

C#08862

REGULAR ARBITRATION PANEL

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In the Matter of the Arbitration	)	GRIEVANT:	BRANCH
between	)	POST OFFICE:	El Cerrito, CA
UNITED STATES POSTAL SERVICE	)	CASE NO:	
and	)	(Management)	W7N-5E-C 815
NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO	)	(Union)	LE10787C
	)		

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BEFORE: Gary L. Axon, ARBITRATOR

APPEARANCES:

For the U. S. Postal Service:

Silas W. Floyd  
Labor Relations Associate  
U. S. Postal Service  
1155 7th Street  
Oakland, CA 94607-9201

For the Union:

Dale P. Hart  
Regional Administrative Assistant  
National Association of Letter  
Carriers AFL-CIO  
Suite 1A  
855 Civic Center Drive  
Santa Clara, CA 95050

Place of Hearing:

Postal Training Center  
Oakland, California

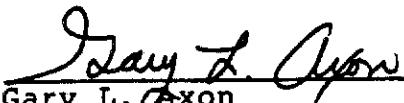
Date of Hearing:

April 18, 1989

AWARD:

The grievance is not arbitrable within the time limits of Article 15, Section 2, Step 1. The grievance is dismissed and denied in its entirety.

Date of Award: May 16, 1989

  
Gary L. Axon  
Arbitrator

## I. STATEMENT OF ISSUE

The parties stipulated to a statement of the issues as follows:

- \*1. Whether or not the grievance was timely filed?
2. If yes, the parties agree that the October 16, 1986 Step 3 agreement will be complied with by the parties.
3. If the grievance is found untimely, the issue on the merits shall be considered moot."

## II. RELEVANT CONTRACTUAL PROVISIONS

### "Article 13

...

#### Section 4. General Policy Procedures

...

G. The following procedures are the exclusive procedures for resolving a disagreement between the employee's physician and the physician designated by the USPS concerning the medical condition of an employee who is on a light duty assignment. These procedures shall not apply to cases where the employee's medical condition arose out of an occupational illness or injury. On request of the Union, a third physician will be selected from a list of five Board Certified Specialists in the medical field for the condition in question, the list to be supplied by the local Medical Society. The physician will be selected by the alternate striking of names from the list by the Union and Employer. The Employer will supply the selected physician with all relevant facts including job description and occupational physical requirements. The decision of the third physician will be final as to the employee's medical condition and occupational limitations, if any. Any other issues relating to the employee's entitlement to a light duty

assignment shall be resolved through the grievance-arbitration procedure. The costs of the services of the third physician shall be shared by the Union and the Employer.

...

## ARTICLE 15

### GRIEVANCE-ARBITRATION PROCEDURE

...

#### Section 2. Grievance Procedure - Steps

##### Step 1:

(a) Any employee who feels aggrieved must discuss the grievance with the employee's immediate supervisor within fourteen (14) days of the date on which the employee or the Union first learned or may reasonably have been expected to have learned of its cause. The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a Union representative. The Union also may initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance. In such case the participation of an individual grievant is not required. A Step 1 Union grievance may involve a complaint affecting more than one employee in the office.

..."

#### III. STATEMENT OF FACTS

This case arose out of a January 30, 1986 "Advance Notice of Discharge" issued to Rubin Reyes. The notice read in relevant part:

"You are hereby given thirty days' advance written notice of discharge from the Postal Service. Based upon the facts set forth below, there is

reason to believe your removal is justified for the following reason(s).

Charge Number 1: Unsatisfactory Conduct/Falsification of PS Form 2485 (Certificate of Medical Examination).

Review of your official medical record reveals that on June 3, 1985, you completed and signed PS Form 2485.

In response to Section A-5 and Section E-2, you checked 'No' in response to questions which asked, in part:

Section A-5 Do you have any medical disorder or physical impairment which would interfere in any way with the full performance of the duties of the position which you are applying?

Section E-2 Do you now have or did you ever have epilepsy, fits, seizures, blackouts?

Subsequent to the completion of your application, on December 24, 1985, while officially on duty, you had what appeared to be a loss of consciousness. This office has received medical documentation that reveals you have nocturnal seizures.

Because of your failure to indicate on PS Form 2485 that you did have/had seizures, you are charged with Unsatisfactory Conduct/Falsification of PS Form 2485 (Certificate of Medical Examination)."

The Union challenged the discharge as "unjust and improper."

The Union and U.S. Postal Service resolved the grievance at Step 3. In a letter dated October 16, 1986, the agreement was reduced to writing as follows:

"In a Step 3 meeting begun on July 2, 1986 and concluded on October 10, 1986 between your Branch 1111 President Paul Rose and me, the above-captioned grievance was resolved in the following manner:

1) Upon receipt of this decision local Management shall schedule the grievant for a fitness for duty examination by a physician selected in accordance with article 13.4G of the National Agreement.

