

C#18540

REGULAR ARBITRATION PANEL
WESTERN REGION

In the Matter of Arbitration) CASE NO: E94N-4E-D 98026689
)
 Between) GTS NO: 011493/REGION 4
)
 UNITED STATES POSTAL SERVICE) GRIEVANT: SCOTT MAYS
 SCOTTSDALE, ARIZONA)
) DATE OF HEARING: 05/22/98
 And)
) DATE OF BRIEFS: 06/12/98
)
 NATIONAL ASSOCIATION OF LETTER) HEARING LOCATION:
 CARRIERS, AFL-CIO.) SCOTTSDALE, ARIZONA
)
)
) ARBITRATOR'S
)
) DECISION AND AWARD

BEFORE: CLAUDE D. AMES, ARBITRATOR

APPEARANCES: For the Employer:
Robert "Bob" Golden, Labor Relations Specialist
4949 E. Van Buren, Room 245
Phoenix, AR 85026

For the Union:
Andrew T. Petersen, Regional Administrative Assistant
Denver Region
22461 Interstate 30, Ste 301
Bryant, AR 72022

AWARD: The Postal Service lacked just cause to impose a fourteen (14) day suspension on the Grievant for AWOL based upon the affirmative defense as set forth under the Family and Medical Leave Act. The Grievant is made whole for all lost wages and benefits during the period of suspension and all reference to the suspension shall be removed from his personnel file. The Grievant shall be allowed to substitute his absences with other leave options as prescribed under the Family and Medical Leave Act. The Union's grievance is sustained.

DATE OF AWARD: July 15, 1998

Claude D. Ames
CLAUDE D. AMES, Arbitrator

I.

INTRODUCTION

This arbitration proceeding came on regularly for hearing pursuant to the current 1994-1998 Collective Bargaining Agreement ("CBA") between the parties, UNITED STATES POSTAL SERVICE ("Employer" or "Agency") and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO, LOCAL BRANCH NO. 1902, SCOTTSDALE, ARIZONA ("Union"). Western Regional Panel Member Claude D. Ames was selected to hear the above-referenced grievance. A hearing was held on May 22, 1998, in a conference room at the Hampton Inn, located at 4415 North Civic Center Plaza, Scottsdale, AR. Robert "Bob" Golden, Labor Relations Specialist, appeared on behalf of the United States Postal Service. Andrew T. Petersen, Regional Administrative Assistant (Denver Region), represented Scott Mays ("Grievant") and the National Association of Letter Carriers, AFL-CIO.

In this case, the Union is appealing a fourteen (14) day suspension on the charge of "AWOL" resulting from the Grievant's failure to timely call in for his scheduled duty shift on August 8 and 9, 1997. The fourteen (14) day suspension is a reduction from the initial removal of the Grievant as determined under the parties' Union-Management Pairs (UMPS) Program in the Phoenix District. According to the Union, the Grievant suffers from a allergy and chronic asthmatic condition which qualifies him for protection and family/medical leave, as set forth under the Family and Medical Leave Act (FMLA). The Agency maintains that the imposition of a fourteen (14) day suspension is appropriate based upon the Grievant's AWOL and violation of a prior UMPS's agreement in which the Grievant promised to be regular in attendance and to notify Management in advance of any absences prior to his reporting time. The Agency maintains that the Grievant failed to do this on

August 8 and 9, 1997, and submitted insufficient medical documentation in support of his absences.

The arbitration hearing proceeded in an orderly manner and the parties were given a full and fair opportunity for the examination and cross-examination of witnesses, production of documents and arguments. All witnesses appearing for examination were duly sworn under oath by the Arbitrator. The parties stipulated that the matter was properly before the Arbitrator with no issues of procedural or substantive arbitrability to be resolved. The parties elected to present oral closing arguments in lieu of submitting written post-hearing briefs. The arbitration hearing was officially closed on 6/12/98 after receiving the parties' supporting arbitrable decisions.

II.

ISSUE PRESENTED

The parties mutually stipulated that the issue for resolution before the Arbitrator is as follows:

Did the USPS have just cause to issue Grievant a fourteen (14) day suspension for AWOL?

If not, what shall the appropriate remedy be?

III.

