REGULAR ARBITRATION PANEL C-22546

In the Matter of Arbitration	)	
	)	
between	)	
	)	Grievant: Quindonell Calvert
UNITED STATES POSTAL SERVICE	)	
	)	Post Office: Los Angeles, Calif.
	)	
AND	)	Case No.: F98N-4F-C 00200492
	)	A14400C
NATIONAL ASSOCIATION OF LETTER CARRIERS	)	
	)	

BEFORE: Carlton J. Snow, Professor of Law

APPEARANCES: For the Union: Mr. Raymond P. Espana

For the Employer: Mr. Edward Carr

PLACE OF HEARINGS: Los Angeles, California

DATE OF HEARING: August 3, 2001

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer's denial of the grievant's request for advance sick leave was not arbitrary or capricious. Accordingly, the grievance is denied. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: September 6, 2001

REGULAR ARBITRATION PANEL

IN THE MATTER OF ARBITRATION BETWEEN UNITED STATES POSTAL SERVICE AND NATIONAL ASSOCIATION OF LETTER CARRIERS (Quindonnell Calvert Grievance) (Case No.: F98N-4F-C 00200492 A14400C)	)	ANALYSIS AND AWARD Carlton J. Snow Arbitrator

I. INTRODUCTION

This matter came for hearing pursuant to the 1998-2001 collective bargaining agreement between the parties. A hearing took place on August 3, 2001 in a conference room of the postal facility located at 7001 South Central Avenue in Los Angeles, California. Mr. Raymond P. Espana, Executive Vice-president, represented Branch 24 of the National Association of Letter Carriers. Mr. Edward Carr, Labor Relations Specialist, represented the United States Postal Service.

The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, to examine and cross-examine witnesses, and to argue the matter. All witnesses testified under oath as administered by the arbitrator. The arbitrator tape-recorded the proceeding as an extension of his personal notes. The advocates fully and fairly represented their respective parties.

There were no challenges to the substantive or procedural arbitrability of the matter, and the parties stipulated that the dispute was properly before the arbitrator. They authorized the arbitrator to retain jurisdiction for 90 days after issuance of a decision. The parties submitted the matter on the basis of evidence presented at the hearing as well as oral closing arguments, and the arbitrator officially closed the hearing on August 3, 2001.

II. STATEMENT OF THE ISSUE

The issue before the arbitrator is as follows:

> Did the Employer violate the parties' National Agreement by denying the grievant's request for advance sick leave? If so, what is the appropriate remedy?

III. RELEVANT PROVISIONS

ELM 513.5 Advance Sick Leave
513.511 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.

IV. STATEMENT OF FACTS

In this case, the Union challenged the decision of the Employer to deny the grievant's request for advanced sick leave. The grievant requested 240 hours of advanced sick leave on April 17, 2000. Her stated reason was an impending childbirth. The grievant supplied medical certification of her condition and indicated she could continue working until May 14, 2000 before beginning her leave. She did not specify a date on which she could return to work. In her Request for Advance Sick Leave, the grievant stated that she would be returning "around about [sic] September 2000. (*See* Joint Exhibit No. 2, p. 14.)

The Employer denied the grievant's request. In response, the Union grieved the matter. When the parties were unable to resolve their differences, the case proceeded to arbitration.

V. POSITION OF THE PARTIES

A. The Union

The Union argues that the Employer arbitrarily denied the grievant's request for advance sick leave. It is the belief of the Union that the grievant complied with requirements of ELM Section 513.511 by providing medical certification with a "begin" date as well as an approximate "return" date. Hence, it is the conclusion of the Union that the Employer was obligated to provide the grievant with advance sick leave.

The Union maintains that the Employer exceeded its discretionary authority by denying the request. While conceding that advance sick leave is not an employee right, the Union, nevertheless, contends that the Employer may not arbitrarily deny such a request. The Union asserts that the correct test for approving "advance sick leave" requests is whether or not an employee is able to repay the advanced sick leave. The Union seeks to have the original request for advance sick leave approved and the appropriate hours credited to the grievant's current sick leave balance.

