

C-26893

REGULAR ARBITRATION PANEL

In the Matter of Arbitration)
between) Grievant: James Gribbin
UNITED STATES POSTAL SERVICE) Post Office: Providence
and) USPS Case No: B01N4BC06215482
NATIONAL ASSOCIATION OF LETTER) DRT #14-050642
CARRIERS, AFL-CIO)

BEFORE: EILEEN A. CENCI

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APPEARANCES:

For the U.S. Postal Service: Robert LoPreste

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For the Union: John Milauskas

John J. Casciano, NBA
NALC - New England Region

Place of Hearing: Providence, Rhode Island

Date of Hearing: January 3, 2007

AWARD: Management violated Article 19 of the National Agreement when, on July 27, 2006, the Grievant's request for advanced sick leave was denied. The denial was not based upon substantial evidence and was therefore arbitrary. The grievant is to be awarded the advanced sick leave he requested.

Date of Award: February 2, 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 January 3, 2007 in Providence, Rhode Island. The parties appeared and were given a full and fair opportunity to be heard, to present evidence and argument and to examine and cross examine witnesses.

The Union called Robert McKenna and James Gribbin as witnesses. The Service called Michelle Rachlow and Gerard Botelho. All witnesses testified under oath. At the conclusion of the testimony the parties made oral arguments in support of their respective positions and the record was closed at that time.

ISSUE:

The parties agreed to adopt the issue statement from the B team:

Did Management violate Article 19 of the National Agreement when, on July 27, 2006, the Grievant's request for advanced sick leave was denied?

If so, what is the appropriate remedy?

FACTS:

The grievant, James Gribbin, is a letter carrier in Providence Rhode Island who has been employed by the Postal Service since May 1987. On July 5, 2006 the grievant applied for 160 hours of advanced sick leave, to be taken between June 30, 2006 and December 31, 2006. His request was accompanied by a note from his physician, Eric Berthiaume, stating that the grievant was currently undergoing a six-month treatment, during which he could be expected to experience some side effects

of medication. The doctor also stated that the grievant's overall prognosis is "extremely good" and that he expected full recovery after the treatment was completed (J. 2 #4). The request for advanced sick leave was denied by Gerald Botelho, Manager of Customer Service Operations (MCSO), in a letter to the grievant dated July 27, 2006 (J. 2 #6). Mr. Botelho denied the request because he found no evidence that the grievant would be able to repay any sick leave advanced to him, and based that conclusion on a review of the grievant's past attendance records. Mr. Botelho noted that the grievant entered on duty on May 23, 1987 and had earned over 2000 hours of sick leave in the time he had been employed, yet his sick leave balance was 6.0 hours and his annual leave balance 41.39 hours at the time of the denial.

The grievant testified that the condition for which he was being treated at the time he requested advanced sick leave was Hepatitis C. His treatment involved weekly injections as well as medication, and the side effects he suffered included extreme fatigue and severe depression. The grievant was unable to work full-time while undergoing treatment, but his doctor expected that he would be able to return to full-time work approximately four to six weeks after completing the treatment. The grievant's treatment was completed on November 30, 2006 and he had not yet returned to full-time work on the date of the hearing, but expected to be able to work full time by February 1, 2007.

The grievant testified that he had difficulty getting a response to his advanced sick leave request, and that he was not asked to explain the reasons for his heavy use of sick leave. The reason he had almost no accumulated sick leave and annual leave was because he had a back injury as a result of two work-related incidents where he fell down stairs.¹ He had also used some of his sick leave for hepatitis diagnosis and treatment before applying for advanced sick leave. There was no current discipline in the grievant's file related to excessive absences at the time he requested advanced sick leave and there were no restrictions on his use of sick leave. He testified that he plans to work approximately ten to twelve more years.

All requests for advanced sick leave in Providence are referred to the main office. Gerald Botelho, as MCSP, oversees all city operations and oversees the managers at all branches and

¹ There is some dispute as to whether the grievant's absences resulted from work related injuries, with the Service pointing out that if that had been the case, his absences would not have been charged as sick leave.

stations. He is responsible for making decisions on advanced sick leave requests and is the person who made the decision to deny the grievant's request, although the grievant does not work directly for him. Mr. Botelho spoke to Mike McKeon and Michelle Rachlow when he received the grievant's request, and asked them about the grievant's leave usage in the past. He also reviewed an electronic attendance report and noticed that the grievant had a high number of both unscheduled absences and LWOP. Although Mr. Botelho had no doubt that the grievant would return to work following his treatment for hepatitis, he denied the request for advanced leave because he doubted that the grievant would be able to repay the leave within a reasonable period of time, given his past pattern of using leave almost as quickly as he accumulates it.

