

C# 10090

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration) GRIEVANT: Moe Biller
between) POST OFFICE: Washington, DC
UNITED STATES POSTAL SERVICE) CASE NO: H4C-NA-C 88
and)
AMERICAN POSTAL WORKERS UNION)
)

BEFORE: DANIEL G. COLLINS

APPEARANCES

For the U.S. Postal Service: Kevin B. Rachel, Esq.,
Senior Attorney
For the Union: Lawrence J. "Larry" Gervais,
National Business Agent

Place of Hearing: Rm. 1-P-629, 475 L'Enfant Plaza, S.W.
Washington, DC

Date of Hearing: March 20, 1990

AWARD: The Postal Service did not violate the 1984-
87 National Agreement when it issued the
revision to Sectio 867.53 of the Employee and
Labor Relations Manual.

Date of Award: June 21, 1990

Daniel G. Collins
(Signature of Arbitrator)

The Issue

The parties stipulated that the issue is whether or not the Postal Service violated the 1984-87 National Agreement when it issued the revision to Section 867.53 of the Employee and Labor Relations Manual (the "ELM")?

The Background of the Dispute

The Postal Service employs approximately 80 full-time physicians, who are employees of the Service and whose responsibilities include conducting pre-employment examinations, examining and treating employees who suffer job related injuries, conducting fitness for duty examinations, and determining whether certain work is suitable for employees with medical limitations. The work of such full-time physicians is sometimes supplemented by the employment, under contract, of part-time physicians ("contract physicians"). Furthermore, the Service also utilizes the services of such contract physicians, including clinics and hospitals, at locations, particularly in rural areas, at which there are no full-time Postal Service physicians.

On March 17, 1983 the Service issued a revision of ELM Chapter 860, entitled "Medical Services," which provided in Section 867.5 as follows:

.51 Full-time medical personnel must not accept any postal employee as a private patient. Medical personnel are defined as physicians, nurses, and other professional personnel. This rule applies to new patients and does not affect physician/patient relationships that were in existence prior to the issuance of this subchapter. The exception is where an existing private relationship creates an actual conflict of interest as defined in ELM 661.42, in which

case the relationship must be terminated.

.52 Physicians who are completing residencies and serving as area medical officers may not refer employees to themselves at the facility where they are serving their residency. Also, medical officers may not make referrals to a relative. Relative is defined in Handbook P-11, 312.323.

.53 Part-time and contract medical personnel may treat postal employees privately within the bounds of the general ethical conduct standard (661.42) which provides that outside employment may not interfere with the duties and responsibilities of postal service employment. Specifically, part-time or contract medical personnel may not:

- a. Serve as the private physician to, or treat in private practice, postal employees sustaining occupational injuries or illnesses.
- b. Continue to treat postal employees for a non-job-related injury or illness when the employee initially sought treatment while the physician, nurse, etc., was acting in an official capacity with the Postal Service.

At all reverant times the Postal Service applied 867.53 to mean that contract physicians who initially treated an employee for an on-the-job injury were not prohibited from providing follow-up care if the employee so chose. Contract physicians who so provided follow-up care were compensated directly by the Postal Service.

In 1986 the Office of Workers' Compensation Programs ("OWCP") which administers the Federal Employees Compensation Act ("FECA"), began to require job-related injuries to be reported, after two visits, even if employees had chosen to receive medical care from contract physicians. OWCP also required that an employee make an election as to whether to have follow-up care provided by the contract physician or another physician of their choice. Furthermore OWCP began paying all physicians, including

contract physicians directly, although ultimately the Postal Service had to reimburse OWCP for any and all such payments. Given these changes in OWCP's procedures the Postal Service became concerned that ELM 867.53, as issued in 1983, could be read to include contract physicians providing follow-up care as "private physicians" precluded from treating postal employees for occupational injuries. The Service therefore in 1987 issued a revision of Chapter 860, which provided in part as follows:

867.5 Conflict of Interest

867.51 Full-time medical personnel must not accept any postal employee as a private patient. Medical personnel are defined as physicians, nurses, and other professional personnel. This rule applies to new patients and does not affect physician/patient relationships that were in existence prior to the issuance of this subchapter. The exception is where an existing private relationship creates an actual conflict of interest as defined in 661.42, in which case the relationship must be terminated.

867.52 Postal medical officers who are treating postal employees in the scope of their duties may not refer employees to their private practice or a relative. Relative is defined in Handbook EL-311, 312.323.

867.53 Part-time and contract medical personnel may treat postal employees privately within the bounds of the general ethical conduct standard (661.42) which provides that outside employment may not interfere with the duties and responsibilities of Postal Service employment. Specifically, part-time or contract medical personnel may not:

- a. Coerce, solicit, or inhibit an employee from the free choice of physician in the treatment of an occupational injury or illness.
- b. Serve as the private physician to, or treat in private practice, postal employees sustaining occupational injuries or illness unless the physician is the physician of choice. Any treatment of an employee for an occupational injury or disease by a part-

time or contract physician will, in all cases, be considered to be performed within the scope of the physician's postal duties or pursuant to the terms of any contract with the Postal Service.

c. Continue to treat postal employees for a non-job-related injury or illness when the employee initially sought treatment while the physician, nurse, etc., was acting in an official capacity with the Postal Service.