2) If the grievant is found fit for full duty, the Advance Notice of Discharge and Notice of Emergency Suspension, both dated January 30, 1986 shall be rescinded and the grievant shall be returned to active duty without back pay. The non work period shall be considered an absence due to medical reasons. During that time, the grievant may use earned sick leave, earned annual leave, or leave without pay at his option.

3) If item #2 is effected the grievant must withdraw all other appeals which he may have filed concerning the subject notices, including but not limited to EEO, MSPB, and NLRB complaints. Failure to withdraw any other appeal shall render item #2 null and void.

4) If the grievant is found unfit for full duty the subject notices shall stand.

This agreement is made without precedence or prejudice to either party and shall not be cited in any further proceedings pertaining to another employee."

Postmaster Freddie B. Mason wrote to Dr. Willie Wilson, Postal Service Medical Officer, on October 23, 1986 requesting that he schedule Reyes for a fitness for duty examination. (Mgt. Ex. 4). On October 29, 1986, Dr. Wilson examined Reyes to ascertain his fitness for duty as a city carrier.

Dr. Wilson reported the results of the examination of Reyes to Postmaster Mason in a letter dated December 24, 1986. Dr. Wilson placed a limitation on Reyes as follows:

"Cannot drive a U.S. Postal Service vehicle."  
(Mgt. Ex. 5)

The medical report bears a N.A.L.C. date stamp showing the Union received Dr. Wilson's report on December 29, 1986.

On March 12, 1987, Reyes was removed from his letter carrier position at the El Cerrito Post Office. Reyes applied for and was reinstated to the Postal Service at Vallejo, California as a Distribution Clerk, Part-time/Flexible Schedule on April 11, 1987. (Mgt. Ex. 9). As a condition of employment to his new job Reyes had to qualify and maintain a satisfactory work record or be terminated.

Reyes failed to qualify by maintaining "a satisfactory record of work performance" and was removed from the U. S. Postal Service effective June 26, 1987. (Mgt. Ex. 9). The Union filed a Step 1 grievance dated August 1, 1987 alleging the October 16, 1986 Step 3 settlement had been violated. (Jt. Ex. 9). The Step 2 appeal summarized the Union's claim to be:

"Grievance #: 1E10787C

**FACTS:** By step 3 decision (#W4N-5C-D 17065 & 17066) dated October 16, 1986, El Cerrito Management was instructed to schedule the grievant for a fitness for duty examination by a physician selected in accordance with article 13.4G of the National Agreement. Instead the grievant was scheduled for a fitness for duty examination with Postal Medical Officer Willie Wilson. As of this date local Management has not complied with the step 3 decisions mentioned above.

**CONTENTIONS:** As the grievant has not properly been scheduled for a fitness for duty examination, local Management has not complied with the step 3 decisions mentioned above and is therefore in violation of Article 15 of the National Agreement.

CORRECTIVE ACTION REQUESTED: Branch 1111 NALC requests that El Cerrito Management immediately comply with step 3 decisions W4N-5C-D 17065 & 17066 and supply NALC Branch 1111 with a list of Five Board Certified specialists in the field in question and schedule the grievant for a fitness for duty examination with the physician selected. Following this local Management is to comply with the remainder of the step 3 decision in full."

This grievance was filed by the NALC, not Reyes.

Management denied the grievance on the grounds the August 1, 1987 grievance was untimely. Union elevated the case to arbitration. At the arbitration hearing the parties stipulated that the only issue to be decided was whether or not the Union's grievance was timely filed. Depending on the Arbitrator's decision, the parties further stipulated as to the appropriate remedy. The case was submitted to the Arbitrator on written documents and oral argument. No witnesses were called to testify by either party. The issue is properly before the Arbitrator for decision.

**IV. POSITION OF PARTIES**

**A. U. S. Postal Service**

Management does not dispute the validity of the October 16, 1986 settlement agreement. By stipulation Management concedes that if the grievance is found timely, the appropriate remedy is compliance with the Step 3 settlement agreement. It is the position of Management that the Union grievance of August 1,

1987 failed to meet the fourteen day time limit established in Article 15, Section 2, Step 1.

Management points out that the Step 3 settlement agreement dated October 16, 1986, required local managers to schedule the fitness for duty examination on receipt of the settlement decision. A request was made to Dr. Wilson to schedule Reyes by Postmaster Mason in a letter dated October 23, 1986. According to Management, the time limits began to toll fourteen days after receipt of the Step 3 decision on October 20, 1986. Hence, the Arbitrator should find the August 1, 1987 grievance failed to meet the fourteen day time limit by nine and one-half months.

