C-33433

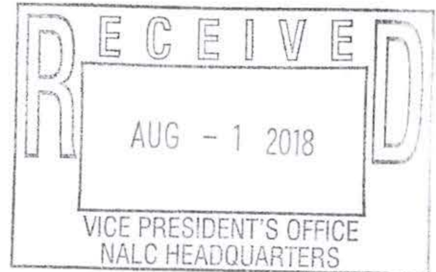
REGULAR ARBITRATION

In the Matter of the Arbitration	)	Grievant: Class Action
Between	)	Post Office: Anchorage, AK
United States Postal Service	)	Case No.: E11N-4E-C 17573892
And	)	DRT No.: 02-412759
National Association of Letter Carriers, AFL-CIO	)	Union No.: 17934

BEFORE: ARBITRATOR Joseph W. Duffy

APPEARANCES:

For the U.S. Postal Service:	Robert H. Boston
For the Union:	James P. Frankford IV
Place of Hearing:	Anchorage, AK
Date of Hearing:	July 6, 2018
Briefs Filed:	None



AWARD:

Date of Award:	July 9, 2018
Panel:	Regular

Award Summary

In this case, the arbitrator adopted his ruling from a similar prior case decided on June 12. (E11N-4E-C 17564824; DRT No.: 02-410087) The arbitrator also found that the employer shall pay the arbitrator's fee and expenses in the present case because of unnecessary delay in approving settlement of this case and correcting the inappropriate statement in the HRSSC form letter.

Joseph W. Duffy
Arbitrator

Introduction

The parties submitted this dispute to regular regional arbitration under the National Agreement. The hearing took place at the Postal facility located at 1601 W. Northern Lights Blvd., Anchorage, AK 99517. At the start of the hearing, the parties agreed that the grievance is properly before me for a final and binding decision on the merits.

The hearing proceeded in an orderly manner. The advocates did an excellent job of presenting the respective cases. Both parties had a full opportunity to call witnesses, to introduce documents into the record and to make arguments. Witnesses were sworn under oath and subject to cross-examination by the opposing party.

The parties introduced two joint exhibits (J1-J2) and three union exhibits (U1-U3) into the record. One union exhibit was admitted noting the objection of the employer. No witnesses testified at the hearing. The parties made oral arguments in support of their positions and I then closed the record.

Issue for Decision

At Step B, the parties agreed on the following issue statement:

> Did Management violate Articles 3, 5, 15 and 19 of the National Agreement, CFR 29 § 825, and Step B decisions 17-328/E11N-4E 17432609 and 16-327/E11N-4E-C 17276708 when they notified employees that "Unknown" and "cannot predict" "are not sufficient responses" by doctors when providing FMLA certification? If so, what is the appropriate remedy? (J2, p. 1 of Step B)

Discussion

On June 12, 2018, I issued the award in another case that arose in Anchorage which had the same issue as the issue statement quoted immediately above. In that case, I summarized my ruling as follows:

> The arbitrator found that the solution in this case lies with HRSSC. Therefore, the employer shall petition HRSSC in a letter to make the change in the form letter reference to indefinite terms from "are" to "may" and provide the union with a copy of the letter. The employer shall also forward a copy of this arbitration decision to higher level management at HRSSC and provide the union with notice that the decision has been forwarded. The employer and the union in Alaska should not have to expend additional resources trying to solve in grievance arbitration what HRSSC can solve by changing one word in a form letter. (E11N-4E-C 17564824; DRT No.: 02-410087) (U2)

In the present case, I can see no basis for issuing a different ruling from the one I issued on June 12.

Following the issuance of my June 12 decision, the parties discussed settlement of the present case. Mr. Boston, meanwhile, sent the information on my June 12 decision to higher level management in the Postal Service. Mr. Boston and Mr. Frankford reached a tentative pre-arbitration settlement of the present case, but finalizing the settlement required approval from higher level Postal management. (U1)

On July 5, 2018, Mr. Boston received notice that he could settle the present case by adopting the award summary from the prior case, as quoted above. The parties discussed cancelling the July 6 arbitration hearing, but could not agree on the payment of the cancellation fee. The union contended that by waiting until the last day to cancel the hearing, the Postal Service prevented the substitution of another case for hearing on July 6. The union contended that the Postal Service should pay the entire fee for the July 6 hearing and the employer contended the fee should be split, according to usual practice.

Conclusion

Concerning the payment of the arbitrator's fee for July 6, I find that Mr. Boston acted with due diligence in submitting the tentative pre-arbitration settlement to higher level management for approval. Although my June 12 decision is recent, this issue has been around for some time and has been the subject of prior Step B decisions. Nevertheless, Postal management at a higher level and HRSSC have been slow to approve settling of this case and in acting to correct the statement that "Unknown and cannot predict are not sufficient responses" by doctors. The use of "are" creates the impression that the indefinite terms never are acceptable. By contrast, the instructions to the health care provider contained on DOL Form WH-380-E state:

> Be as specific as you can; **terms such as 'lifetime,' 'unknown,' or 'indeterminate' may not be sufficient to determine FMLA coverage**. (Step B, p. 6) (Emphasis by bold added)

In my judgment the employer has caused further, unnecessary litigation of the issue. Consequently, I find that the arbitrator's fee and expenses for this arbitration shall be paid entirely by the employer.

On the merits of this dispute, I adopt my conclusion from the prior decision issued on June 12, which is also consistent with the tentative pre-arbitration settlement the parties reached. (U1)

A very simple resolution is available here. All HRSSC has to do is change the word "are" to "may"[1] in the statement in its form letter related to indefinite terms such as "unknown." Such a change would be consistent with the language on both the WH-380-E and the NALC 1 forms.

HRSSC would experience no hardship through making such a change in the form letter. The body of the rule 29 CFR Part 825 states that employers may determine that a certification is "vague, ambiguous or non-responsive". Therefore, stating in the form letter that "Unknown" and "cannot predict" **may** not be sufficient responses by doctors does not prevent HRSSC from questioning particular statements from doctors it considers vague, ambiguous or non-responsive.

The solution in this case lies with HRSSC. Therefore, the employer shall petition HRSSC in a letter to make the change in the form letter reference to indefinite terms from "are" to "may" and provide the union with a copy of the letter. The employer shall also forward a copy of this arbitration decision to higher level management at HRSSC and provide the union with notice that the decision has been forwarded. The employer and the union in Alaska should not have to expend additional resources trying to solve in grievance arbitration what HRSSC can solve by changing one word in a form letter.

//

//

//

[1] To be completely correct, the change involves substituting "may not be" for "are not."