867.54 The provisions described in 867.53 are also applicable to medical clinics or other similar facilities under contract with the Postal Service.

Article 19 of the National Agreement provides that the Service shall have the right to make changes in "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" only insofar as they are "not inconsistent" with the Agreement and are "fair, reasonable, and equitable."

The Union, in 1985, grieved the performance of follow-up care by contract physicians as a violation then ELM then 867.53a. That grievance was denied and is awaiting national-level arbitration in Case H4C-4C-C 9961.

The Union in 1987 grieved the proposed issuance of the present, revised ELM Chapter 860. That grievance is at issue in this proceeding.

The Parties Positions

The Union's position is two-fold: First, it argues that the 1987 revision of 867.53 was inconsistent with the Agreement and/or failed to meet the "fair, reasonable and equitable" test. Second, the Union argues, as it did in protesting the use of

contract physicians to provide follow-up care in its 1985 grievance, that any such use of such physicians represents a prohibited conflict of interest under the Code of Ethical Conduct set forth in ELM 661.

The Postal Service denies that revised ELM 867 in any way violates Article 19 of the Agreement. The Service emphasizes that it is important to allow employees to choose whether they wish to continue follow-up care with the contract physician who initially treated them. Also, the Service notes, given the limited number of primary providers of medical services in some communities, precluding employees from utilizing physicians, including clinics and hospitals under contract with the Postal Service, may radically restrict employees' access to medical care. Furthermore, there is no evidence that the revision has operated unfairly or unreasonably over the three years of its existence. As to alleged conflict of interest, the Service argues that there have been no claims of specific conflicts, and that the assertion that doctors are necessarily susceptible of unethical conduct does an unwarranted disservice to the medical profession.

Discussion

The Arbitrator does not agree with the Union's reading of ELM 867.53a as it was issued in 1983. The Arbitrator believes it to be most reasonable to read that provision only as prohibiting contract physicians from treating postal employees for job-related injuries outside of their performance of duties under contract to the Postal Service. The Union's reading of 867.53a

would deprive injured employees of chosen access for follow-up care to the initially treating physician--surely a result that could not be justified on medical grounds, and might do a disservice to injured employees.

The revision of 867.53 then is nothing more than an effort to ensure continuation, in light of the 1986 changes in OWCP procedures, of the Service's policy of allowing employees to choose to have follow-up care provided by the initially treating contract physician. The Arbitrator regards that policy as imminently fair, reasonable and equitable in that it provides employees the important right, if they choose, to have follow-up care provided by the physician that initially treated them.

The Union argues, though, that any provision which permits a physician who is under contract with the Postal Service to treat an employee in connection with a Workers' Compensation covered injury, constitutes a conflict of interest in violation of ELM 661. Essentially, the Union is arguing that a contract physician's interest in and responsibility generally to the Postal Service may override his or her obligations to the patient, in terms of treatment regimen, determination as to when and under what circumstance the employee may work, etc. It is not only actual injury that the Code of Ethical Conduct addresses, the Union stresses, but the appearance of conflict as well.

The Code of Ethical Conduct defines certain situations in which a conflict exists. See, e.g., § 661.412 and .43. Other of its provisions are more general and less definitive, e.g., those dealing with employment under 661.42. The question then of what constitutes a prohibited conflict in the area of concern here is

somewhat problematical. In that connection it is of some importance that there apparently never been any specific complaint that follow-up treatment by a contract physician has resulted in injury or detriment to the postal employee being so treated. Furthermore, with respect to conflicts of interest, particularly apparent conflict, disclosure and waiver usually remove any impediment. Here OWCP requirements as well as 867.53b, mandate that an employee make an election as to whether that employee will receive follow-up care from the contract physician who gave the initial treatment or some other physician of the employee's choice. On that point the employee would of necessity know if his initial treatment were by a contract physician. Moreover, 867.53a prohibits the contract physician from interfering in any way with the employees' free choice of physician. The Arbitrator does not believe the revision of 867 violates the Code of Ethical Conduct.

The Union also argues that revised ELM 867 accords contract physicians "an advantage over others not in the Postal Service who are engaged in a similar business or activity," in violation of ELM 661.42h. The Arbitrator disagrees. It is not any regulation authorizing a contract physician to provide follow-up care, but rather that fact the physician who was involved in the initial treatment happened to be a contract physician, that may provide such physician with an "advantage." In any event, the Union on this point is attempting to assert a claim on behalf of professionals who are not even employed by the Service. Such a claim does not seem to be authorized by Article 19 of the Agreement.

For the foregoing reasons the Arbitrator finds that the Service did not violate the Agreement.

Dated: June 21, 1990

Daniel G. Collins
Daniel G. Collins, Arbitrator

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated 1984-87 and having duly sworn, AWARDS as follows:

The Postal Service did not violate the 1984-87 National Agreement when it issued the revision to Section 867.53 of the Employee and Labor Relations Manual.

Daniel G. Collins
DANIEL G. COLLINS, Arbitrator