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In the Matter of Arbitration

between

Grievance Nos. H8C-4A-C-
11834, 11772, 11832

UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL SERVICE UNION

APPEARANCES: J. K. Hellquist for the Postal Service;
Gerald "Andy" Anderson and Arthur M. Luby, Esq.,
for APWU; David Noble for NALC

DECISION

These grievances arose under and are governed by the 1978-1981 National Agreement (JX-2) between the above-named parties. The undersigned having been jointly selected by the parties to serve as sole arbitrator, a hearing was held on 11 May 1982, in Washington, D.C. Both parties appeared and presented evidence and argument on the following issue:

Did the Postal Service violate the terms of the 1978-1981 National Agreement by not reinstating the two grievants to the salary levels they would have achieved had they never left the employ of the Postal Service on a separation disability?

The NALC intervened, but its representative took no part in the arbitration proceedings other than to state that the NALC would probably file a brief in support of the APWU position. (Tr. 38) In fact, however, no brief was filed by the NALC.

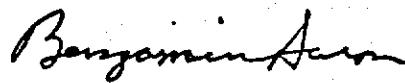
A verbatim transcript was made of the arbitration proceedings, and the Postal Service and APWU each filed a post-hearing brief. Upon receipt of both briefs, the arbitrator officially closed the record on 14 July 1982.

On the basis of the entire record, the arbitrator makes the following

AWARD

The Postal Service did not violate the terms of the 1978-1981 National Agreement by not reinstating the two grievants to the salary levels they would have achieved had they never left the employ of the Postal Service on a separation disability.

The grievances are denied.



Benjamin Aaron
Arbitrator

Los Angeles, California
3 September 1982

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UNITED STATES POSTAL SERVICE

and

AMERICAN POSTAL SERVICE UNION

Grievance Nos. H8C-4A-C-
11834, 11772, 11832

OPINION

I

These three grievances involve two grievants, Helen Sanders and Marie P. Frazier. Both were employed at the South Suburban Illinois facility. Each suffered an on-the-job injury and each was separated because of disability-- Sanders on 25 August 1975 (Ex-10), and Frazier on 22 May 1976 (Ex-8). Both were awarded compensation under the Federal Employees Compensation Act of 1974 (FECA) (JX-6). Both employees partially recovered from their injuries and were reinstated on 25 June 1979, in the same salary levels they had occupied at the time of their separation--level 5, step 2 for Sanders; level 5, step 4 for Frazier (EX-9, EX-11).

The Union claims that the two grievants should have been reinstated at the salary levels they would have occupied had they been continuously employed from the dates of their separation to 25 June 1979 (see UX-1). The Postal Service argues that it reinstated the grievants precisely as provided

by the 1978-81 National Agreement (JX-2) and by the applicable policies of the Postal Service, and more particularly, Sub-chapter 540 (Injury Compensation Program) of the Employee and Labor Relations Manual (ELM), dated 22 October 1979. (JX-8) In rebuttal, the Union charges that the ELM violates the applicable provision of the FECA, 5 U.S.C. §8151(a), which provides:

In the event the individual resumes employment with the Federal Government, the entire time during which the employee was receiving compensation under this chapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

It is conceded that this provision applies to postal employees; section 1005(c) of the Postal Reorganization Act of 1970 expressly provides:

Officers and employees of the Postal Service shall be covered by [the provisions of the FECA] relating to compensation for work injuries.

The Postal Service replies that the Union has misconstrued the meaning of section 8151(a) of the FECA.

II

A Letter of Intent dated 16 July 1978 between the parties (UX-3) reads in part:

It is understood that the provisions of the [1978-1981] National Agreement and any local agreements are subject to the obligations and responsibilities imposed by the Federal Employees Compensation Act and its implementing regulations. . . .

Similarly, Article XXI (Benefit Plans), Section 4 (Injury Compensation) of the Agreement provides:

Employees covered by this Agreement shall be covered by subchapter I of Chapter 81 of Title 5 [FECA], and any amendments thereto, relating to compensation for work injuries. The Employer will promulgate appropriate regulations which comply with applicable regulations of the Office of Workers Compensation Programs and any amendments thereto.

Article XIX (Handbooks and Manuals) of the Agreement provides in part:

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. . . .

Notice of such proposed changes that directly relate to wages, hours, or working conditions will be furnished to the Unions at the national level at least thirty (30) days prior to issuance. At the request of the Unions, the parties shall meet concerning such changes. If the Unions, after the meeting, believe the proposed changes violate the National Agreement (including this Article), they may then submit the issue to arbitration in accordance with the arbitration procedure within thirty (30) days after receipt of the notice of proposed change. Copies of those parts of all new handbooks, manuals and regulations that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall be furnished the Unions upon issuance.