Management next argues even if the Arbitrator finds the receipt of the Step 3 decision did not trigger the running of the fourteen day time limit, the receipt of the medical report of Postal Service Medical Officer Wilson by the Union on December 29, 1986, did start the fourteen day time period. According to Management, the Union became aware of the facts giving rise to a grievance on December 29, 1986. Under Article 15, Section 2, the Union had fourteen days to initiate a grievance. Because the Union waited until August 1, 1987, the Arbitrator should hold this grievance is time barred.

With respect to the Union's argument of a "continuing grievance," Management asserts the Union should not be permitted to remain silent for nine and one-half months before filing a grievance. Management reasons what really prompted this

grievance was Reyes' failure to qualify on his new job as a Distribution Clerk in Vallejo. Therefore, Management submits Union should not be allowed to benefit from its good faith efforts to accommodate the medical problems of Reyes.

B. The Union

The Union alleges its grievance arose out of Management's violation of paragraph 1 of the October, 1986 Step 3 decision. From the viewpoint of the Union that settlement agreement required Management to schedule Reyes for a fitness for duty examination under the terms of Article 13, Section 4(G). Section 4(G) established a procedure by which the employee is examined by a doctor selected from a list furnished by the local medical society. Because Dr. Wilson is the Postal Medical Officer, Reyes was scheduled for a fitness for duty examination in violation of the Step 3 decision letter.

The Union claims the breach of the Step 3 decision is a "continuing violation" which repeats itself each day Management does not schedule Reyes for a fitness for duty examination pursuant to Article 13, Section 4(G). Union cited several arbitration awards it believed supported its position the grievance was timely.

The Union also argued that its grievance was timely because it was filed after the termination of Reyes from the Vallejo Post Office in June, 1987. During the course of Union investigation of the removal, it was discovered Management had violated the October, 1986 Step 3 decision.

The purpose of settlement agreements is to resolve grievances, not promote grievances. Union reasons an award in favor of Management would make settlement agreements worthless. Therefore, the Arbitrator should find this grievance was timely filed and order compliance with the October 16, 1986 settlement agreement.

**V. DISCUSSION AND FINDINGS**

The issue presented to this Arbitrator is whether or not the grievance was timely filed. Based on a careful review of the evidence and argument, the Arbitrator concludes for the reasons set forth below the instant grievance is barred by a failure to timely file a grievance over the Step 3 decision letter.

The grievance before this Arbitrator is a "Union" grievance, and not one of a named employee. Relevant contract language on Union grievances states:

"...The Union also may initiate a grievance at Step 1 within 14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance."

The Union grievance dated August 11, 1987 is grounded on the premise Reyes "was not properly scheduled for a fitness for duty examination" as required by the settlement agreement dated August 16, 1986. Union alleged in the grievance that under the terms of the settlement agreement Reyes was required to be

examined by a doctor selected from a panel of five doctors furnished by the local medical society.

Management scheduled Reyes to be examined by Dr. Wilson, the Postal Service Medical Officer. Dr. Wilson examined Reyes on October 29, 1986. He prepared a written medical report dated December 24, 1986, which placed a limitation on Reyes that he could not drive a Postal Service vehicle. The Union received a copy of Dr. Wilson's report on December 29, 1986. (Mgt. Ex. 5).

On December 29, 1986, the Union first became aware of the facts giving rise to their grievance. Specifically, the Union knew that Dr. Wilson, the Postal Service doctor had examined Reyes, rather than a doctor appointed from a list furnished by the local medical society which the Union later alleged violated the Step 3 settlement agreement. There is no dispute Union was aware Dr. Wilson was the Postal Service doctor.

The event which gave rise to this grievance was the examination of Reyes by Dr. Wilson on October 29, 1986. The Union first became aware of the fact of Dr. Wilson's examination on December 29, 1986. Pursuant to Article 15, Section 2, Step 1, the Union has "14 days of the date the Union first became aware of (or reasonably should have become aware of) the facts giving rise to the grievance." The Union waited eight months before it filed the grievance alleging the fitness for duty examination by Dr. Wilson violated the settlement agreement. Based on the fact the August, 1987 grievance is well outside of the contractually

mandated 14 day time limit, this Arbitrator has no choice but to hold the grievance is time barred.

The Union contends the conduct complained of was a "continuing violation." According to the Union, each day Management failed to schedule Reyes for a fitness for duty examination a new violation of the Step 3 settlement agreement occurred. This Arbitrator holds the theory of a "continuing violation" does not apply to the alleged breach of the Step 3 agreement.

The parties to this Collective Bargaining Agreement have placed in the grievance procedure time limits to encourage the prompt and expeditious settlement of disputes. Arbitrators have a responsibility to respect and enforce those contract time limits. When the parties place time limits in the contract, it is not for this Arbitrator to change or alter the express terms and conditions of the Agreement as set forth in the written contract.

