhibit No. 2). The parties stipulated at the hearing that the matter was properly before the arbitrator. They also agreed on the statement of the issue as previously noted given.^{1/} They further made the following stipulation:

^{1/} The request for leave, Form 3971, was dated June 21, 1989, and the leave requested and the annual leave granted was for a twenty-four hour period through June 24, 1989, as is clear from the grievance and from the processing of the grievance, Joint Exhibits Nos. 4, 2, and from the statements of the parties in their presentations.

The following employees would testify that they had submitted sick leave requests, Form 3971, to care for a family member with a contagious disease as listed on the communicable disease chart submitted in Joint Exhibit Number 6 and that the disease was chicken pox in all cases: Patti Mathes, Toni Williams, Cindy Martin, Sheryl Rogers, Gretchen Bailey, Linda Beener, Anita Trout, Sheryl Lacher.

Pertinent provisions of the National Agreement are:

ARTICLE 10
LEAVE
* * * *

Section 2. Leave Regulations

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.

* * * *

ARTICLE 19
HANDBOOKS AND MANUALS

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21, Timekeeper's Instructions.

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least sixty (60) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within (60) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Unions upon issuance.

Pertinent provisions of the Employee and Labor Relations Manual are:

513 Sick Leave

513.1 Purpose

Sick leave insures employees against loss of pay if they are incapacitated for the performance of duties because of illness, injury, pregnancy and confinement, and medical (including dental or optical) examination or treatment.

* * * *

513.32 Conditions of Authorization.

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| a. Illness or injury. | If employees are incapacitated for the the performance of official duties. |
| b. Pregancy and confinement. (Sick leave, annual leave, or LWOP is granted as may be necessary.) | See 515, Absence for Maternity/ Paternity Reasons. |
| c. Medical, dental, or optical examination or treatment. | If absence is necessary during the employee's regular scheduled tour. |
| d. Contagious disease. A contagious disease is a disease ruled as requiring isolation, quarantine, or restriction of movement of the patient for a particular period by the health authorities having jurisdiction. | If employees: (1) Must care for family member afflicted with a contagious disease, or (2) Have been exposed to a contagious disease and would jeopardize the health of others, or (3) Have evidence supplied by the local health authorities or certificate signed by a physician certifying the need for the period of isolation or restriction. |
| e. Medical treatment for disabled veterans. (Sick leave, annual leave, or LWOP is granted as may be necessary.) | If employees: (1) Present a statement from a duly authorized medical authority that treatment is required. (2) When possible, give prior notice of the definite number of days and hours of absence. (Such information is needed for work scheduling purposes.) |

* * * *

THE POSITION OF THE UNION

The Union argues that management is placing technical form over substance in denying sick leave to the grievant and is ignoring the intent of the parties with respect to the regulation in question, ELM 513.32 d, as well as the history of its administration. The Union holds that the words isolation and quarantine in the regulation have been obsolete as a medical practice for over forty years and have been superseded by the practice of exclusion. It contends that exclusion constitutes the present method of applying the formerly used practices of isolation and quarantine and means basically the same thing. The Union argues that the Department of Health of the State of Iowa has indicated in its Communicable Disease Chart (Joint Exhibit No. 6) that exclusion is the procedure currently used for the contagious diseases listed on it including chicken pox. It says that the clear intent of the regulation is to allow an employee to take care of a family member with a contagious disease by using sick leave rather than vacation time or being off work with a loss of pay.

The Union maintains that there has been no dispute as to the clear meaning of the language of Item d of ELM 513.32 based on the mutual understanding of the parties over the course of several years. It states that the meaning of the regulation is not unclear and that the way in which it has been interpreted confirms that its meaning is not unclear. In support of this position it cites the evidence in Joint Exhibits 7 through 14 and the testimony by stipulation of eight employees in which contagious diseases, and specifically chicken pox, have been accepted

by supervisors and management as a basis for employees to take sick leave to care for family members with contagious diseases. It notes that Joint Exhibit No. 14 shows that an employee was granted sick leave when he had chicken pox and was directed to remain at home "until lesions are crusted over" by the head occupational health nurse. The Union refers to the absence of grievances or arbitrations over the meaning of the regulation. It says that the Postal Service could have indicated an intention to change the regulation under Article 19 anytime since 1971 with the Union having the right to grieve such a change. Further, it says that any time during the eighteen years of the last seven collective bargaining agreements the Union would have made any such change a subject of negotiations, something which it was not necessary to do.