In PB 21101, dated 16 December 1976 (EX-1), the Postal Service set forth its injury compensation program implementing section 8151 of the FECA. Paragraph XIV-B-2 of the procedures provided:

If the injury or disability is overcome within a period of more than one year after the date of commencement of compensation, make all reasonable efforts to place and accord priority in placing the employee in his former or equivalent position within USPS or within any other department or agency.

Section 413.323 (Injury Compensation) of the ELM dated 1 April 1978 (UX-2) provided:

An employee on official absence due to an injury compensable under rules of the Office of Workers' Compensation Programs shall receive credit for such period of absence as if duty with the Postal Service had been continuous.

Both grievants cited this provision in their grievances.

In October, 1979, the U. S. Department of Labor and the Postal Service jointly promulgated implementing guidelines for their joint rehabilitation program (EX-4). Exhibit 29 of the guidelines illustrated a hypothetical case which, according to the Postal Service, represents "the exact fact circumstance that exists in this case" (Tr. 30), namely, reinstatement to the same grade and step held at the time of injury.

In PB 21215, dated 22 October 1979 (JX-8), the Postal Service published subchapter 540 (Injury Compensation Program) of the ELM. Section 546.14 provided in part:

When any employee, current or former, has partially recovered from a compensable injury or disability, the USPS must make every effort toward reemployment. . . . These employees may be returned to any position for which qualified, including a lower grade position than that held when compensation began.

Section 546.4 (Restoration Rights) specifically provided for the possibility of reemployment to the former grade/step, to a higher grade, or to a lower grade/step than that held at the time of injury or disability.

In settlement of a NALC grievance, the Postal Service

and the NALC executed a letter agreement from William E. Henry of the Postal Service to Vincent R. Sombrotto, President of NALC, dated 26 October 1979 (EX-5), adopting a new Part 546.14 of the ELM, reading in part:

.142 When a former employee has partially recovered from a compensable injury or disability, the USPS must make every effort toward reemployment consistent with medically defined work limitation tolerances. Such an employee may be returned to any position for which qualified, including a lower grade position than that held when compensation began.

This language, to which you indicated you and other Unions with whom you discussed it are amenable, incorporates procedures relative to the assignment of employees to limited duty that you proposed.

Subchapter 540 of the Employee and Labor Relations Manual was published on October 22, 1979, as a Special Postal Bulletin. It is the intent of the Postal Service to publish Part 546.14 with the language set forth in this letter, separately, after transmitting it to the Unions under Article XIX of the National Agreement. Part 546.14 subsequently will be published along with the rest of Subchapter 540 in the Employee and Labor Relations Manual.

The approved language was subsequently incorporated in subchapter 540 and published in PB21230, dated 31 January 1980 (EX-6).

Section 546 (Reemployment of Employees Injured on Duty) of the ELM dated 20 May 1981 (EX-7), the most recent introduced in evidence, repeated in section 546.11 that the Postal Service "has legal responsibility to employees with job-related disabilities under 5 U.S.C. 8151 and the Office of Personnel Management's (OPM) regulations, as outlined below." The following regulations distinguish, as did the

earlier ones, between disabilities fully overcome within one year and those overcome in more than one year. Section 546.41 provides:

OPM Regulations. OPM has responsibility for the implementing regulations of 5 USC 8151. These regulations are codified in 5 CFR Part 353. 5 USC 8151(a) provides that an individual, injured or disabled on duty, who resumes employment with the USPS is to be credited with the time during which compensation was received for purposes of certain rights and benefits based on length of service.

Section 546.425 (Salary Determination) provides, as did the same section in PB 21215, previously quoted, for the possibility of reemployment to the former grade/step, to a higher grade, or to a lower grade/step than that held at the time of injury or disability.

Section 422.3 (Step Increases) of the ELM dated 20 May 1981 (JX-7) provides:

:31 Eligibility Requirements. Eligibility for a periodic step increase is based on four conditions. An employee must have:

- a. Received and currently be serving under a career appointment.
- b. Performed in a satisfactory or outstanding manner during the waiting period.
- c. Not received an equivalent increase during the waiting period.
- d. Completed the required waiting period according to the table below.

From step	To step	Waiting Period
5.	6	44 weeks
6.	7	44 weeks
7.	8	34 weeks
8.	9	34 weeks
.....		

