REGULAR ARBITRATION PANEL

In the Matter of Arbitration)
)
between) Grievant: S. Strong
)
UNITED STATES POSTAL SERVICE) POST OFFICE: Rockville Maryland
)
and) CASE #K06N-4K-C12227507
NATIONAL ASSOCIATION OF)
LETTER CARRIERS, AFL-CIO)

BEFORE: Mark A. Rosen, Arbitrator
APPEARANCES:
For the Postal Service: Corey Williams, Labor Relations Specialist
For the Union: Delano Wilson, Local Business Agent, Region 13
Place of Hearing: Rockville Maryland
Date of Hearing: August 6, 2013
Date of Award: August 16, 2013
AWARD SUMMARY: For the reasons stated below Management violated the local parties' Agreement/ binding past practice pertaining to National Agreement Article 10 and Article 5 by requesting Grievant provide documentation of her FMLA absence for April 13 and 14, 2012 and not reimbursing her for expenses she directly incurred in obtaining that documentation. Management shall reimburse Grievant for those expenses. Therefore, the grievance is sustained accordingly.

FACTS

Most of the essential facts in this case are not in dispute. Grievant is a carrier at the Rockville, Maryland Pike Street station with approximately 18 years service. The parties stipulated that at the time in question, Grievant had already been certified for coverage under Family Medical Leave Act (FMLA). The parties also stipulated at the time the Grievant called in sick she was asked by management to bring in medical documentation for her absence.

Grievant testified she called in on April 13, 2012 and spoke to 204B Julie Hsueh (sic). Grievant stated she told the 204B she was requesting FMLA for April 13 and 14. According to the Grievant, the 204B told her she needed documentation. Grievant stated she brought to work

documentation from her attending physician dated April 14 stating she could return to regular work duties on April 16, 2012 after having been under that physician's professional care from April 12 to April 14, 2012. Grievant explained in order to obtain that documentation she made a separate trip to her attending physician, who charged her $25 for the aforementioned written return to work authorization statement. The record reflects the distance between Grievant's residents in her attending physician's office is 4.27 miles. They PS form 3971 shows Grievant's request for 18 hours of sick leave from April 13 through the 14th was approved (signature of supervisor entered is not legible) on April 16 as follows "approved FMLA, pending documentation noted on reverse" followed by the aforementioned doctor's statement dated April 14. The 204 B did not testify.

Thereafter, a grievance was filed on Grievant's behalf contesting Management's 204 B requiring Grievant to provide "documentaion" was in violation of Article 10 Section 5, ELM Sections 513.361 and 513.362, National Pre-Arbitration Settlement (M – O1474), numerous local installation grievance resolutions and numerous Rockville Labor/Management meeting minutes. By way of relief, the grievance sought Grievant be reimbursed for the medical expense of her Doctor's visit to secure the documentation and for the cost of her mileage incurred in obtaining it.

Rockville Manager Jenny Thompson was the Formal A Representative for Management. She denied the grievance stating, in pertinent part:

> First management contends that the words "medical documentation" were never said to [Grievant] during the morning phone conversation when she called in or at any time during any conversation with [Grievant]. [Grievant] has been using a day here a day there every month always around a non-scheduled day and was setting a pattern. Management contends they did not violate [Grievant's] FMLA right in did pay her FMLA leave as she

> requested. Nor did management violate local agreement. In fact it was the local understanding that prompted management to ask for the documentation since she was setting a pattern. As shown in management documentation [grievant] called in the last seven times around annual leave or nonscheduled days therefore management contends she was setting a pattern. [Grievant] has a long history of setting a pattern of calling in around nonscheduled days, holidays and annual leave. Also, the documentation [Grievant] provided management did not indicate her absence was related to her FMLA condition.