RELEVANT CONTRACT PROVISIONS AND REGULATIONS

ARTICLE 2 - NON-DISCRIMINATION AND CIVIL RIGHTS

Section 1. Statement of Principle

...In addition, consistent with the other provisions of this Agreement, there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act.

ARTICLE 15 - GRIEVANCE-ARBITRATION PROCEDURE

Section 1. Definition

A grievance is defined as a dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Unions which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

ARTICLE 16 - DISCIPLINE PROCEDURE

Section 1. Principles

In the administration of this Article, a basic principle shall be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

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 contained 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.

FAMILY AND MEDICAL LEAVE ACT (FMLA) OF 1993

Section 825.100 - What is the Family and Medical Leave Act?

- (a) The Family and Medical Leave Act of 1993 (FMLA or Act) allows "eligible" employees or a current employee to take job-protective, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of twelve work weeks in any twelve months because of ..., or because the employee's own serious

health condition makes the employee unable to perform the functions of his/her job. In certain cases, this leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

Section 825.110 - Which Employees are "Eligible to Take Leave under FMLA"?

- (a) An "eligible employee" is an employee of a covered *employer* who:
 - (1) has been employed by the employer for at least twelve months, and
 - (2) has been employed for at least 1,250 hours of service during the twelve-month period immediately proceeding the commencement of the leave, and
 - (3) is employed at a work site where 50 or more employees are employed by the employer within 75 miles of that work site.

Section 825.14 - What is a "Serious Health Condition" Entitling an Employee to FMLA Leave?

- (a) For purposes of FMLA, "serious health condition" entitling an employee to the FMLA leave means an illness, injury, impairment, or physical or mental condition that involves:
 - (i) a period of *incapacity* (*i.e.*, inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involve:
 - (A) treatment two or more times by a health care provider, by a nurse or physician's assistant under direction supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or
 - (A) requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direction supervision of a health care provider;

- (B) continues over an extended period of time (including reoccurring episodes of a single underlying condition); and
- (C) may cause episodic rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.).

IV.

STATEMENT OF FACTS

The Grievant, Scott Mays, is a City Letter Carrier at the Scottsdale-Papago Post Office with the date of employment of 10/17/81. On three separate incidences, the Grievant is alleged to have failed to report to work as scheduled and to notify his supervisor in advance of his starting time of each unscheduled absence. On March 4, 1997, the Grievant was absent without leave from 7:30 a.m. through 8:03 a.m. This resulted in an AWOL charge of 33 minutes before he called in at 8:03 a.m. No advance notification was given by the Grievant prior to his start time of his unscheduled absence for the entire day. Again, on May 8, 1997, the Grievant failed to report to work as scheduled and didn't call in his absence until 9:54 a.m. He was then placed in an AWOL status for a period of 2 hours and 24 minutes until he called in at approximately 9:54 a.m. The third incident which gives rise to the Grievant's fourteen (14) day suspension for Failure to Report to Work as Scheduled - AWOL, occurred on August 8, 1997, when the Grievant failed to report to work as scheduled. The Grievant was absent without leave from 7:30 a.m. through 8:05 a.m. (35 minutes, AWOL). According to the testimony of the Grievant's immediate supervisor Les Armstrong; on Friday morning, 8/8/97, the Grievant failed to report to work as scheduled at 7:30 a.m. There was no call-in from the Grievant prior to 7:45 a.m. when his supervisor placed a call to the Grievant's home at approximately 7:45 a.m., in an attempt to inquire as to why the Grievant had not reported as scheduled to work. According to Supervisor Armstrong's testimony, when he contacted the Grievant, the Grievant first

answered the phone in a voice which appeared that he had just woken up. The supervisor asked the Grievant if he was aware of his tardiness of 15 minutes, and reporting time of 7:30 a.m. The Grievant is alleged to have replied "Oh," in a very groggily tone and mumbled something to the effect that he was just waking up and he was disoriented about the time.

