

C-27066

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)
between) Grievant: Shane Wasson
UNITED STATES POSTAL SERVICE) Post Office: Bristol, CT
and) USPS Case No: B01N4BC06187305
NATIONAL ASSOCIATION OF LETTER) DRT # 14-050146
CARRIERS, AFL-CIO)

BEFORE: EILEEN A. CENCI

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APPEARANCES:

For the U.S. Postal Service: Anthony Salzo, Jr.

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For the Union: Gennaro Mascolo

John J. Casciano, NBA
NALC - New England Region

Place of Hearing: Hartford, CT

Date of Hearing: March 28, 2007

AWARD: The grievance is sustained. The FMLA coordinator violated Article 10 when they concluded that the 2nd FMLA packet submitted by the grievant was incomplete and needed more clarification. The grievant's request for FMLA status is to be approved retroactive to June 22, 2006 on the basis of the request he submitted on that date.

Date of Award: April 26, 2007

Regular Regional Arbitration Panel

Eileen A Cenci

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VICE PRESIDENT'S
OFFICE
NALC HEADQUARTERS

OPINION

STATEMENT OF PROCEEDINGS:

This matter was arbitrated pursuant to the grievance and arbitration provisions of a collective bargaining agreement (National Agreement) in effect between the United States Postal Service (Service) and the National Association of Letter Carriers (NALC or Union). A hearing in this matter was held before me on March 28, 2007 in Hartford, Connecticut. The parties agreed to rely upon the written record in the case and neither party called witnesses. Oral arguments were made and the record was closed on the day of the hearing.

ISSUE:

The parties agreed to adopt the issue statement framed by the B Team:

Did the FMLA coordinator violate Article 10 when they conclude the 2nd FMLA packet incomplete and it needed more clarification?

If so, what shall the remedy be?

FACTS:

The grievant is a 10% disabled veteran who submitted NALC Form 2 requesting coverage under the Family and Medical Leave Act on March 3, 2006. The form had been completed by his health care provider and identified a condition of traumatic arthritis affecting his shoulder. The form stated that the condition was of indefinite duration and also stated that the grievant was not presently incapacitated, but that he was restricted to working nine hours per day (J. 2 #4). The grievant received a response to his request from the FMLA coordinator dated April 21, 2006 which stated that the certification he had provided lacked clarity in terms of the probable duration of the incapacity and a description of the employee's restrictions.

The grievant submitted a second Form 2 completed by the same health care provider and dated June 22, 2006. The form was almost identical to the first one except that it added in response to question 3 (b) that it would be necessary for the grievant to take time off from work "intermittently" (J. 2 #18). The form again described the duration of his condition as "indefinite" and

stated that he was "not presently incapacitated" but was restricted to working nine hours per day (J. 2 #18). Upon receiving this second Form 2 the FMLA coordinator responded by letter to the grievant dated June 28, 2006, again stating that the certification lacked necessary medical information for the employer to contemplate the rate or frequency of absence.

The Union filed a grievance on behalf of Mr. Wasson, contending that the Form 2 filed by the grievant on June 22, 2006 was complete and that his request for FMLA coverage should have been accepted. The matter was not resolved through the grievance process and was appealed by the Union to arbitration.

POSITIONS OF THE PARTIES:

National Association of Letter Carriers [Union]

The Union argues that the FMLA certification submitted by the grievant was complete and should have been accepted by the Service. It was clear from the form that the grievant's condition was chronic, so it was appropriate to answer the question about duration by saying that it was "indefinite". It was also clear that the grievant had no present incapacity, but was restricted to working nine hours per day. No further clarification was necessary or possible. FMLA-90 is controlling and recognizes that the duration of health conditions may be unpredictable and may require intermittent absences. The Union asks that the grievance be sustained, that the Postal Service be ordered to approve the grievant's request for FMLA certification on the basis of the Form 2 he submitted, and that the FMLA certification be retroactive to March 1, 2006.

United States Postal Service [Service]

The Service emphasizes that it did not deny the grievant's FMLA request, but merely asked that the medical professional give an estimate with reasonable medical certainty as to the duration of the condition and the employee's restrictions. The Service agrees that FMLA 90 is controlling and has been accepted by the parties at the national level. The Service maintains that FMLA 90 permits it to seek clarification and obtain the type of information that was requested here. It asks that the grievance be denied.

DISCUSSION:

While the Service has a right to seek clarification, where necessary, of the medical information submitted in support of FMLA requests, I find that it had insufficient basis in this case to require additional clarification. It is clear from reading the June 22, 2006 Form 2 that the grievant suffers from a chronic condition of traumatic arthritis to his shoulder as a result of an old fracture, that his condition is unlikely to improve and its duration is therefore "indefinite", and that he is not presently incapacitated from performing any of the duties assigned to him or from working a full eight hour shift. At the same time it is clear that the grievant is not able to work more than nine hours per day. Although the grievant is not presently incapacitated, the medical provider certifies that he may have to take some time off on an intermittent basis due to the condition. Nothing on the Form 2 submitted by the grievant seems confusing or contradictory. The grievant is able to perform the full duties of his position but may not work more than nine hours in a day. Intermittent leave might be necessary.

The Service argues that it is permitted to require greater specificity when medical providers use terms such as "indefinite" duration and "intermittent" absences. The parties agree that FMLA-90 is the controlling document in this regard, since the parties agreed at the national level to be guided by it when the certification for a chronic condition uses descriptors such as "unknown", "indefinite" or "intermittent" (J. 2 #24). Having carefully reviewed FMLA-90, I find that it does not provide a definitive answer, however. FMLA-90 acknowledges that FMLA leave may be taken intermittently and requires only that employees notify their employer "as soon as practicable" when the need for leave is unforeseeable. The term "as soon as practicable" is held to require at least verbal notice within one or two business days of when the need for leave becomes known to the employee. FMLA 90 also notes that not all absences under the FMLA will be predictable and that certification cannot be withheld because a health care provider did not submit an exact schedule of leave.

The Form 2 submitted by the grievant met the requirements set forth in FMLA-90 in my view, and the grievant should not have been required to provide further clarification. His condition is chronic and it is difficult to see how its duration could be described more precisely than as "indefinite". The fact that his only restriction is that he may work no more than nine hours in a day is very clear. The fact that he may need intermittent leave is also clear, and according to the FMLA 90 he is obligated only to notify management as soon as he knows when such leave will be needed, or as

soon as practicable if the need is unforeseen. The grievance is sustained and the Service is directed to approve the grievant's request for FMLA coverage retroactive to June 22, 2006, since that is the date of the request that is the subject of this grievance arbitration.