C-32862

REGULAR ARBITRATION PANEL

APR 17 2017

John J. Casciano, NBA
NALC - New England Region

In the Matter of the Arbitration	*	
	*	
between:	*	Grievant: A. Gagnon
	*	
United States Postal Service	*	Post Office: Waterbury, CT
	*	
and	*	USPS Case No: B11N-4B-C 16577711
	*	
National Association of Letter Carriers Union, AFL,CIO	*	NALC Case No: 01-82-16
	*	DRT # 14-373019

BEFORE: Lawrence Roberts, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Glenn C. Smith

For the Union: Charles Carroll

Place of Hearing: Postal Facility, Hartford, CT

Date of Hearing: March 21, 2017

Date of Award: April 11, 2017

Relevant Contract Provision: Article 13-19

Contract Year: 2011

Type of Grievance: Contract

Award Summary:

This grievance was filed alleging light duty work and a timely return to his regular assignment was not provided to the Grievant. The record shows the Grievant's medical restrictions prevented him from returning to work. Even though there was an error in the medical documentation, it was up to the Grievant to present a corrected version to Management. And with that reasoning, the instant grievance is hereby denied.

Lawrence Roberts

Lawrence Roberts, Panel Arbitrator

SUBMISSION:

This matter came to be Arbitrated pursuant to the terms of the Wage Agreement between United States Postal Service and the National Association of Letter Carriers Union, AFL-CIO, the Parties having failed to resolve this matter prior to the arbitral proceedings. The hearing in this cause was conducted on 21 March 2017 at the postal facility located in Hartford, CT. Testimony and evidence were received from both parties. A transcriber was not used. The Arbitrator made a record of the hearing by use of a digital recorder and personal notes. The Arbitrator is assigned to the Regular Regional Arbitration Panel in accordance with the Wage Agreement.

OPINION

BACKGROUND AND FACTS:

The Grievant in this case is employed at a Waterbury Ct Post Office, the Lakewood Delivery Unit. He has been employed by the Agency since 2006 working as a Letter Carrier.

The record indicates the Grievant is a twenty eight (28) year Army Veteran with sixteen (16) years of active service. The Grievant was deployed on 3 May 2015 and released from duty on or about 28 February 2016, due to an injury. Following corrective surgery the Grievant applied for a light duty assignment on 18 April 2016 and then full duty as of 24 May 2016. The Grievant did not return to work until 9 June 2016.

It was that return to work delay which resulted in this instant grievance being filed. The Union contends the Grievant

was not returned to Postal employment upon the conclusion of his military deployment in a timely fashion. To the contrary, the Employer insists the Grievant was unable to return due to the restrictive nature of his medical documentation. Therefore, the Agency insists the Parties Agreement was not violated in any way.

Obviously, the Parties were unable to resolve this dispute during the prior steps of the Parties Grievance-Arbitration Procedure of Article 15. The Step B Team reached an impasse on 13 July 2016.

It was found the matter was properly processed through the prior steps of the grievance procedure. Therefore, the dispute is now before the undersigned for final determination.

At the hearing, the Parties were afforded a fair and full opportunity to present evidence, examine and cross examine witnesses. The record was closed following the receipt of oral closing arguments by the respective Advocates.

JOINT EXHIBITS:

1. Agreement between the National Association of Letter Carriers Union, AFL-CIO and the US Postal Service.
2. Grievance Package

UNION'S POSITION:

It is the contention of the Union that Management has violated the Parties Agreement, namely Articles 13 and 19 as it pertains to light duty assignments.

The Union also claims the Grievant was eligible for protections under the Uniformed Services Employment and Reemployment Rights Act of 1994. According to the Union, one of the focal points of the law is the reemployment matter is to be treated expeditiously and the Employer has a two week period to re-employ the returning veteran.

As explained by the Union, this did not happen in this instant case. Instead, the Union argues the Grievant was cleared to return to work with some medical restrictions on or about April 18, was cleared for full duty in May 2016 and was returned to work on 9 June 2016.

The Union insists the evidence and testimony will show that between April 16 and June 8, the Grievant was not allowed to return to work. And according to the Union, the Employer's defense in this matter is contradictory.