The supervisor inquired whether the Grievant was coming into work and he replied "yes". At approximately 8:05 a.m., the Grievant called the station and spoke to Jerry Vogel, Manager at the Papago Station, and informed him that he would not be reporting for work that day. The Grievant is alleged to have informed Mr. Vogel that he was "sick". At approximately 8:25 a.m., Supervisor Armstrong returned a called to the Grievant's home to confirm that he was not reporting to work that day and to advise him that he would have to substantiate his absence by medical documentation. The Grievant is alléged to have stated that he was planning on going to the doctor that day. Later that afternoon at approximately 2:20 p.m., the Grievant called Supervisor Armstrong and indicated that he could not get a doctor's appointment until Monday, August 11, at the Veterans Administration Medical facility. He also informed his supervisor that his VA appointment was not until the 28th of August and he was attempting to move that appointment up, but he could not yet reschedule it. Supervisor Armstrong inquired of the Grievant as to whether he was intending to report to work as scheduled on 8/9/97. The Grievant replied "yes" and indicated that he would have an appointment at 10:00 a.m. on Monday, August 11 with the VA.

On the morning of 8/9/97, at approximately 7:15 a.m. prior to the Grievant's report time, he telephoned Supervisor Armstrong and reported he would not be coming into work that day because he was sick. He further explained that he had seen a doctor at the VA Hospital on the night of 8/8/97 for his allergies. He informed his supervisor that he had been prescribed a very strong allergy

medication by his doctor. He also said that his doctor took his blood pressure and that his blood pressure was high due to the medication. The Grievant was again informed by his supervisor that medical documentation in writing was required upon his return to work for his absences on 8/7-9/97 and upon his return to work on Monday, 8/11/97. He was further reminded, according to the testimony of Supervisor Armstrong, that the Grievant could not place himself on sick leave (unable to perform his duties as scheduled), which would require placement in an off-duty status only by his doctor (Agency Exhibit 2). Supervisor Armstrong testified that on August 8, 1997, when he telephoned the Grievant and was informed that the Grievant was not coming to work, the Grievant stated that he was "exhausted from his allergies, using only single strength Vasconese". The Grievant submitted a medical receipt from the VAMC Phoenix, AR., to Management on August 11, 1997, which was determined to be insufficient medical documentation because of inadequate dates for the periods of absence, in addition, the Grievant's medical statements submitted showed the wrong dates for his absenteeism in which the medical nurse endorsed on August 11, 1997. Management informed the Grievant that his medical documentation was insufficient and gave him ample opportunity, according to Supervisor Armstrong and Station Manager Vogel, to present the required documentation, which he failed to do.

The Grievant testified in his own behalf as follows: That he suffers physical disabilities of chronic asthmatic condition or asthma and severe allergies. He further testified that he received a medical discharge from the United States Military based upon his medical conditions, specifically, his chronic asthmatic condition and his allergies to certain pollens and plants occurring within the area of his delivery route. He further indicated that he is under medication for his condition which oftentimes, due to the strength of the medication, leaves him drowsy in the morning. On the morning

of 8/8/97, the Grievant indicated that he was completely exhausted due to his allergies and his physical condition resulting from constant discomfort during the night. As a result of the Grievant's chronic asthmatic condition and allergic reactions to certain pollens and vegetations, he takes certain medications including steroids to control his condition. When he returned to work on August 11, 1997, the Grievant indicated that he provided documentation from the medical facility that he had gone to to seek medical attention. On August 12, 1997, Supervisor Armstrong denied the Grievant's medical documentation from the family care facility. According to the Grievant's testimony, due to his inability to get a scheduled appointment at the VA Hospital, he sought immediate treatment from the medical care facility who issued him a medical report dated 8/11/97 and again on 8/14/97, at the request of his supervisor. On 8/8/97, the Grievant was seen at the VAMC Phoenix, AR., facility and given a prescription of Prednisone. After submitting this documentation, Management also deemed it to be insufficient. On cross-examination, the Grievant acknowledged his lateness in reporting to work as scheduled including prior absences, tardies and AWOL's as a result of his failure to report timely and to notify his supervisor of his failure to report as scheduled to work. He also acknowledged that neither he or the Union, during the UMPS procedure had argued the applicability of the Family and Medical Leave Act. The parties having been unsuccessful in resolving this dispute under the UMPS program, have mutually agreed to submit the entire dispute to arbitration for final and binding resolution.

