



American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

April 24, 2012

To: Local and State Presidents
National Business Agents
Regional Coordinators
National Advocates
Resident Officers

From: Mike Morris, Director
Industrial Relations

A handwritten signature in black ink, appearing to read 'Mike Morris', is written over the 'From:' line. The signature is enclosed in a hand-drawn oval.

Re: Das Award Permitting Use of FMLA Forms Other than WH-380 Forms

Enclosed is a copy of a recent national level award by Arbitrator Das that sustained our grievance challenging revision of ELM 515.52 to require that employees use only Department of Labor (DOL) WH-380 forms when seeking FMLA-protected leave. Das rejected the contention that APWU's Article 15 grievance was inarbitrable. He found that management's unilateral change to ELM 510 "to mandate use of previously optional WH-380 forms violated Article 10.2.A of the National Agreement and the JCIM...", and ordered that it cease and desist from requiring employees to submit FMLA medical certifications using only the WH-380 forms. (USPS Nos. Q06C-4Q-C 11001666 and Q06C-4Q-C 11008239, 4/18/2012) This award makes it possible to again use APWU's FMLA forms or any other forms or formats that contain information required under the law, as was permitted before ELM 515.52 was changed in 2010.

This case arose in July 2010 when management sent the APWU Article 19 notice that it was revising ELM Section 515.52 to add a requirement that employees use only DOL WH-380 forms when they seek to have absences protected by the Family and Medical Leave Act (FMLA). We subsequently filed an Article 19 appeal to arbitration of the proposed change, and management responded that our appeal was procedurally defective. Nine days later the APWU initiated a national dispute under Article 15; we contended in part that "[i]t is the APWU's position, consistent with the Collective Bargaining Agreement, applicable Department of Labor (DOL) regulations, the parties' established accepted past practice (for over 15 years), and the mutual understanding and agreement between the parties at the national level, that (1) employees are not required to use a specific format or form for FMLA certification; (2) employees may use APWU forms for FMLA certification, or any other format or forms that contain the information required under 29 CFR 825.306; and (3) the submission of FMLA certification using DOL WH-380 forms is optional." The parties agreed to combine the Article 19 appeal and Article 15 grievance in a single proceeding, and the NALC and NPMHU intervened.

In 2003, the APWU and USPS resolved a national dispute over implementation of Resource Management Database (RMD) software in which the APWU had asserted that a new USPS policy

requiring employees to use WH-380 forms was contrary to the parties' prior agreement. The pre-arbitration settlement provided in part "Optional FMLA Forms: ... [t]he APWU forms or any form or format which contains the required information (i.e. information such as that required on a current WH-380) is acceptable." Subsequently in June 2007, the parties included this settlement in the USPS-APWU Joint Contract Interpretation Manual (JCIM) relating to Article 10 with the following statement "Documentation to substantiate FMLA is acceptable in any format, including a form created by the union, as long as it provides the information as required by the FMLA."

During arbitration, the Postal Service argued that the APWU's Article 19 appeal should be dismissed because we didn't request or attend an Article 19 meeting before filing the appeal. It contended also that requirements of Article 19 would be "meaningless" if we could merely file an Article 15 grievance challenging handbook or manual language. In addition, the Service maintained that our argument that it violated Article 10.2.A was barred since it wasn't raised until the arbitration hearing. As to the merits, management asserted that Article 10.2.A applies only to ELM 510 provisions that establish wages, hours and working conditions and requiring use of the WH-380 form wasn't a change directly relating to wages, hours and working conditions. It further maintained that no Article 5 violation existed because DOL's regulations allow employers to decide which forms employees must use when seeking FMLA protection. Moreover, the Service asserted that the 2007 JCIM merely stated the then-current policy allowing use of APWU's forms and it retains the right to make future changes that are fair, reasonable and equitable.