B. The Employer

The Employer believes that the decision to deny the grievant's request for advance sick leave did not violate the parties' National Agreement. According to the Employer, management retained discretionary authority to approve or deny such a request for advance sick leave. In this case, the Employer allegedly exercised its discretion in good faith.

The Employer also believes that the grievant abused the "sick leave" provision of the parties' National Agreement. The decision to deny her advance sick leave allegedly was based on a careful review of her record and was in no way arbitrary or capricious. Hence, the Employer concludes that the grievance must be denied.

VI. ANALYSIS

A. Looking at the Facts in Depth

In this case, the grievant's immediate supervisor was Mr. Eugene Garcia, Jr. Mr. Garcia reviewed the grievant's request for advance sick leave and also examined FORMS 3972 in her file from 1997 to the present. He concluded that her file reflected far too many "call-in" absences and recommended that her request for advanced sick leave be denied. In fact, Mr. Garcia has denied all "advance sick leave" requests which he has been asked to review. (*See* Joint Exhibit No. 2, p. 12.)

On April 20, 2000, Mr. Thomas J. Egan, Manager of Customer Service Operations for the Northwest Area in Los Angeles, denied the grievant's request. He reviewed Supervisor Garcia's recommendation as well as the grievant's five-year sick leave report. He did not elect to interview the grievant. Mr. Egan testified that the grievant, in his opinion, had a record of abusing sick leave. Moreover, he testified that he had considerable doubt with regard to whether the grievant would be able to pay back the advanced sick leave. The grievant, on the other hand, testified she had no doubt that she would be able to return to work following her pregnancy.

Mr. Egan believed he saw evidence in the grievant's record that in 1998 she was abusing sick leave. In 1998, the grievant suffered from back pain and testified that she was off work for approximately 150 hours during the months of November-December. In 1996, the grievant suffered a miscarriage and took a four month absence from work. In that case, however, the grievant had accumulated sufficient hours to cover her absence. The grievant's record also revealed other shorter periods of sick leave, but she was unable to recall specific reasons for any of those absences.

Mr. Egan offered his belief that the grievant, as an ll-year employee, should have accumulated more sick leave than she had accrued. Among employees under Mr. Egan's supervision, the grievant is among those who used the most sick leave during the last four years. Mr. Egan, however, maintained that he did not compare the grievant with other employees in reaching his decision to deny her request but focused on her prior pattern of attendance.

In 2000, the grievant accumulated only nine hours of sick leave. At the same time, management never disciplined her for sick leave abuse or poor attendance. Nor was she placed on Restricted Sick Leave.

Mr. Egan testified that he was amenable to granting advanced sick leave to employees in appropriate cases and, in fact, has done so in the past.

The grievant left work on May 17, 2000 and returned on July 17, 2000. Following her pregnancy, she was diagnosed with congestive heart failure. At the time of her pregnancy, she was unaware of her condition. When she requested advanced sick leave, she did not know she had congestive heart failure. She now is restricted to light duty work.

B. Teaching of the ELM

Section 513.511 of the Employee and Labor Relations Manual states that:

> Sick leave not to exceed 30 days (240 hours) may be advanced in cases of serious disability or ailment 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. (*See* Joint Exhibit No. 2, p. 18, emphasis added.)

Pursuant to Article 19 of the parties' collective bargaining agreement, Section 513.511 of the ELM must be construed as a contractual provision; and ordinary rules of contract interpretation must be applied to it. The parties have a long bargaining relationship and are presumed to be astute in

their careful use of verbiage in the collective bargaining agreement as well as in manuals incorporated by reference into it. While words are imperfect vehicles of communication, arbitrators as well as the common law long have held that "the party who willingly and without protest enters into a contract with knowledge of the other party's interpretation of it is bound by such interpretation and cannot later claim that it thought something else was meant." (*See Perry and Wallis, Inc. v. United States,* 427 F.2nd 722 (1970).)