According to the Union the Postal Service takes the position that an employee must meet all the conditions set forth in the regulation to qualify for sick leave. The Union holds that an employee only must show that a disease is defined as a contagious one under Item d of the regulation. The practice of exclusion according to the Union shows this with respect to chicken pox and is something the parties have accepted. The Union stresses that the regulation uses the word "or" not "and" in indicating its requirements. It says that the only other requirement is that an employee document the need to be off work to care for a family member afflicted with a contagious disease, as the grievant has done through a note from her physician (Union Exhibit No. 9.)

The Union denies the applicability of the Sherman arbitration award in the southern region, stating that it is clearly distinguishable from the current dispute since it pertains to mononucleosis and an exposed

employee (Employer Exhibit No. 4). The Union claims that Arbitrator Sherman is off target in his interpretation of Items a, b, c, e, of ELM 513.32 since the interpretation eliminates for all practical purposes Item d. The Union also points out that Robert D. Kessler, Union national business agent for the clerk craft, testified that in the southern region chicken pox is accepted as a contagious disease and explained the Hicks case to illustrate this fact.

THE POSITION OF THE EMPLOYER

The Employer argues that the request of the grievant for sick leave did not meet the conditions required for approval in ELM 513.32 d and, therefore, properly was not approved by management. According to the Employer an employee is entitled to sick leave only if he/she was prevented from reporting for work because the health authorities having jurisdiction (in this case a State or County agency) imposed a quarantine which generally involves a legal prohibition against anyone leaving the quarantine area. The Employer contends that this is the clear definition of a contagious disease under ELM 513.32. A note from an employee's doctor, such as that of the grievant, is not sufficient to fulfill this definition of a contagious disease, the Employer holds. It states that a private physician has no authority to declare a patient's residence a quarantine area or to legally restrict a patient's movements or require a patient's isolation. The private physician also lacks authority according to the Employer to make a legally binding determination with respect to the interests of persons not patients, including the management and employees of the Postal Service.

The Employer notes that in a letter of December 16, 1985, the Polk

County Health Department stated, "quarantining for a communicable disease is no longer required by the State of Iowa" (Joint Exhibit No. 5, D). A later letter of January 27, 1987, from the Iowa Department of Public Health, Division of Disease Prevention, stated, "public health and infectious disease authorities no longer feel there is any value to the practice of isolation and quarantine for community illnesses." (Joint Exhibit No. 5, C). Thus, the Employer concludes that chicken pox does not meet the definition of a contagious disease in ELM 513.32 d. It does not contend that chicken pox is not contagious but only that it does not fit the definition in ELM 513.32 d. The Employer contends that it is only after this first condition of a definition of contagious diseases is met that the other conditions (1), (2), and (3) of the ELM are to be applied. According to the Employer, if the first condition of the definition is not met, these other conditions are not applicable. The Employer further argues that the ELM says quarantine, not exclusion. Thus, it states that the Communicable Disease Chart from the State Division of Disease Prevention is not relevant or applicable to ELM 513.32 since it pertains to exclusion from school. The Employer also notes that the grievant's child was only eighteen months old at the time of her sick leave request.

To the Union's argument of a past practice, the Employer citing arbitration awards argues that there was enough confusion about this matter so that past practice was not established. It holds that there was no showing that both parties acquiesced in a past practice. It notes that tour superintendent Clayton Crosby testified that he told the grievant's supervisor that granting sick leave for this purpose was not consistent with what is done and that normally annual leave is

offered. In support of its position, the Employer argues from the reasoning in the Sherman arbitration award that only a physician's note is necessary under ELM 513.32, d, stresses that the regulation requires that a public health authority declare a patient to be quarantined or isolated. The Employer holds that, if the Union argument for chicken pox is accepted, then most diseases including the common cold become acceptable. This opens up a Pandora's box of which Arbitrator Sherman speaks, according to the Employer, and management would be hard pressed to deny sick leave for a common cold.

DISCUSSION

A resolution of this matter hinges on the interpretation of ELM 513.32 d including (1), (2), and (3) of that section. It pertains to the meaning of contagious disease in that section and to the applicability of that meaning to the fact situation of the grievant. There is little disagreement between the parties about the facts in this case.