Included in the record are the PS form 3972 attendance records for Grievant during 2010 through 2012. That form provides for notations regarding "Attendance Related Actions and Dates" as well as "Reviewing Supervisor's Comments, Signature and Date"; however, there are no entries by any supervisor for any of those years regarding any particular dates or absences. The 3972 for 2012 highlights the following seven absences: the use of unscheduled sick leave for eight hours on October 22 and October 24 with October 23 as Grievant's scheduled day off; eight hours unscheduled sick leave on November 26 with November 27 as grievant's Scheduled day off; December 21 eight hours unscheduled sick leave with December 22 as Grievant's Scheduled day off; March 20 unscheduled sick leave for eight hours with March 18 and 19 both Scheduled day off; April 13 and 14 eight hours each off unscheduled sick leave with April 15 as Scheduled day off; and May 8 and 13 as to Scheduled day off followed by unscheduled annual leave and/or emergency annual leave. However, those May entries occurred a month after the time in question and are therefore not germane to to the April 204B request for documentation in this dispute.

On June 20, 2012 Step B issued its impasse decision wherein it stated the issue to be "Did Management violate Articles 10 and 19 of the National Agreement when they require the Grievant to provide documentation for her FMLA absence, and if so, what is the appropriate remedy?"

Branch President Kenneth Lerch testified that since 1993 he and numerous Rockville Management Postmasters and other Management officials agreed , as a result of grievance resolutions and at joint NALC/Management Meetings, management will not require evidence for sick leave for less than two days, except under the following circumstances: 1) the employee is on restricted sick leave; 2) the employee was given an undesirable task and then fell out sick; 3) the employee requested annual leave, and it was disapproved, and the employee [then] called in sick on that day; 4) the employee has an obvious pattern of sick leave, (like calling in sick on seven Saturdays during the year); the supervisor always has the option of not requiring evidence; and, 5) the employee was sick for more than three consecutive days. He explained the purpose of that agreement was to stop clear employee abuse of the use of sick leave and reduce unnecessary requests for documentation by management officials and thereby reducing the number of grievances over that subject.

In support thereof, Lerch identified numerous grievance settlements at informal and formal Step A from 1993 to February 10, 2012 wherein the above policy was recognized and/or an employee was paid for a doctor's statement and mileage to acquire same, under circumstances similar to those herein according to Lerch. An example thereof is a September 21, 2007 Formal Step A Resolution in grievance number 52- 2007- MC 47 (grievant Shearly Shawn) signed in by Lerch and then Rockville Postmaster Katherine Harris and which stated:

> As a result of our discussion on this date, it is mutually agreed that the above reference grievant's/dispute is resolved in accordance with the following:
>
> From this point forward, management will comply with M- 01474. Management will not require documentation for FMLA covered them absences of three days or less unless the Postal Service deems the documentation necessary to protect the interests of the USPS. In those scenarios, management will comply with the spirit and intent of the agreements made during the labor/management meetings dated April 26, 2007 and

October 26, 2006.

The settlement is made in accordance with the language of Article 15 and the dispute resolution process.

The above referenced M-01474 is a December 9, 2002 pre-arbitration resolution involving Case # Q2 98N-4Q-C01090839 signed off by then NALC President William Young and Postal Service Manager of Labor Relations Policies and Programs Douglas Tulino and which provided

> We recently met in pre-arbitration discussion concerning the above referenced grievance. The issue is whether Publication 71, `Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act", violates the National Agreement by requiring "supporting documentation` for an absence of three days or less in order for an employee's absence to be protected under the Family and Medical Leave Act (FMLA).
> After reviewing this matter, we agree that no national interpretive issue is presented. The parties agree to resolve the issue presented based on the following understanding:
> The parties agree that the Postal Service may require an employee's leave to be supported by an FMLA medical certification, unless waived by management, in order for the absence to be protected. When an employee uses leave due to a condition already supported by an FMLA certification, the employee is not required to provide another certification in order for the absence to be FMLA protected.
> We further agree that the documentation requirements for leave for an absence of three days or less are found in Section 513.361 of the Employee and Labor Relations Manual which states in pertinent part that
> For periods of absence of 3 days or less, supervisors may accept the employee statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work or need to care for a family member is required only when the employee is on restricted sick leave (see 513.39) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service.