The APWU countered that the Article 19 grievance was arbitrable since not having a meeting doesn't waive our right to a hearing on the merits. We argued also that management didn't show it was prejudiced by the lack of a meeting since it was well aware of our position on the issues. The APWU cited evidence of our routine enforcement of the requirement that USPS accept forms other than the WH-380 since the 2003 RMD settlement. We further referred to our Article 19 15-day statement which specified that the proposed changes weren't fair, reasonable and equitable and alleged violations of Articles 5, 10 and 19. Moreover, the APWU pointed to JCIM provisions on not requiring use of the WH-380 form which reference Article 10. In addition, we asserted that the Article 15 grievance was arbitrable because an Article 19 challenge doesn't cut off our Article 15 arbitration rights. Since Article 10.2 prohibits management from making changes in ELM 510 that affect wages, hours or working conditions during the life of the Agreement, the union retains its right to challenge such changes by filing an Article 15 grievance as well as by using Article 19. As to the merits, the union argued that placement of the RMD settlement in the JCIM made it "binding" on both parties and the ELM change deprived employees of rights protected under the FMLA.

Arbitrator Das ruled first of all that the union's Article 15 grievance was arbitrable. Though noting that Article 19 "contemplate[s]" a meeting, he said there was "no requirement ... that the Union present its position at this meeting ... in advance of its decision to appeal to arbitration and submission of its 15-day statement." In addition, Das observed that "the record leaves little doubt that the Union's position in opposition to the mandatory use of WH-380 forms, including its reliance on Article 10, was or should have been known to the Postal Service at the time the Union submitted its Article 19 appeal to arbitration." He reasoned, however, that he didn't need to "rule on the issue of whether the union's failure to request or attend a meeting precluded it from filing an Article 19 appeal" since the union also had filed an Article 15 dispute. Das stressed that management failed to cite arbitral authority to support

its position that the union should be barred from proceeding with the Article 15 dispute. In addition, there was no showing that the APWU “acquiesced in the protested ELM change.” The union’s “timely Article 19 appeal, even if defective, certainly put the Postal Service on notice as to the Union’s position that the change violated the National Agreement, and the Union filed its Article 15 grievance within days after the Postal Service asserted its claim that the Union’s Article 19 appeal was procedurally defective,” according to Arbitrator Das. He thus ruled that we could pursue our grievance “at least with respect to allegations that the change violated Articles 5 and 10 of the National Agreement.”

Arbitrator Das then rejected the argument that our Article 10 claim should be dismissed as being raised for the first time at arbitration. He relied on management’s waiver of arguments on the lack of a Step 4 meeting or exchange of 15-day statements, and the union’s citing of Article 10 in its Article 19 15-day statement. In addition, Das didn’t agree with the Postal Service that Article 10.2.A was inapplicable on the basis that ELM 510 provisions that were changed don’t relate to wages, hours or working conditions. “[T]he ELM 510 provision that was changed established a working condition and, hence, was not subject to unilateral change by the Postal Service under Article 10.2.A,” according to the arbitrator. He further noted that “there has been no change in the FMLA or the related DOL regulations that would necessitate mandatory use of the WH-380”; “[o]n the contrary, under current DOL regulations, use of the WH-380 by an employer is optional.” Moreover, “the Postal Service’s insistence that only WH-380 forms be used could have a negative effect on when, if not whether, FMLA leave is approved, cause additional inconvenience and expense to the employee, and possibly subject an employee to discipline for an unauthorized absence, even if the employee submits certification that meets the statutory requirements.” Accordingly, management’s unilateral change to ELM 510 “to mandate use of previously optional WH-380 forms violated Article 10.2.A of the National Agreement and the JCIM,” and “there is no need here to decide whether the Postal Service’s action in requiring use of the WH-380 also violated the FMLA....”

As a result of this award, we will be making APWU’s FMLA forms available very soon in the Industrial Relations section (Steward’s Corner) of APWU’s website.

Attachment

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