The Union filed a grievance over the denial of the advanced sick leave request and filed an information request. Union steward Robert McKenna testified that he brought up the information request at both the Informal and Formal A meetings, but was not provided with any information in response to his request. Michelle Rachlow, the manager of the Elmwood Station who did the informal and Formal A meetings, stated that she gave the Union the grievant's attendance record for the past five years before the Formal A meeting (J. 2 #12).

CONTRACT AND MANUALS

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 continued in effect except that the Employer shall have the right to make changes that are not inconsistent with the Agreement and that are fair, reasonable, and equitable.

Employee Labor Relations Manual (ELM)

513.5 Advanced Sick Leave

513.511 May Not Exceed Thirty Days

Sick leave not to exceed 30 days (240 hours) may be advanced in cases of an employee's serious disability or illness if there is reason to believe the employee will return to duty. Sick leave may be advanced whether or not the employee has an annual leave or donated leave balance.

513.512 Medical Document Required

Every request for advanced sick leave must be supported by medical documentation of the illness.

POSITIONS OF THE PARTIES:

National Association of Letter Carriers [Union]

The Union recognizes that the Service has discretion in granting advanced sick leave under §513.511, but notes that the denial cannot be unfair, arbitrary or capricious. The Union argues that the Service failed to respond to its information request. It further maintains that the Service did not have grounds to deny the grievant's request for advanced sick leave. The grievant has suffered from two serious medical conditions, hepatitis and lower back problems, both of which have been medically documented and approved under FMLA. His doctor informed the service that his prognosis was extremely good and there was no evidence that the grievant would be unable to return to work or pay back the leave. There is also no evidence that the grievant abused his sick leave, since he has not been disciplined for using excessive sick leave. In denying the request, the Service relied heavily on the fact that the grievant, a long-term employee, had almost no accumulated sick leave. However, the mere fact that an employee has a low sick leave balance is not grounds to refuse a request for advanced sick leave. As several arbitrators have noted, such reasoning would make a mockery of the provision, since any employee requesting advanced sick leave has, by definition, a low sick leave balance. No one in management spoke to the grievant about the reasons for his low sick leave balance before denying his request. Under the circumstances of this case the denial of the grievant's request was arbitrary and capricious since it was not supported by a factually-based good reason. The Union asks that the grievance be sustained and that the grievant be awarded the advanced sick leave he requested.

United States Postal Service [Service]

The Service points out that the Union bears the burden of proving a violation of the contract by a preponderance of the evidence. The language of §513.511 is permissive, not mandatory, and the Service has the right to deny requests as long as it exercises its discretion in a reasonable way.

Moreover, arbitrators have concluded that the Service may properly consider not only whether an employee is likely to return to work, but whether he is likely to be able to pay back the loan in a reasonable period of time. It is therefore reasonable to consider an employee's past use of sick leave, since an employee who consistently uses all the leave he accrues will be unable to pay back the loan within a reasonable period of time. In this case management made the decision to deny the grievant's request after appropriately considering all the facts, including the grievant's past use of sick leave. The manager was not required to meet with the grievant before making a decision, since he had made a reasonable investigation. The Union was provided with written information responsive to its information request prior to the Formal A grievance meeting. The decision to deny the grievant's request for advanced sick leave was not arbitrary or capricious and the grievance should be denied.