The aforementioned local Labor /Management meeting agreements of October 26, 2006 and April 26, 2007 provide in chronological order:

> AWOL for EAL and Sick Leave requests: Union pointed out that, of late, Supervisors are demanding documentary evidence for every call ins and put employee on AWOL status till that is produced. Union felt that was in violation of several settlements they had entered into in the past on the same subject. Management agreed with the union's

observation and said that demanding documentary evidence would be on case to case basis keeping in mind the previous settlements. Jack Felton directed Managers to talk to their Supervisors and 204Bs about it. The earlier settlement indicated that Management would ask for documentation if: (1) the employee is on restricted sick leave, (2) the employee was given an undesirable task and then fell out sick, (3) the employee requested AL and it was disapproved and the employee called in sick on that day, (4) the employee has an obvious pattern of sick leave and (5) the employee was sick for more than 3 consecutive days.

The April 26, 2007 local Labor/Management meeting agreement states:

Sick Leave and Evidence: Kenneth Lerch brought to the management's attention that supervisors are still demanding documentation for every call ins, in spite of the clear understanding in the last Joint Labor-Management meeting held in October 2006 and the previous grievance settlement in 1993. Kathryn Harris advised Managers to carry the message to all supervisors and 204Bs to abide by the previous settlement.

The grievance settlements Lerch identified numerous carriers, who had been required to provide documentation for use of sick leave of one or two days, were reimbursed by Management for the costs associated with acquiring that documentation, that is, doctor office fees and mileage/expense incurred therein.

Lerch testified the parties' agreed upon practice for when documentation could be required for two days use of sick leave also applied to FMLA leave. He stressed the parties never agreed that an employee's "obvious pattern" of sick leave usage warranting documentation included any sick leave use associated used in conjunction with that employee's scheduled day off. He explained because of carriers' rotating day off schedules there was a 86% chance such sick leave would have to fall on or before the employee's scheduled day off. He emphasized for those reasons the Grievant had not established an obvious pattern of sick leave usage warranting her having to provide documentation in this case in accordance with the parties' practice.

Thompson testified that she was the Management official who received Grievant's April call-in requesting sick leave and that she asked the Grievant to provide her documentation. However, in her denial of the grievance, Thompson does not mention in any way that it was she who received that phone call from the Grievant. Thompson said Grievant had been properly requested by management to provide documentation in accordance with the terms of the local Union and Management "agreement"in such circumstances because Grievant's use of sick leave reflected her having "set" or "setting" " a pattern" for such use.

POSITIONS OF THE PARTIES

NALC

Management violated the Agreement; therefore, the grievance should be sustained. By way of relief, Management should reimburse Grievant for travel and other expenses incurred in obtaining the documentation from her attending physician's office.

Record is clear, Management violated Article 10 by requiring Grievant to provide documentation of her FMLA absence under the circumstances of this case. If Management requires such documentation, it has the responsibility to reimburse the Grievant for the cost of acquiring such documentation. There is a lot of case history at this local documenting that Management has paid for such expenses if it initiates the request for such sick leave documentation. The 204B did not testify; therefore, it's impossible to know what she wanted other than what the Grievant understood and provided. In addition, without the 204B testifying there is no way to determine if the 204B had a valid reason for requesting Grievant provide documentation of her use of FMLA.

The record also is clear that the Grievant did not have a pattern of sick leave abuse,

according to the testimony of the Branch President. Therefore, there was no reason for requesting Grievant to obtain documentation. There is abundant evidence in this record documenting Management has repeatedly paid for an employee's expenses related to obtaining sick leave/FMLA documentation at Management's request. Management has offered no explanation why it should not pay similar expenses under the facts of this case.

Lastly, the Union emphasizes because of the circumstances surrounding rotating scheduled days off over a 42 day period, there are only 12 days in which an employee could take sick leave which would not fall on the day before or after one of those scheduled days off. For Management so say that an employee taking a sick leave on any of the remaining 30 days which would fall next to a scheduled day off creates possible sick leave abuse is unreasonable. That is why the Union agreed with Management that such a pattern would have to be in relationship to a particular day of the week, that is, Saturdays.