POSITION OF THE PARTIESEmployer's Position:

Management has followed the principles as outlined in Article 16 of the National Agreement to provide that discipline shall be corrective as opposed to being punitive. Based upon the Grievant's past disciplinary record of two (2) separate letters of warning and a seven (7) day suspension served, Management found it necessary to issue to the Grievant a suspension of fourteen days for AWOL. None of the medical documentation received from the Grievant was sufficient to disprove Management's position that the Grievant was incapacitated to the point of being disabled from calling in his absence prior to his reporting time and being totally incapacitated from performing his duties. In addition, the Grievant's medical statement received on August 12, 1997, shows the wrong dates for the Grievant's days of absenteeism which the medical nurse endorsed on 8/11/97. Subsequently, the Grievant submitted to Management on 8/27/97 another document which was dated 8/14/97 for the same visit (8/11/97) which stated that the Grievant was out of work, incapacitated due to asthma on 8/8 and 8/9/97. However, when the USPS medical unit personnel contacted the medical nurse who treated the Grievant on 8/11/97, the medical nurse replied that she hadn't seen the Grievant on the date of 8/14/97. The Grievant has submitted a medical receipt from VAMC Phoenix to Management on 8/11/97, which was dated on 8/8/97 and stated "seen this date due to illness 2017 time.

The Grievant was told by Management that this was unacceptable evidence of being incapacitated for 8/8/97, and the AWOL charge would stand unless he provided specific documentation from the VA stating that his illness prevented him from performing his duties. The

Grievant never submitted any further documentation from the VA. The Grievant's statement to Supervisor Les Armstrong on 8/8/97 is at odds with his current position. He informed Supervisor Armstrong that he was not coming to work because he "was exhausted from his allergies, using only single strength Vasconese". Clearly, by the Grievant's own statement made to his supervisor that morning, his reason for not coming to work was due to the fact that he was exhausted and didn't feel like coming into work. In summary, the Grievant has not supported his absence with acceptable evidence of incapacitation due to an illness. Thus, the Postal Service had just cause to impose a fourteen (14) day suspension on the Grievant for AWOL.

Union's Position:

The Employer bears the burden of proof in this case. The Employer must show that the Grievant's absence was not covered by the FMLA. To date, this is something that the Employer has not been able to do. The Service must prove that just because the Grievant did not call in at 7:30 a.m. that somehow he is not protected by federal law. The Employer must show how his documented chronic health condition is not covered by the FMLA, especially in light of the fact that until the hearing, the Employer had not challenged that the Grievant has asthma. The Service alluded to Joint Exhibit 13 and the Grievant's employment application and the fact that it only lists allergies. However, the Grievant completed his medical application in 1981, approximately 16 years prior to the absences cited in the instant case.

There is no doubt, based upon the evidence presented, that the Service was aware that the Grievant suffered from asthma as he had worked for the Service approximately 16 years with this chronic condition. The Grievant was charged with being AWOL for 16 hours. The medical documentation supplied by the Grievant clearly covered this period and meets the requirements of

both the Postal Service and the FMLA. In the past, Mr. May has taken responsibility and accepted the discipline imposed for his irregular attendance due to his chronic medical condition. He has also taken the responsibility and attempted to correct his tardy problem that has been identified by the Employer. His actions are not those of an uncaring employee, but one that shows the willingness to correct his problems. His actions are also not those of a person who shirks his responsibility. Although the Employer would argue that there is no difference between the Grievant and an employee who fails to call in prior to his start time, which can result in disciplinary action if ignored. However, under the FMLA, if an employee's absence is covered by the Act, due to a family or medical condition, the employee enjoys the protection of the FMLA. This Act will forever change the culture of the work place in the way work place attendance is addressed. The Act takes priority over the Employer's operational needs. It is therefore clear that the Grievant is protected by the Act and as a result, the Union's request of the discipline issued to the Grievant be rescinded and that he be made whole for all lost wages and benefits.

VI

DECISION

Postal employees are required to be regular in attendance at their scheduled work stations as a condition of employment. This condition of employment is recognized by the parties under the National Agreement and necessary in order for the Postal Service to carry out its national mission and maintain efficient postal operations. Failure of a postal employee to be regular in attendance as scheduled, subjects the employee to possible disciplinary action for violation of postal rules and regulations. Unless, the absence is scheduled in advance; of an emergency nature, or the employee is within a recognized protected class codified by federal statutory law which the Employer is

obligated to recognize. Such federal statutes are imposed on the parties' National Agreement as external law and mandated by Congress to ensure and promote public policy. Federal statutes which carve out exceptions to the parties' National Agreement create an exception to the Employer's regular attendance policy due to physical or mental handicap conditions granting a special qualified status to an employee ("Rehabilitation Act"), or under the Family and Medical Leave Act ("FMLA") of 1993, which protects employees under specified conditions, from disciplinary actions by the Employer, which would otherwise occur, but for their failure to be regular in attendance.