The Employer holds that contagious disease in ELM 513.32 d is limited to a disease which is ruled by health authorities with legal jurisdiction to require isolation or quarantine or restriction of the movement of a patient. It further notes that letters of December 16, 1985 from the Polk County Health Department and of January 27, 1987, from the Iowa Department of Public Health, Division of Disease Prevention, state that the practice of isolation or quarantining for a communicable or community disease is no longer required or practiced in the State of Iowa (Joint Exhibits Nos. 5 D, 5 C). Since the grievant has presented

no evidence that her son was quarantined or isolated or restricted in movement for his chicken pox by the action of a health authority having jurisdiction, the Employer concludes that his chicken pox did not constitute a contagious disease as defined in ELM 513.32 d and that the request of the grievant for sick leave under the ELM properly was denied by management.

The Union, on the other hand, argues that the use of quarantine or isolation has been obsolete as a health practice for at least forty years. It points out that this occurred long before the negotiation of the first agreement between the parties in 1971 and before the incorporation in 1973 of Article 19 into their Agreement and in 1978 of Article 10, Section 2 (Union Exhibits Nos. 10, 11, 12). The Union holds that exclusion for contagious diseases is the present day medical equivalent of the previously used practice of quarantine and isolation. In support of its position it cites the Communicable Disease Chart of the Iowa Department of Public Health, Division of Disease Prevention, concerning exclusion of students from school (Joint Exhibit No. 6).

After reviewing the evidence and presentations of the parties, the arbitrator concludes that the grievance of Lisa Solinger must be sustained. And he so rules. His decision is based on the meaning of ELM 513.32 d in the light of the position of the Iowa Department of Public Health, Division of Disease Prevention, regarding the exclusion from school of children with chicken pox, and is supported by the record of the administration of this regulation in the Des Moines office.

In his January 27, 1987, reply to an inquiry from Dawn Baber, head occupational health nurse at the Des Moines Division, Russell W. Currier, DVM, of the Iowa Department of public Health, Disease Prevention, stated:

(Joint Exhibit No. 5C).

Generally, public health and infectious disease authorities no longer feel there is any value to the practice of isolation and quarantine for community illnesses. Ideally, recently diagnosed or recovering patients would not return to work until they had recovered corresponding to a time of greatly reduced or non-infectivity. Accordingly, we are unable to provide any list or guidelines for a specific policy. Optimally, the personal attending physician can order exclusion from work for those extremely infrequent instances when an illness or infectious condition would pose significant risk to others. (Joint Exhibit No. 5C).

Julius S. Conner, M.D, M.P.H., Public Health Director, Polk County Health Department wrote on April 5, 1988: (Joint Exhibit No. 6)

Enclosed is the "Communicable Disease Chart" used in Iowa schools for excluding children with contagious diseases. Children with chicken pox are to be excluded for 7 days from the onset of their pocks.

Quarantine measures have not been used for contagious diseases since the early 1940's. Exclusion is more convenient for the family and equally as effective. (Joint Exhibit No. 6).

The "Communicable Disease Chart" which Dr. Conner enclosed in his letter was issued by the Iowa State Department of Health, Division of Disease Prevention, and gives "Concise Descriptions and Recommendations For Exclusion of Cases From School." The Chart lists chicken pox among the communicable diseases and provides for seven days of exclusion from school from the onset of the pocks. It also states that for readmission to school, "it is advisable that school authorities require written permission from the health officer, school physician or attending physician before any pupil is readmitted to class following any disease which requires exclusion, not mere absence, from school". Employer witness Dawn Baber, head occupational health nurse for the Des Moines Division, testified that medical practice recommends that a child with chicken pox not associate with and stay away from other children and not go where there

are other children.^{2/}

In the judgment of the arbitrator this practice of exclusion from school of children with chicken pox by the Polk County Health Department following the recommendations for exclusion of the Division of Disease Prevention, Iowa State Department of Health, falls under the definition of contagious disease in ELM 513.32 d. in so far as it requires "restriction of movement of the patient for a particular period by the health authorities having jurisdiction". It is clear from the quoted correspondence of health authorities that the previous practice of isolation and quarantine has not been utilized for contagious diseases for many decades and that exclusion is the present medical practice with respect to school children with communicable diseases in the State of Iowa. In the present case the grievant's son had chicken pox and the practice of exclusion would apply to him. The arbitrator does not consider the fact that he was only eighteen months old to be a factor limiting the eligibility of his mother for sick leave under ELM 315.52 d. Similar, although less extensive, restrictions of exclusion of school age children would apply to him, namely, that he not associate with other children and not go where there are other children, as nurse Baber stated. Nor does the arbitrator consider persuasive the Employer argument that the grievant was not a single parent and that there was not testimony that she was the only one who could take care of her son.