It is the opinion of the Union that there is no question as to whether work was available as it was stipulated that the part time work force worked many hours during this period.

According to the Union, there is no question the Grievant was eligible for protections under the National Agreement as well as the various laws including FMLA and the USERRA. It is the view of the Union these laws were cast aside by the Postal Service and the Grievant was treated as though he had no legal protections.

The Union also notes the Union's Step B Team Members attempted to remand the instant grievance back to Step A for further development. However, according to the Union, this request was vetoed by Management's Step B Team.

And with that said, the Union argues that, now at arbitration, Management now wants to introduce a high level Postal official as an expert witness. It is the contention of the Union this witness should not be allowed to testify as this evidence was not presented at the Step A or Step B level.

As a remedy, the Union requests the instant grievance be sustained. The Union asks the Employer be found in violation of Articles 13 and 19, as well as the USERRA. The Union also requests a cease and desist order. Additionally, the Union

requests the Grievant be made whole for all lost wages, benefits and the average overtime worked for the period of 18 April 2016 through 9 June 2016.

COMPANY'S POSITION:

It is the position of the Postal Service, first of all that this is a contract case and the burden of proof rests with the Union. In the opinion of the Employer, there was no violation of the USERRA law or the National Agreement.

Management suggests the Union must show a prima facie case for an alleged violation. And the Service believes the Union will not be able to support their allegations, there is no merit to their case and the instant grievance should be denied.

The Service believe the Grievant was not able to return to work until June 9, 2016 due to a Military Service related disability, and therefore qualifies for incapacitation pay to be paid by the military through June 8, 2016.

According to the Employer argument, the Grievant failed to submit medical documentation to return to work with his request for light duty. The Agency also mentions the records indicate the Grievant received an Honorable discharge from the military with no documented disability.

Management insists the Grievant submitted conflicting documentation to the Postal Service and failed to provide the required medical documentation to support the request for light duty and show when he was injured. The Service also asserts the Grievant submitted a request for light duty that was so restrictive, the Postal Service could not place him back into his previous position as a Letter Carrier as required under USSERA law and was unable to provide any work to the Grievant based on his medical restrictions.

The Agency insists the medical forms and documentation provided by the Grievant which appear in this file are not only ineligible as presented but also vague on the alleged injury and/or limitations.

It is Management's position that it is the Employee's responsibility to provide the documentation of their military service and the documentation for their medical issues to the Postal Service.

The Service proffers the Grievant received documentation from the military and submitted requests to the military for

incapacitation pay. According to the Employer's argument, the military had declared the Grievant was not fit for civilian employment until May 19, 2016. Management argues the Grievant attempted to return to work in a light duty status while at the same time was requesting the military pay him for the same period.

According to the Employer, the conflicting medical documentation provided by the Grievant, his physician and the military required clarification before the Postal Service could return the Grievant back to work.

Managements also mentions the Service requested a release of the Grievant's medical information which would allow the Postal physician to speak with the Grievant's physician. The Employer indicated the Grievant's physician did not return the message from the Postal physician.

According to the Agency, the Grievant then submitted a request to return to work on full duty, however, the medical form had a circle around the Cervical Lift Section of the form. And finally, on June 8, 2016, both physicians collectively determined the circle on the form was an unintentional error on the part of the Grievant's physician.

It is the argument of the Employer the Grievant's physician identified the error on June 8, 2016 and the Grievant was returned to work on June 9, 2016.

The Service maintains proper procedures were followed in this matter. The Agency insists the Grievant failed to provide definitive medical documentation through the entire time period from April 18, 2016 through June 9, 2016. Management also believes the record will show the military is the responsible party for the Grievant's injury and disability.

The Employer implies claims the record will show the military is in the process of approving incapacitation pay for the Grievant.

And accordingly, based on all of the above, the Postal Service argues there is no violation of either the USSERA Law or the National Agreement and therefore requests the instant grievance be denied in its entirety.