Management is attempting to avoid any liability in this case by Thompson's testimony to the effect she was only asking Grievant to provide "documentation" and not "medical documentation." However, it is unclear what other type of documentation other than medical Grievant could have provided. In addition, Grievant already had been certified for FMLA, of which Management had previously received notice.

Postal Service

The Union has failed to show Management violated the Agreement; therefore, the grievance should be denied. Management is not responsible for such expenses, except as they are specified in the Agreement or in particular settlements over specific circumstances. Most of the prior settlements are questionable and should not be controlling here or in the future. Because

there are no arbitration decisions on this specific point, this Arbitrator has the responsibility of not issuing a decision that would be considered as a new precedent in support of the Union's position, which would incur to the financial liability of the Postal Service.

Thompson stated there was a pattern of abuse by the Grievant in the use of her sick leave. Thompson's conclusion is supported by Grievant's attendance record. Therein, Grievant used sick leave in conjunction with more than seven of her non-scheduled days off. In calendar year 2010 grievant had more than nine such incidents of sick leave before after her non-scheduled days off. Such patterns constitute a red flag for supervision to act upon. Clearly that constitutes a pattern justifying the request for documentation. The ELM requires employees to be regular in their attendance.

Discussion and Analysis

The Union, as the moving party in this contract interpretive/enforcement controversy, has the burden of persuasion to demonstrate with sufficiently reliable evidence its position is supported by the Agreement. As this Arbitrator has previous stated, in contract interpretation and enforcement actions, it is a well recognized principle of labor arbitration that clear and unambiguous collective bargaining agreement language is the best evidence of the parties' intentions as to what they agreed upon. In such cases, the Arbitrator must give the Agreement words and/or phrases their plain and common meaning in order to maintain the integrity of the parties' Agreement, even if one party finds that result undesirable for whatever reason and/or somehow contrary to its expectations. It is likewise well recognized as a basic principle of contract interpretation that related provisions of an agreement are to be read as a whole in harmony with each other, unless clearly stated therein to the contrary. In addition, it is generally

recognized in labor arbitration that only in cases in which where the applicable provision language is silent, unclear, or ambiguous can extrinsic evidence, including past practice, if any, be relied upon to determine the parties' intent.

There is no dispute that under applicable detailed regulations on sick leave set forth in ELM Section 513, employees are required to provide medical documentation of sick leave more than 3 days or longer. Nor does either party argue the applicable Agreement sick leave language of Article 10.5 D is unclear and ambiguous. It provides "For periods of absence of three (3) days or less, a supervisor may accept an employee's certification as reason for an absence." That Agreement language does not provide specific circumstances under which a supervisor may require documentation for a sick leave absence.

The record contains unrebutted testimony from Branch President Lerch with supporting documentation that the local parties since 1993 have specified the circumstances in which a supervisor may require documentation for sick leave and that management regularly reimbursed employees for expenses related thereto, when documentation was requested under such circumstances. That evidence further reflects the fact the local parties included therein use of sick leave for FMLA, after its enactment. Moreover, in the Labor Management meeting records in this record , which on their face shows they were prepared by Management, the parties' long standing practice regarding those circumstances was reaffirmed twice in the last seven years and was specifically identified therein as an "agreement." Thompson referred to that local agreement as the instrument which was relied upon in Management's seeking documentation from Grievant in this case for her absences of April 13, 14.

Nothing within that arrangement, whether treated as a local agreement or as a past

practice, is contrary to or violates the express terms of the National Agreement. Therefore, by operation of Article 30 that arrangement governs the outcome of this case. As explained in the JCAM at 30-1, "Article 30 of the National Agreement enables the local parties to negotiate over certain work rules and other terms and conditions of employment" which are essentially not specifically addressed in the terms of the National Agreement.