III

It is at once apparent that section 413.323 of the ELM dated 1 April 1978, previously quoted, upon which the grievants originally relied, has no bearing on these grievances. Section 413.323 refers to an employee "on official absence due to an injury," whereas the grievants were totally separated from the Postal Service's employ because of their disabilities.

The various regulations and procedures applicable to the reemployment of employees injured on duty previously quoted all support the Postal Service's contention that it has the right, in the case of employees previously separated from employment because of job-related injuries, who have overcome their disabilities in more than one year, to reinstate them at the same, lower, or higher levels and ranks they occupied at the time the separations occurred. Admittedly, section 8151(a) of the FECA is susceptible of the interpretation placed upon it by the Union, although the Postal Service argues that inasmuch as the grievants were not in its employ from the dates of their separation until 25 June 1979, when they were both reinstated, they could not have satisfied at least one of the eligibility requirements for step increases, previously quoted, namely, "Performed in a satisfactory or outstanding manner during the waiting period." Of even more persuasive effect, in my view, is the Union's failure to challenge the various Postal Service regulations, of which it had full and timely notice, within the

30 days required under Article XIX of the Agreement.

Ultimately, the Union's case appears to rest upon an exchange of letters in 1978 between Paul N. Carlin, Assistant Postmaster General, Employee Relations Department, and Arch S. Ramsay, Director, Bureau of Recruiting and Examining, U.S. Civil Service Commission, and upon the testimony of Raleigh Neville, a policy analyst with the Office of Personnel Management. On 22 December 1979, Carlin wrote to Ramsay (UX-4), in part as follows:

This letter relates to a November 30, 1978, meeting between representatives of the Postal Service, the Department of Labor and your office (Mr. Horvitz and Mr. Neville) concerning restoration rights of injured employees under 5 U.S.C. 8151. This has become a particular concern because the Postal Service and the Department of Labor are embarking on a program aimed at restoring to duty many former postal employees who were injured. The precise extent of our obligations to restore an injured former employee and our obligations to an employee who is restored, take on great significance as there may be an interplay between the restoration and the applicable collective bargaining agreement which, in the case of the Postal Service (unique among federal employers), are legally binding and enforceable, through binding arbitration, unfair labor practice charges before the National Labor Relations Board, or resort to the courts. Therefore, we pose the following questions for your consideration and advice: . . .

3. Does 5 U.S.C. 8151(a) apply to a former employee whose disability is partially overcome more than one year after the commencement of compensation, and who is restored to duty by the employing agency? . . .

On 6 March 1979, Ramsay replied to Carlin (UX-5), in part as follows:

This is in response to your letter of December 22, 1978, concerning the restoration rights of injured employees. Since receipt of your letter our staffs

have had extensive discussions on this matter. We are pleased to have this opportunity to further respond to the questions you posed. For your convenience, we have keyed our answers to question numbers in your letter. . . .

3. Section 8151(a) provides that an employee who resumes employment with the Federal Government is to be credited with the time during which compensation was received for purposes of rights and benefits based upon length of service. This section applies if the individual is reemployed regardless of whether the employee is fully recovered or partially recovered. . . .

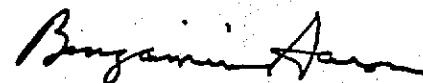
Should you have any further questions or wish to discuss this, please call Raleigh Neville on 632-6817.

At the arbitration hearing, Neville testified that his office is charged with the responsibility for administering Section 8151, and that he was involved in drafting OPM's regulations, a statement seemingly borne out by the last sentence of Ramsay's letter to Carlin, quoted above. Neville testified, more specifically, that he had drafted Ramsay's answers to the nine questions posed by Carlin, and that those answers represent current as well as previous OPM policy.

Under cross-examination, Neville testified that since March, 1979, there has been no further correspondence on this issue between the U.S. Civil Service Commission or OPM and the Postal Service, even though the current Postal Service regulations were promulgated after that date; that neither he nor his office has reviewed the various regulations submitted in evidence in this case, nor expressed an official opinion about them; and that nobody in OPM has ever advised the Postal Service that its regulations promulgated in

October, 1979, fail to conform with the law.

Whatever the intended meaning of section 8151, nothing in the FECA prohibits the Union from agreeing with the Postal Service on the regulations that shall govern its application. This the Union obviously has done, even though a procedure exists under Article XIX of the Agreement whereby it could have challenged those regulations on legal or equitable grounds. As the Postal Service points out, correctly in my view, the arbitrator's function is to interpret and apply the Agreement. In the circumstances of this case, there is no necessity to look to the external law. Accordingly, I conclude that the grievances must be denied.



Benjamin Aaron
Arbitrator