Use of the word "may" in ELM Section 513.511 meant that the Employer retained discretionary authority to grant or not to grant advance sick leave. As one scholar stated, "No drafter of a document should consciously use *may,* however, when he means *must.*" (*See* Garner, *A Dictionary of Modern Legal Usage,* 354 (1987).) The Union conceded it knew that the Employer retained discretionary authority over granting advance sick leave. No evidence submitted to the arbitrator established that the Employer was required to honor the grievant's request in this case. No evidence suggested that use of the word "may" in Section 513.511 meant anything other than that management retained discretionary control over granting the requested leave nor that the Union challenged management's interpretation.

C. An Arbitrary Denial?

The Union contended that the grievant, nevertheless, should prevail over the Employer's discretionary control of advance sick leave because management had no right to deny such a request arbitrarily. While conceding that an employee has no automatic right to advance sick leave, the Union insisted that management could not be capricious, discriminatory, or arbitrary in rejecting such requests. In this case, management allegedly ran afoul of its duty of good faith to the grievant.

The Union is correct in its assertion that management has an obligation to exercise its contractual discretionary authority in good faith. This duty of good faith is woven into the warp and woof of every contract, and "good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common focus and consistency with the justified expectations of the other party." (*See Restatement (Second) of Contracts,* Section 205, comment a, 100 (1981).) The duty of good faith performance requires management to exercise its discretionary authority under Section 513.511 of the ELM with rationality and sound judgment.

Evidence submitted to the arbitrator established that the Employer complied with its obligation. It is recognized that the grievant's immediate supervisor never has approved a request for advanced sick leave.

In this case, he evaluated the grievant's request for advance sick leave and recommended against it. But he did so only after carefully reviewing her FORMS 3972 . No evidence showed that his was an irrational, arbitrary decision. Moreover, he was not the deciding official.

Mr. Thomas Egan made the decision in the case. He did so after evaluating (1) Supervisor Garcia's recommendation; (2) the grievant's five-year sick leave report; and (3) her general attendance record. Based on those data he made a prediction with regard to whether or not the grievant would be able to repay the advance sick leave on returning to work.

Mr. Egan amassed the following information. In 1997, the grievant used 61.74 hours of sick leave. In 1998, she used 167.09 hours. In 1999, she used 66.17 hours. In 2000, she used 113.83 hours. (*See* Employer's Exhibit No. 2 as well as Joint Exhibit No. 2, p. ll.) By comparison, if the grievant had amassed all her sick leave hours, she would have enjoyed a balance of 1,288 hours. As of June 29, 2001, she had a balance of eight hours. Based on these data, Mr. Egan was charged with making a rational prediction in good faith.

Mr. Egan had to decide whether to grant the grievant 240 hours of advance sick leave. It was his role to speculate with regard to whether he believed she would be able to return to work in order to pay

back the sick leave account. Evidence submitted to the arbitrator failed to establish that he was arbitrary and capricious in concluding that the grievant did not meet the test.

After a 11-year record of employment with the U.S. Postal Service, the grievant has amassed a history of using nearly all her accumulated sick leave. In reviewing her record, it was not unreasonable for Mr. Egan to conclude that the grievant would continue the trend. He concluded that her past provided a prologue to her future, and he was not arbitrary or irrational in the way he went about analyzing the facts before him. The totality of the record failed to establish that in this case the Employer violated its duty to exercise its discretionary authority in good faith.

D. Arbitral Authority

The Union submitted a number of arbitration decisions which it argued supported the grievant's case. In the *Lyons* case, an arbitrator concluded that an employee had been dealt with unfairly by management's denying her request for sick leave. In that case, however, the employee

was able to account for all use of her sick leave. Moreover, her supervisors had concluded that her sick leave record was improving and that her prognosis for recovery was good. Additionally, her supervisor denied her sick leave request without explanation. Moreover, when the union sought an explanation, the Employer failed to give one. (*See* Case No. W4N-5R-C 46269 (1988),)

The case before this arbitrator is clearly distinguishable from the *Lyons* grievance. In this dispute, the grievant failed to account for all her past sick leave usage. Her medical certification did not specify a date on which she would return to work. The grievant estimated her return in most general terms, and this fact undermined the ability of management to determine whether or not she would be able to repay the sick leave. Finally, her attendance record failed to show noticeable improvement.