THE ISSUE:

Did Management violate Articles 13 and 19 of the National Agreement by keeping the Grievant home after he requested light

duty even though there was work available and CCAs were gainfully employed while the Grievant is not and if so, what is the proper remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 13
Assignment of Ill or Injured Regular Workforce Employees

ARTICLE 19
Handbooks and Manuals

DISCUSSION AND FINDINGS:

At the onset, there was a disagreement between the Parties regarding the issue in this matter. However, after hearing and considering all the arguments in this case, I find no reasoning to alter the issue as formulated by the Step B Team. In fact, the respective presentations made by the Advocates convinced me the issue at hand was properly formulated by the Step B Team.

Article 13 of the Parties Agreement identifies a general obligation of the Employer to offer light duty assignments. Each request is to be given careful attention and reassignments are to be made to the extent possible.

The crux of this particular matter rests within the unambiguous directive extended to the Parties via the following language found in Article 13, Section 2, Paragraph A which provides:

"Any full-time regular or part-time flexible employee recuperating from a serious illness or injury and temporarily unable to perform the assigned duties may voluntarily submit a written request to the installation head for temporary assignment to a light duty or other assignment. The request shall be supported by a medical statement from a licensed physician or by a written statement from a licensed chiropractor stating, when possible, the anticipated duration of the convalescence period. Such employee agrees to submit to a further examination by a physician designated by the installation head, if that official so requests".

Management, via the above language, has agreed to accept an obligation to provide light duty work to those Employees that are duly qualified and have made the proper requests for such an assignment. And all of that is based on the assumption that certain work is available to be performed that conforms to the respective medical limitations of the respective Employee to the following extent defined in Paragraph C:

"Installation heads shall show the greatest consideration for full-time regular or part-time flexible employees requiring light duty or other assignments, giving each request careful attention, and reassign such employees to the extent possible in the employee's office…"

In my view, the Employer is under no contractual obligation to create or make work to satisfy light duty assignments. Instead, the Service's obligation only extends to provide

already existing work, if possible, to an Employee requesting such an assignment. And that available work must also fall within the defined parameters of the employee's medical restrictions.

At the hearing, the Union raised objection to Employer testimony and documentation. The arbitrator requires a total understanding of the dispute at hand. And during the progression of any hearing, with the limited knowledge concerning the issue available to the arbitrator, of any particular case, at that given time of presentation, it becomes virtually impossible to determine whether or not certain evidence or events are relevant or should even be included for consideration. And it has always been my protocol to accept a broad range of evidence, oftentimes over the objection of the opposing party, for the mere sake of later determining its value following my full understanding of the matter. So unless it is very clear at the time of introduction, any objectionable evidence may be accepted at face value and certainly subject to full consideration at a later time.

In this case, the testimony and evidence offered by the Employer over the Union's objection had absolutely no impact in my decision in this matter. Instead, controlling in this case was the Grievant's medical documentation. The evidence shows

there was an error made by the Grievant's physician in his medical documentation. It was that error that caused the delay in the Grievant being returned to either a light duty assignment or regular duty work. And in my considered opinion, the convincing evidence in this matter failed to show an Employer violation of either the National Agreement or the Uniformed Services Employment and Reemployment Rights Act of 1994.

The fact of the matter is, it was the erroneous medical documentation that prevented the Grievant from returning to work. And in my view, the Grievant is the one ultimately responsible to present the Employer with accurate medical documentation. Furthermore, the Grievant should have been aware of the error and the reasoning for the Employer not allowing him to return to work.

As previously mentioned, the burden is on the Union to prove work was available within the Grievant's medical restrictions. And clearly in this case, without the ability to perform any tasks involving lifting, it would be impossible for the Grievant to return to work. And in my opinion, the Grievant should have been aware of the requirements and the content of his own medical documentation. Furthermore, it was the Grievant's sole responsibility to obtain a correction from his physician.

Under cross examination, the Grievant admitted that he was aware his physician's physical limitations would not allow him to perform the duties of a letter carrier. The Grievant also validated he was aware of restrictions limiting standing and walking to two (2) hours and no lifting.

The instant grievance will be denied in its entirety. As previously discussed, the record clearly shows the Employer was not responsible for the delay in the Grievant's return to work. While there may have been erroneous documentation submitted by the Grievant's physician, it was the responsibility of the Grievant to have the error(s) corrected. There was no evidence indicating the Employer violated the Parties Agreement.

AWARD

The instant grievance is denied.

Dated: April 11, 2017
Fayette County PA