The FMLA of 1993, as stated in Section 825.100, "allows "eligible" employees or a current employee to take job-protective, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of twelve work weeks in any twelve months because of ..., or because the employee's own serious health condition makes the employee unable to perform the functions of his/her job". Section 825.110 of the Act identifies employees "Eligible to Take Leave" as those "employed for at least twelve months and have been employed for at least 1,250 hours of service during the twelve-month period immediately proceeding the commencement of the leave, and employed at a work site where 50 or more employees are employed by the employer". Further, Section 825.14 of the Act defines "Serious Health Condition" entitling an employee to FMLA leave to include "an illness, injury, impairment, or physical or mental condition that involves a period of *incapacity* (i.e., inability to work ... or perform other regular daily activities ...) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also ... (c) may cause episodic, rather than a continuing period of incapacity (e.g., asthma, diabetes, epilepsy, etc.)."

In a National Joint letter dated 10/16/97, referencing Case Nos. F94N-4F-D 97026204 and

F90N-4F-D 95063343, Pete Bazylewicz, USPS Manager, Grievance and Arbitration, and William H. Young, Vice President, NALC, agreed as follows:

"In a disciplinary hearing involving just cause, the Union may argue as an affirmative defense that Management's actions were inconsistent with the Family and Medical Leave Act."

The parties at the National level have clearly recognized their responsibility to apply and enforce this federal statutory provision protecting postal employees where applicable. Consequently, arbitrators have no less of a responsibility and duty to apply this federal provision where it is raised as an affirmative defense to the Employer's disciplinary action resulting from an employee's irregular attendance (AWOL).

In the instant case, applicability of the FMLA is not barred or waived due to the employee's failure to raise it during earlier forums such as UMPS or the grievance procedure. This federal status may be raised at any point during the disciplinary proceeding where an employee is being charged with failure to be regular in attendance or AWOL. However, the burden of proof rest exclusively on the employee to clearly demonstrate "eligibility" and "serious health condition" as required under the Act. Once an employee establishes clear eligibility requiring status protection, then the Employer is mandated under the FMLA, to treat their serious medical condition and protective status differently, rather than under their disciplinary procedures which would normally apply for employees failing to be regular in attendance, but for the recognized exceptions accorded under FMLA. Notwithstanding the seemingly harsh results which may occur, Congressionally mandated public policy requires that it be implemented by the Employer.

Sufficient evidence supports the Grievant's appeal and protected status under FMLA. The Grievant was medically separated from active military duty with a 10% medical disability for allergies.

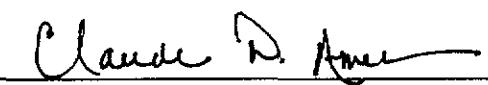
He has a well established medical history for his asthmatic condition and a history, with long standing notice to the Postal Service, of incapacity relating to his condition, which has extended over a period of time, including reoccurring episodes during certain times of the year when his allergic reactions cause episodic, rather than continuing periods of incapacity. This medical synopsis clearly mirrors the Grievant's episodic pattern demonstrated on August 8, 1997, when he informed Supervisor Les Armstrong that he was "exhausted" due to his allergies and medication taken to immunize his condition.

A careful review of the Grievant's medical documentation, submitted in support of his medical visits and treatment, coupled with his Certification of Health Care Provider was sufficient, as defined under Section 825.307 of FMLA, and should have been accepted by Management. The Grievant clearly has a serious medical condition accorded protective status under the FMLA for which leave should have been granted. Accordingly, for the reasons stated above, the Union's grievance is sustained.

AWARD

The Postal Service lacked just cause to impose a fourteen (14) day suspension on the Grievant for AWOL based upon the affirmative defense as set forth under the Family and Medical Leave Act. The Grievant is made whole for all lost wages and benefits during the period of suspension and all reference to the suspension shall be removed from his personnel file. The Grievant shall be allowed to substitute his absences with other leave options as prescribed under the Family and Medical Leave Act. The Union's grievance is sustained.

Dated: July 15, 1998



CLAUDE D. AMES, Arbitrator