DISCUSSION:

The plain language of §513.511 permits, but does not require, the Service to advance up to 30 days of sick leave to employees who have a serious disability or illness, where there is reason to believe that the employee will return to duty. Numerous arbitrators have considered the standards that must be applied when evaluating a management decision to deny such a request, and have concluded that management may not exercise its discretion in an arbitrary and capricious manner. This standard leaves management with substantial discretion, requiring only that the decision be factually-based and that a reasonable person reviewing the request could come to the same decision. Arbitrator Foster's 1984 decision in C28250 has been considered the benchmark decision establishing the standard of review. Arbitrator Foster concluded that the granting of advanced leave "...is left to the exercise of sound managerial discretion, as distinguished from unfettered discretion." In other words, "...the denial of an employee's legitimate request without a factually based good reason becomes so arbitrary as to constitute an abuse of that discretion subject to reversal in arbitration." Arbitrator Foster noted that one good reason for denial would be that the employee may not be able to return to duty and repay the advanced leave, and another good reason would be evidence that the employee had abused sick leave in the past by excessive use without good cause. The advance of sick leave is considered analogous to a loan, and the Service is entitled to repayment of that loan within a reasonable period of time. §513.511 contemplates that the loan will be repaid when the employee

returns to work and accrues more sick leave that will then be repaid to the Service.

While §513.511 refers explicitly to the employee's return to duty but not his ability to repay, arbitrators since Foster have considered both the employee's ability to return to work and his ability to repay the leave. Some, like Arbitrator Reeves, have concluded that the two issues are almost always intertwined, since an employee who is unlikely to return to work will be unable to repay the leave, while an employee who returns will accrue sick leave rapidly enough to repay the loan within a reasonable time (C04028786). Other arbitrators, however, have found that management may reasonably deny a request for advanced sick leave even where an employee is likely to return to duty, if the evidence suggests that the employee is unlikely to be able to repay the loan within a reasonable period of time. One factor that may be considered in making that determination is whether the grievant's lack of accumulated sick leave has been caused by a few lengthy illnesses or injuries, as opposed to a pattern of using sick leave as soon as it accrues, with no evidence of major illness or injury (Levak C03189802). Virtually all arbitrators are in agreement that the lack of accumulated sick leave cannot, in itself, be considered a reason to deny a request for advanced sick leave. Any employee requesting advanced sick leave undoubtedly lacks substantial accumulated sick leave, and to deny requests on that criterion alone would render the advanced sick leave provision meaningless.

Applying the ELM language and accepted review criteria to the facts of this case, I conclude that the Service did not have a reasonable basis to deny the grievant's request on the facts that were available when the decision was made. The grievant's request, on its face, satisfied several of the requirements for advanced sick leave: it was based on a serious disability or illness that had been properly documented, his prognosis was excellent and his doctor had certified that the grievant could be expected to make a full recovery. Moreover, there was no discipline related to attendance in the grievant's file and no evidence that he had been placed on restricted sick leave. The request was denied, according to Mr. Botelho, solely because the grievant's ability to repay the advance was questionable. This is a proper consideration by management and it is true that the grievant had virtually exhausted the sick leave he had accumulated over many years of service. However, it is universally agreed among arbitrators that the absence of accumulated sick leave cannot, standing alone, be considered grounds to deny a request for advanced leave. All employees requesting advanced sick leave, by definition, lack sufficient accumulated leave to meet their current need. In

determining whether to grant or deny a request for advanced sick leave, the Service may properly look to the employee's pattern of sick leave usage, including whether the absences have been caused by one, or a few, major injuries or illnesses that are unlikely to recur. Mr. Botelho considered the pattern of usage in this case and concluded that the grievant's absences had not been caused by a single major illness. He therefore concluded that the grievant's pattern of sick leave usage raised serious questions about his ability to repay the loan. Neither Mr. Botelho nor the grievant's supervisor, however, asked Mr. Gribbin to explain his sick leave usage, either verbally or in writing, prior to denying his request. Had such a request been made, the grievant would have explained that most of his absences were caused by two major health conditions: lower back pain resulting from earlier injuries and the Hepatitis C for which he was being treated. His explanation may not have altered management's ultimate decision, but would have provided more complete information on which to base a decision.

It is true that management is not required to interview an employee or request the employee's explanation of sick leave usage before denying a §513.511 request. However, by not doing so management may place itself in a situation where the request is being denied almost entirely on the impermissible basis that the employee has exhausted his accumulated sick leave. In the circumstances of this case, I conclude that a full and fair investigation would have included an opportunity for the grievant to explain his sick leave usage before his request was denied. For the reasons set forth above, I conclude that there was no substantial factual basis for the denial of the grievant's advanced sick leave request and that the denial was therefore arbitrary.