The Union also relied on the *Mongeau* arbitration decision. (*See* Case No. J90N-4J-C 95039906 (1996).) The grievant in the *Mongeau* case sought advance sick leave in order to cope with a pregnancy. Prior sick leave used by the employee had been for the delivery of a child. There was no evidence of abuse of sick leave. Most importantly, management in the *Mongeau* case spontaneously added criteria to the ELM provision with regard to granting advance sick leave. An arbitrator concluded that the

additional criteria were arbitrarily added and should not have been a factor in the decision-making process.

The dispute before this arbitrator is clearly distinguishable from the *Mongeau* grievance. The employee in this case failed to account for all of her sick leave usage. Based on her prior attendance record, her supervisors had substantial misgivings about her ability to repay the advanced sick leave to her account. Most importantly, no evidence established that management in this case arbitrarily added criteria to the ELM provision.

The Union additionally relied on the *Ferrari* case in support of its contention that management treated the grievant unfairly. (*See* Case No. B94N-4B-C 97111585; GTS:24297 (1998).) The grievant in the *Ferrari* case requested advance sick leave in response to abdominal pain and ovarian cysts and stress. The Employer denied the request based on its judgment that the employee would not be able to return to work as well as the fact that she had an empty sick leave account. An arbitrator concluded that the Employer abused its discretionary authority because management had learned from the grievant's personal doctor that, in fact, she did not have a serious illness. Moreover, the Employer knew that the employee was firmly committed to returning to work.

In the current case, the Employer did not premise its decision to deny advance sick leave on the grievant's lack of good health but, rather, on her past attendance record and high usage of sick leave. Nor did the Employer in this case deny the grievant's request based on her sick leave balance as much as Mr. Egan focused on her frequent use of sick leave. Likewise, the Employer had no evidence in the record of this case of the grievant's strong commitment to returning to work.

Finally, the Union relied on the *Harris* grievance in support of its theory of the case. (*See* Case No. SON-3A-C 16801 014045 (1994).) In the *Harris* case, the Employer concluded that the employee's request for advance sick leave should be denied based on a history of abusing sick leave. The employee, however, accounted fully for her previous use of sick leave. Moreover, she had a history of repaying advance sick leave. But in the case before this arbitrator, the Employer was reasonable in predicting that the grievant might not be able to repay the advance sick leave. No evidence showed that she had a history of repaying advance sick leave. Nor was she able to account for all her previous sick leave usage.

VII. CONCLUSION

Arbitral authority on which the Union relied failed to establish that the Employer acted in bad faith by denying the grievant's request for advance sick leave. In cases on which the Union relied, employees submitted strong evidence supporting their intention to return to work as well as their ability to repay borrowed sick leave. In this case, the grievant failed to supply the Employer with data on which management could base a rational belief that she would be able to repay the advance sick leave account. A review of the grievant's sick leave account established that she had a history of using a majority of her sick leave. Management recognized that it would take her years to pay back the advance sick leave, if she continued to use her acquired sick leave at the same rate as had been true in the past and if she continued to be absent from work as much as had been the case over the past 11 years. Accordingly, it must be concluded that evidence submitted to the arbitrator failed to prove managerial bad faith in denying the grievant's request in this case.

AWARD

Having carefully considered all evidence submitted by the parties concerning this matter, the arbitrator concludes that the Employer's denial of the grievant's request for advance sick leave was not arbitrary or capricious. Accordingly, the grievance is denied. It is so ordered and awarded.

Respectfully submitted,

Carlton J. Snow
Professor of Law

Date: September 6, 2001