

C# 00191

AIRS NUMBER 3696

IN THE MATTER OF THE)
ARBITRATION BETWEEN)
United States Postal Service)
Ft. Worth, TX)
Employer,)
-and-)
American Postal Workers)
Union)
Union.)

OPINION AND AWARD
SIC-3A-C-~~21850~~ 28150
C. Ellsworth

Before:
Robert W. Foster, Arbitrator

APPEARANCES

For the Employer:
Holloway Adair, Jr., Labor Relations Executive
For the Union:
John C. Palmeiro, Arbitration Advocate

PRELIMINARY STATEMENT

The undersigned was appointed to arbitrate a dispute between the United States Postal Service (Employer) and the American Postal Workers Union (Union) arising out of a grievance pursued by the Union on behalf of Clerk C. Ellsworth (Grievant) to this arbitration proceeding according to the National Agreement between the parties. A hearing was held on March 22, 1984 in Fort Worth, Texas, attended by the Grievant and the above-named representatives of the parties who were accorded full and equal opportunity to present evidence and arguments. Both parties elected to file post-hearing briefs which were

received by April 26, 1984, thereby closing the record and bringing this matter before the arbitrator to render a final decision according to the terms of the National Agreement.

ISSUE

Whether the Employer violated the National Agreement when it disapproved the Grievant's request for 120 hours of advanced sick leave and, if so, what shall be the remedy?

PERTINENT PROVISIONS FROM THE EMPLOYEE AND LABOR RELATIONS MANUAL

513.3--Authorizing Sick Leave

.311 General. Sick leave cannot be granted until it is earned, except as provided in 513.5.

.32 Conditions for Authorization

- e. Medical Treatment for Disabled Veterans. (Sick leave, annual leave, or I.WOP, as may be necessary, is granted.)

513.5--Advance Sick Leave

.511 May Not Exceed 30 Days. Sick leave not to exceed 30 days (240 hours) may be advanced in cases of serious disability or ailments if there is reason to believe the employee will return to duty. Sick leave may be advanced whether or not employees have annual leave to their credit.

BACKGROUND

This Grievant complains of the Employer's failure to grant Grievant's August 1, 1983 request for 120 hours of advanced sick leave. The corrective action requested is that Grievant be granted 120 hours of advanced sick leave retroactive to the date of her request.

Grievant, presently employed as a FTR District Clerk, commenced her employment with the Postal Service in November, 1980, following her discharge from active duty military service with a compensable service connected disability of 10%. As part of her application for initial employment Grievant's

Certificate of Medical Examination pertaining to her initial appointment reflects a negative response to the question of whether she had any medical disorder or physical impairment which would interfere with the performance of the duties of the position for which she was applying.

While Grievant has never been disciplined for unsatisfactory attendance, she was placed on restricted sick leave in January, 1983, based on an accumulation of hours of sick leave. This action was grieved and resolved at Step 2 on February 4, 1983 with the following statement:

"Due to the circumstances in the particular case, in all but three (3) absences being approved in advance, Ms. Ellsworth will be removed from sick leave restriction effective upon receipt of this decision."

Grievant was not issued a removal letter until July 21, 1983.

On August 1, 1983, Grievant submitted a PS Form 3971 requesting advanced sick leave. This was accompanied by a written statement that the purpose was to cover two weeks of hospitalization and one week for recuperation thereafter in connection with a "veterans administration related absence." Grievant's attending physician who had been treating Grievant for over a year for a "provisional diagnosis of functioning bowel disorder," provided a written statement dated July 29, 1983, that explained Grievant was being admitted to the hospital on August 1, 1983 for the anticipated period of at least two weeks followed by an additional week for recuperation.

The Postmaster, who did not appear as a witness at the arbitration hearing, responded with a written communication to Grievant dated August 22, 1983 citing Part 513.511 of the Employee and Labor Relations Manual and containing the following statement: "Based on evaluations and recommendations from your supervisors as to the possibility of your repaying the advanced sick leave, I cannot give approval to your request." It was this action that triggered the instant grievance.

The Step 3 denial of the grievance that brought this matter to arbitration stated that the decision to approve sick leave is discretionary with the Postmaster and was "denied on the basis of the employee's past record of sick leave usage."

Grievant's current supervisor, who was not present at the station in August, 1983 to participate in the initial recommendation to disapprove Grievant's request for advanced sick leave, accepted the Grievance at Step 1 and investigated it. She testified that she had received the Grievant's Form 3972, and found the Grievant's attendance record to be unsatisfactory based on 101 hours of sick leave during a one year period. She did not, however, review the Form 3971, "Request for, or notification of, absence," which reflects the reason for Grievant's absences as being based on her service connected disability.