^{2/} In terms of ELM 513.32 the letter of Russell W. Currier, DVM, quoted above, appears to apply specifically to employees who have a contagious disease or have been exposed to a contagious disease so as to jeopardize the health of others. The letter of Julius S. Conner, M.D., M.P.H, on the other hand, refers to school children and relates to ELM 513.32 d (1), that is, to employees who "must care for family member afflicted with a contagious disease", the matter in dispute in the present case.

The Employer is concerned that applying the definition of contagious disease in ELM 513.32 d to chicken pox will open a Pandora's box so that even the common cold would fit the definition. The present decision and award pertain only to the disease of chicken pox and to the eligibility of an employee for sick leave under ELM 315.52 d (1), to care for a family member with a contagious disease. It says nothing about the common cold or other contagious diseases beyond those listed on the Communicable Disease Chart of the Iowa State Department of Public Health, Division of Disease Prevention, in Joint Exhibit No. 6. Nor does it take up the question of sick leave for employees under other parts of the regulation. Further, this decision does not grant some type of legal or jurisdictional authority to private physicians. It merely concludes that exclusion from school of children with chicken pox fits the definition of contagious disease in ELM 513.32 d in the State of Iowa. It further concludes that under (1) of the regulation an employee qualifies for sick leave to care for a child afflicted with chicken pox. The regulation itself and the parties by incorporating the regulation into their Agreement in Article 10, Section 2, state in (3) of the regulation that a certificate signed by a physician may certify the need for the period of restriction or exclusion.

The basis for awarding the grievant sick leave in the present matter also is supported by the record of the administration of ELM 513.32 d in the Des Moines office. The Employer contends that there is enough confusion in this evidence so that an established past practice is not shown according to the generally accepted standards for past practice. In the judgment of the arbitrator the evidence of the application of the ELM in the past further supports his determination based on the meaning of the

provision, whether or not it is sufficient in itself to establish a past practice. This evidence of the past record is based on several fairly recent documents showing that sick leave has been granted to employees to care for family members afflicted with a contagious disease, including children with chicken pox and scarlet fever, on the stipulated testimony of eight employees that they had submitted sick leave requests to care for a family member with the contagious disease of chicken pox, and on testimony about the absence of any grievances or arbitrations over the issue, except for the Sherman Award in the southern region which will be taken up later.

Joint Exhibit Number 7 contains the request for and granting to an employee, Thomas J. Jeffries, of sick leave to care for two children on separate occasions in the spring of 1987. Joint Exhibit No. 11 is the record of the request, denial, and later granting of sick leave to Sheryl Y. Rogers in February, 1989, to care for her daughter who according to her stipulated testimony and a doctor's note had chicken pox (Union Exhibit No. 2). Joint Exhibit No. 12 and Union Exhibit No. 1 detail the request and granting of sick leave to C. M. Housh to care for her daughter who had scarlet fever^{3/} As has been stated, eight employees,

^{3/} The Employer objected to the introduction of medical notes from physicians including that from the grievant's doctor. The Employer argued that these notes were hearsay and that the Employer had no opportunity to question or cross-examine the physicians regarding their diagnoses and recommendations. The Employer also stated that there was no evidence that supervisors had considered the notes in their decisions about sick leave. The arbitrator overruled the Employer objection and admitted the notes into the record. In doing so, he noted that such medical notes normally were accepted into evidence in arbitration hearings without the testimony of the physicians because of the difficulty and expense of securing such testimony. He also notes his previous discussion of ELM 513.32 d. (3) and the provision in that paragraph for a physician to certify the need for the period of isolation or restriction.

one of whom was Sheryl L. Rogers mentioned above in regard to Joint Exhibit No. 11, by stipulation testified that they had submitted sick leave requests to care for a family member with the contagious disease of chicken pox.

Robert D. Kessler, Union national business agent for the clerk craft for the St. Louis region including Iowa, Missouri, and Arkansas in the southern region, testified that in some nine years of full-time representation of the Union at the third step grievance level he had never known of sick leave being denied for chicken pox or any other contagious disease so that a grievance was filed over the matter. He said that there could be grievances in other localities or regions of which he was not aware. No arbitrations concerning sick leave from the Des Moines Division or from other areas except the Sherman Award were introduced into evidence. If such had been rendered, it appears that the parties would have introduced them into the record, as the Employer did with the Sherman Award.