The doctrine of continuing violation is explained in Elkouri and Elkouri, How Arbitration Works, 4th ed., 1985, p. 197 as follows:

"Many arbitrators have held that 'continuing' violations of the agreement (as opposed to a single isolated and completed transaction) give rise to 'continuing' grievances in the sense that the act complained of may be said to be repeated from day to day -- each day there is a new 'occurrence'; these arbitrators have permitted the filing of such grievances at any time, this not being deemed a violation of the specific time limits stated in the agreement (although any back pay ordinarily runs only from the date of

filing). For example, where the agreement provided for filing 'within ten working days of the occurrence,' it was held that where employees were erroneously denied work, each day lost was to be considered a new 'occurrence' and that a grievance presented within ten working days of any such day lost would be timely."

(Emphasis added)

The doctrine of continuing violations is frequently misconstrued. In a well reasoned opinion arbitrator Rotenberg wrote on the subject of continuing violation in Board of Education School District 1, 81 LA 41(1983).

"The concept of 'continuing violation' is an elusive one often misunderstood and misapplied by arbitrators and parties alike. Analysis of the precedents, however, shows that the better reasoned cases consistently view allegations of improper pay as falling in that category. Thus, it was said in an early case that 'a continuing grievance is one where the act of the Company complained of may be said to be repeated from day to day, such as the failure to pay an appropriate wage rate or acts of a similar nature.' Bethlehem Steel Company, 26 AL 550, 551 (Feinberg, 1955). Examples of kinds of disputes which have been held to be continuing violations include improper wage rate, Bethlehem Steel Company, 34 LA 896 (1960); change in commission structure, Sears Roebuck & Company, 39 LA 567 (1962); misassignment of work, Copolymer Rubber and Chemical Corp., 40 LA 923 (1963); misclassification of work, Lycoming Division, 43 LA 765 (1964); failure to grant merit increases, Taylor-Winfield Corp., 45 LA 153 (1965); failure to pay proper job rate, Steel Warehouse Company, 45 LA 357 (1965); incentive rate grievances, Blaw-Knox Company, 50 LA 1086 (1968); job classifications and rates, Addmaster Corp., 52 LA 1207 (1969); upward reclassification, Mississippi Structural Steel Company, 55 LA 23 (1970); misassignment of work, Lockheed Missiles and Space Company, 61 LA 91 (1972); and salary increase denial, San Francisco Unified School District, 68 LA 767 (1977). The foregoing cases establish the general principle that in a

continuing or recurring type of grievance the grievance may be filed within the time specified after the first occurrence of the alleged violation 'or following any subsequent repetition or recurrence of the action or behavior which is the basis of the grievance.' The underlying premise of this position 'is simply that a current occurrence of a repeated and continuous violation reasonably and properly can and should be given the same status as if the same current violation were occurring for the first time.' See Sears Roebuck & Company, *supra*."

As can be seen from the above cited cases the doctrine of continuing violation is typically applied to improper payment of wage grievances. It can readily be seen from the wage cases the violation continues each day the employee is improperly paid as opposed to a single isolated and completed transaction.

The arbitration cases cited by the Union were carefully reviewed by this Arbitrator and found to be inapplicable to the facts of the instant grievance.

In the present case, the event which triggered the grievance was a completed transaction. The Step 3 agreement provided:

"Upon receipt of this decision local management shall schedule the grievant for a fitness for duty examination by a physician selected in accordance with article 13.4G of the National Agreement.

(Jt. Ex. 7; emphasis added)

Management received the Step 3 decision and scheduled Reyes to be examined by the Postal Service doctor. It is the act of having Reyes examined by a Postal Service doctor rather than by a doctor appointed from a panel supplied by the local medical society

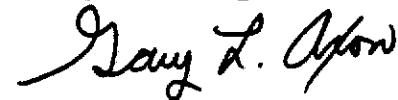
which the Union alleges violated the Step 3 agreement. In no sense can the examination of Reyes by Dr. Wilson on October 29, 1986 be construed to be a continuing violation. Because Dr. Wilson did not examine Reyes on a daily basis, the act complained of by the Union cannot be found to repeat itself from day to day.

In summary, the acts which started the time limitation were the examination of Reyes by Dr. Wilson on October 28, 1986 and the Union's subsequent awareness of the examination on December 29, 1986. Pursuant to Article 15, Section 2, Step 1 the Union has fourteen days from the time the Union first becomes aware of the facts giving rise to the grievance to file a grievance. Because the Union did not file a grievance within the contractually mandated fourteen day period, this Arbitrator must conclude the grievance is time barred.

AWARD

The grievance is not arbitrable within the time limits of Article 15, Section 2, Step 1. The grievance is dismissed and denied in its entirety.

Respectfully submitted,



Gary L. Axon  
Arbitrator

Dated: May 16, 1989