SUMMARIZED POSITION OF THE PARTIES

The Union

While conceding that the granting of advanced sick leave is discretionary on the part of the Postmaster, the Union contends that Grievant should have been granted advanced sick leave as authorized by the E&LR Manual and the Presidential Executive Order No. 5360. In support of this position, the Union points out that Grievant followed the proper procedures for applying for advanced sick leave by filling out the 3971 form and attaching the doctor's statement explaining the reason to enter the hospital for testing and evaluation of her service connected disability in order to correct the problem which was causing her to lose time from her job. The Union further objects to management's use of Grievant's VA sick leave as grounds for an unsatisfactory rating after being removed from the restricted sick leave at the Step 2 hearing, and charges that the denial of the Grievant's request was discriminatory without considering

the fact that the Grievant would be capable of repaying the advanced sick leave.

The Union views the testimony of management's witnesses as irrelevant since none of them was involved in the decision to deny the request, leaving the Union with having presented a prima facie case based on the uncontroverted testimony of the Grievant.

Accordingly, the Union requests the arbitrator to find in the Grievant's favor and order that she be advanced 120 hours of sick leave retroactive to the date of her original request.

The Employer

The Employer views the issue involved in this Grievance as being simple to resolve since the granting of advanced sick leave is a discretionary right of the installation head and not a contractual provision. Accordingly, it is the Employer's position that the Grievant's request for advanced sick leave was denied based on the provisions as outlined in the E&LR Manual and the Grievant's unsatisfactory attendance record. The Employer denies that the Grievant is entitled to advanced sick leave because she is a disabled veteran under the Executive Order cited by the Union, and contends that even if such an Order did apply to the Grievant no evidence was introduced to support the contention that the diagnostic tests the Grievant was to undertake beginning on August 1, 1983, was causally related to a VA disability which was not indicated when she signed her Form 2485.

Since the Employer finds no probative evidence in support of the Union's allegation, it requests that the Grievance be dismissed.

DISCUSSION AND OPINION

While the Employer correctly observes that Part 513.511 does not mandate the granting of advanced sick leave, but rather employs the permissive word "may," the language does not provide such a simple answer to the question raised by this Grievance as suggested by the Employer's advocate. Having once expressed the policy allowing sick leave to be advanced to an employee up to a 30 day limit for medical reasons, the circumstances under which it will be granted is left to the exercise of sound managerial discretion, as distinguished from an unfettered discretion. That is to say, 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. One such good reason for denial suggested by the language in this section is that the employee may not be able to return to duty and repay the advanced leave. Another would be the evidence that the employee had abused sick leave in the past by excessive use without good cause.

In applying these standards to the record of this case, it should first be noted that there was no evidentiary indication at the time Grievant's request was denied that she would be unable to return to work at the conclusion of the 120 hours of advanced sick leave. To the contrary, management had before it the Grievant's statement, confirmed by her doctor, that the estimated period of absence would be the requested 120 hour of sick leave. And while the denial letter from the Postmaster stated the reason as "evaluations and recommendations from your supervisors as to the possibility of your repaying the advanced," neither the supervisor nor the Postmaster appeared at the hearing to provide evidence relating to any factual basis on which that conclusion could be based. Thus, the naked assertion without any probative evidence going to the point, is insufficient to support the validity of the initially stated reason for the denial.

Once the Grievance was filed, the stated reason for the denial became "the employee's past record of sick leave usage" that had earlier led to Grievant being placed on the restricted sick leave list. But management was apparently convinced that this was not an actual abusive sick leave once it was known that almost all of the leave had been approved in advance due to Grievant's continuing medical problems. Since the official removal of Grievant from the restricted sick list did not occur until July 21, 1983, it is quite possible that the fact of removal was not known to management at the time the advanced sick leave request was denied in August. There is even some doubt as to whether Grievant's current supervisor who processed the Grievance at Step 1 was aware of the reason for Grievant's prior absences since she did not review Form 3971 reflecting the reasons for those absences. In any event, it would be grossly unfair to Grievant to resurrect those pre-August 1983 absences based on admittedly legitimate medical reasons as a justification for now denying Grievant's request for advanced sick leave.

In summary, there is no evidence of record providing any indication that Grievant may not have been able to return to duty had she been granted the requested 120 hours of advanced sick leave, or that she had abused sick leave in the past. To the contrary, the policy authorizing advanced sick leave under Part 513.511 of the E&LR Manual is designed to accomodate an employee in Grievant's position on August 1, 1983 who had legitimately used all available sick leave and was then requesting an advance in order to correct the medical problem that had been causing her to miss time from work.

Accordingly, Employer's denial of Grievant's request for advanced sick leave in August 1983 was an abuse of managerial discretion which this arbitrator cannot allow to stand.

AWARD

After careful consideration of the evidence and arguments of the parties, and based on the reasons set out above, the award is that the Employer violated the National Agreement, and the provisions of the E&LR Manual relating to advanced sick leave incorporated therein by reference, by denying Grievant's request for 120 hours advanced sick leave.

The remedy is that Grievant shall be advanced 120 hours of sick leave retroactive to August 1, 1983 when it was originally requested.

Accordingly, the Grievance is sustained.

Robert W. Foster
Robert W. Foster

June 11, 1984

Columbia, South Carolina