As he has stated, the arbitrator finds that this evidence supports his conclusion in this matter. The testimony of Clayton Crosby, tour superintendent on the day shift and an employee with thirty-four years of service, and two instances in 1989 when sick leave was not granted did not serve to counter this evidence. Crosby stated that he told the supervisor of the grievant, who asked him about her request for sick leave, that leave for this purpose was not consistent with what was done and that annual leave or leave without pay was normally offered to the employee. Crosby also testified that supervisors were responsible for approving or not approving such requests and that some do and some do not. He said that if they come to him regarding sick leave requests for this

purpose he tells them that it is not given. The Employer introduced into evidence two Form 3971, Request For Or Notification of Absence. In one of these Regina L. McNeal on January 24, 1989, requested leave to care for her sick child and brought in a medical statement or note (Employer Exhibit No. 10). From the Form 3971 it appears that she was first granted sick leave which was changed to thirty-two hours of annual leave and eight hours of emergency annual leave. In the second request L. Schmacht on August 26, 1989, was granted sixteen hours of emergency leave without pay to care for her sick child who had a contagious disease (Employer Exhibit No. 2). This leave was granted some two months after the denial of sick leave to the grievant and cannot be used to show the practice prior to the denial of sick leave to the grievant. The Employer introduced as Employer Exhibit No. 3 an August 10, 1989, notice to Des Moines managers and supervisors from its labor relations representative stating the Employer position that sick leave is not for taking care of minor children with childhood diseases such as chicken pox, measles, and flu. This notice also is dated after the June 21, 1989, request of the grievant for sick leave and cannot serve to indicate the policy regarding sick leave prior to the request of the grievant.^{4/}

^{4/} The Union contended that the employer was inconsistent in denying sick leave to the grievant to care for her son with chicken pox and in granting such leave to employees similarly afflicted with that and other contagious diseases and to employees whose exposure to chicken pox or other contagious diseases "posed significant risk to other employees in the work place" (Joint Exhibit No. 2, p. 5). That the Employer has a policy of granting sick leave to employees with contagious diseases or to those who are exposed to such diseases and are a risk to other employees appears clear from the evidence, such as its reply at the second step on August 11, 1989, quoted above, from its notice of August 10, 1989, to managers and supervisors (Employer Exhibit No. 3), and from its granting (footnote continued on page 17)

The Employer refers to the Sherman Award in the southern region in support of its position (Employer Exhibit No. 4). The issue in that case concerned the disease of mononucleosis and an exposed employee. The issue in the present case involves the disease of chicken pox and the care by an employee of a family member with that disease. The only evidence apparently offered by the grievant in the Sherman case was a statement from her personal physician that her exposure to the disease could jeopardize the health of others including her fellow employees. Arbitrator Sherman did not consider that evidence sufficient to support her grievance. In the present case the decision is based on the position of the Iowa Department of Public Health, Division of Disease Prevention, and that of the Polk County Health Department regarding the exclusion from school of children with chicken pox and is supported by the record of the administration of ELM 513.32 d in the Des Moines office. Arbitrator Sherman in his opinion specifically notes the lack of any evidence to support the grievant's allegation in his case that other employees were permitted to use sick leave under similar conditions.

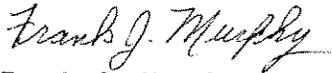
4/ (continued from page 16)
of sick leave to an employee with chicken pox on August 26, 1989 (Joint Exhibit No. 14). The Employer may contend that this policy of granting sick leave to such employees comes under ELM 513.32 a, "illness", not ELM 513.32 d. Its statement of the policy in Joint Exhibit No. 2, p. 5, and in Employer Exhibit No. 3 would seem to indicate, however, that this policy more properly falls under ELM 513.32 d (2). Question can be raised at any rate about the Employer's different interpretation and application of the term, contagious disease, in the same regulation.

AWARD

Management violated the National Agreement, specifically Articles 10 and 19, and Employee and Labor Relations Manual, Part 513.32, by denying the grievant's request for sick leave covering the period June 21, 1989, through June 24, 1989.

Management is directed to recredit the twenty-four hours of annual leave which she used for the period June 22, 1989, through June 24, 1989, and to grant twenty-four hours of scheduled sick leave for that period.

Respectfully submitted,


Frank J. Murphy

November 15, 1989
Kansas City, Missouri