Nor can that past practice/agreement be unilaterally nullified by Management, as it seeks in this case, which would be in violation of Article 5. The JCAM at pages 5- 1 through 5-4 discusses at great length and detail the necessary elements for a valid binding past practice, which it notes "limit the employer's ability to take a unilateral action" in contravention of Article 5. Those enumerated elements have been met by the Union as reflected in this record. Those elements include: clarity and consistency; longevity and repetition; acceptability by employees, Union and managerial/supervisory officials; the underlying circumstances which gave a practice its true dimensions (as discussed below); and, "the significance to be attributed to a practice may possibly be affected by whether or not it is supported by mutuality."

There is no question based on the unrebutted testimony and documents presented by local Branch President Lerch the practice/agreement arose out of a need of both parties and affected employees to know with clarity those circumstances under which a supervisor "may" request documentation for sick leaves of two days or less. Particularly in this case, that involves whether or not Grievant had a "obvious pattern" of sick leave use warranting documentation. By its very nature, the burden of persuasion establishing that pattern falls on Management.

In order to meet that burden, Management relied primarily upon Thompson's testimony and Grievant's attendance record. However, although Thompson believed that Grievant's use of

sick leave and/or FLMA constituted an obvious pattern under the local parties' agreement, the evidence in support thereof is at best questionable and directly in conflict with Lerch's unrebutted testimony on the meaning of the phrase "obvious pattern". In her written denial of the grievance, Thompson asserted Grievant "set" or was "setting" a pattern of sick leave use by "using a day here a day there every month always around a non-scheduled day".... [Grievant] called in the last seven times around annual leave or non-scheduled days....[Grievant] has a long history of setting a pattern of calling in around non-scheduled days, holidays and annual leave."

Nothing in the local parties' agreement/past practice defines an "obvious pattern" of sick leave use as tied to non-scheduled days, holidays, or annual leave. Statistically, because of rotating days off, use of sick leave would occur an overwhelming majority of time next to those non-work days, making such an interpretation unreasonable on its face. Additionally, Management cites in support of that pattern Grievant's attendance records for the last three years. None of those records contains any supervisory remarks about Grievant's use of sick or FLMA use in any manner.

Thompson's reference to Grievant having "called in the last seven times around annual leave or non-scheduled days" inaccurately represents the pertinent facts in this record. As noted above two of those 7 instances in 2012 occurred after the date Management requested documentation for Grievant's FMLA use of sick leave in April 2012. Therefore, those two post April 2012 dates are irrelevant and cannot be relied upon as showing an obvious pattern as of the time in question.

Lastly, there the record is unclear at best that Thompson, as she testified, received Grievant's call in to be off the days in question. There is strong conflicting evidence in this

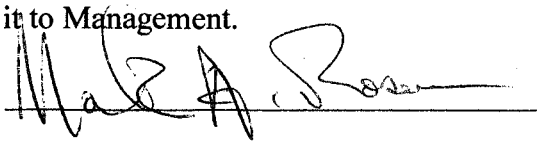
record Grievant in fact spoke to 204 B Julie Hsueh, who requested the documentation. The 204 B did not testify, nor is there any written explanation by her for her requesting Grievant provide the documentation.

It is important to point out that it t does not matter whether or not the Management request for documentation referred to "medical documentation" or just "documentation". The record is clear Grievant said she told the 204B she was requesting FLMA for April 13 and 14. In that context, the only relevant documentation was reasonably understood by Grievant to mean medical documentation from her attending physician regarding her FMLA.

AWARD

For the reasons stated above Management violated the local parties' agreement/ binding past practice pertaining to National Agreement Article 10 and Article 5 by requesting Grievant provide documentation of her FMLA absence for April 13 and 14, 2012 and not reimbursing her for expenses she directly incurred in obtaining that documentation. Therefore, the grievance is sustained. Management shall reimburse Grievant for those expenses, which specifically include the $25 for the doctor's office billing Grievant for the statement she was under her doctor's care for those two April days and the applicable mileage rate for the miles Grievant traveled to acquire that doctor's office statement and providing it to Management.

DATED: August 16, 2013



Mark A. Rosen, Arbitrator