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MEMORANDUM

TO: Bill Burrus
FROM: Art Luby *AL*
DATE: March 24, 1999
RE: Privacy Act Claim

It is my understanding that officers of the Washington state organization requested and received the Form 3971s of several ex-officers. Those ex-officers have, in turn, threatened to sue the supervisor who provided this information for violation of their rights under the Privacy Act. For reasons set forth below, I do not believe that either the request for information, or the supervisor's act in honoring the request, violated the Privacy Act.

The Postal Service's obligations under the Privacy Act in this sort of situation were reviewed by the Court in NLRB v. U.S. Postal Service, 841 F.2d 141 (6th Cir. 1988):

The Privacy Act prohibits certain "agencies" from disclosing "records" from a "system of records" without prior consent of the individuals to whom the records pertain. 5 U.S.C. § 552a(b). The definition of "agency" includes "any Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government ... or any independent regulatory agency." 5 U.S.C. § 552(e). The Postal Service is an "independent establishment of the executive branch," 39 U.S.C. § 201, and as such is an "agency" subject to the strictures of the Privacy Act. Therefore, unless the records sought fall within an exception to the Privacy Act, the Postal Service justifiably refused to release them since it is clear that the union did not have the involved individuals' consent. The failure to provide information falling within an exception to the Privacy Act clearly can violate §

Bill Burrus
March 24, 1999
Page 2

8(a)(1) and (5) of the National Labor Relations Act. *Goodyear Atomic Corp.*, 266 N.L.R.B. 890, *enforced*, 738 F.2d 155 (6th Cir. 1984) (per curiam). The relevant Privacy Act exception, the "routine use" exception, provides that nonconsensual disclosure is permissible "for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section." 5 U.S.C. § 552a(b)(3). The Postal Service is obligated to annually publish in the Federal Register routine uses of its records pursuant to 5 U.S.C. § 552a(e)(4). In 1982, the Postal Service published a notice in the Federal Register describing the following "routine use": "Pursuant to the National Labor Relations Act, records from this system may be furnished to a labor organization upon its request when needed by the organization to perform properly its duties as a collective bargaining representative of postal employees in an appropriate bargaining unit." 47 Fed. Reg. 1,199 (1982). Therefore, it is clear that if the National Labor Relations Act requires the Postal Service to supply the desired information, the unconsented-to disclosure of such would fall within the "routine use" exception to the Privacy Act.

Id., at 144-145.

In this case, the information was needed by the Washington state organization to properly perform its duties as a collective bargaining representative for several reasons. The request for the 3971s was made to investigate allegations of "double dipping," i.e., an allegation that the officer in question was actually working for the USPS when he or she was being paid by the union. The union has a statutory obligation under 29 U.S.C. § 501 (Landrum-Griffin) to investigate and prevent such conduct. If it fails to do so, it can potentially lose its autonomy and status as a collective bargaining representative.

Further, officers who become aware of such conduct are held responsible by the DOL for failing to protect the assets of the Union and are potentially criminally liable for failing to act — a matter which, in turn, could impact their employment status with the USPS. All of the above, in my view, is sufficiently tied to the Union's role as a collective bargaining representative to place the request within the "routine use" exception.

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INTRODUCTION

The instant arbitration arose as a result of a grievance filed by the American Postal Workers Union (the "Union") on behalf of William Henn (the "Grievant") alleging that the United States Postal Service (the "Service" or "Management") violated Article 19 of the National Agreement, 1994-98, (the "Agreement"), by failing to properly retain restricted medical information in accordance with the Postal regulations, thereby allowing the information to be disseminated to unauthorized personnel. When the parties were unable to resolve the matter, it was submitted to Arbitration pursuant to Article 15.

BACKGROUND

The Grievant is a full-time regular label expeditor on Tour 2 at the Pittsburgh GMF. On July 1, 1997, the Grievant requested, from the GMF medical facility, a copy of his Family Medical Leave Act ("FMLA") documentation, which he had submitted in support of a leave request. He was informed that his supervisor had the documentation. His supervisor in turn relayed that the documentation was maintained by Supervisor Dugas, in the Attendance, Time and Leave ("ATAL") Department. The documentation allegedly contained the Grievant's prognosis and diagnosis, as well as other restricted medical information.

The Union filed a grievance alleging that the medical information kept in the ATAL is an improper and illegal record system, in violation of the Handbooks and Manuals and the Privacy Act. The Union alleges that this failure to properly maintain restricted medical information resulted in the information being disseminated to unauthorized personnel and requests that Management cease and desist from keeping such medical records at the ATAL and return the medical information to the medical unit. It also request damages for the unauthorized access to

the information.

ISSUE

Is the Postal Service in violation of the parties' collective bargaining agreement by having supervisors maintain a system of records consisting of employees' Family Medical Leave Act medical certification? If so, what shall the remedy be?

PERTINENT CONTRACT AND HANDBOOK PROVISIONS

**ARTICLE 19
HANDBOOKS AND MANUALS**

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours or working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions.

**ADMINISTRATIVE SUPPORT MANUAL 11
MARCH 1996**

- 351 **Records**
- 351.11 **Definition**
Records are recorded information, regardless of media or physical characteristics, developed or received by the Postal Service during the transaction of its business and retained in its custody.
- 351.131 **Custodian**
For purposes of this section, the records custodian is the head of a postal facility such as an area, district, post office, or other postal installation that maintains Postal Service records and information. . . . Senior medical personnel are the custodians of restricted medical records maintained within postal facilities. . . . Custodians are responsible for seeing that records within their

facilities or organizations are managed according to Postal Service policies.

353
353.11
353.111

**Privacy Act
Requirements
Scope**

This part includes instructions for applying the Privacy Act of 1974 and the Postal Service regulations that implement it. These regulations are parts 266 and 268 of title 39, CFR. If there is a conflict between these instructions and the Act or regulations, the latter govern.

353.112

Postal Service Requirements

Under the Privacy Act of 1974, the Postal Service must:

- a. Publish in the *Federal Register* and forward to Congress and the Office of Management and Budget (OMB) adequate advance notice of any proposal to establish or modify, or alter the uses of, any system of records that contains any information about persons.
- b. Comply with certain requirements for the collection, use, disclosure, and safeguarding of information about individuals.

353.12
353.121

**Definitions
System of Records**

A *system of records* that contains information about individuals means any group of records under the control of the Postal Service, including mailing lists, from which information is retrieved by the name of an individual or by some personal identifier assigned to the individual, such as a Social Security number.

353.13
353.131

**Penalties
Postal Employees**

The Privacy Act provides criminal penalties, in the form of fines of up to \$5,000, for any officer or employee of a federal agency, including the Postal Service, who:

- a. Knowing that disclosure of specific material that includes information about a person is prohibited, willfully discloses that material in any manner to any person or agency not entitled to receive it.

- b. Willfully maintains a system of records that contains information about individuals without giving appropriate notice in the *Federal Register*.

353.2 **Collecting and Using Information About Individuals**
353.21 **Approved Systems**

Notice on the systems of records listed in the Appendix has been published in the *Federal Register*. These are the only current systems of records in which information about individuals may be maintained in the Postal Service. New systems may be established only as provided in 353.24.

353.24 **New or Changed Systems of Records**
353.241 **Approval**

The following apply:

- a. *Headquarters/Field.* Any Headquarters or field organization that wants to establish a new system of records with information about individuals, change an existing system, or introduce new forms to collect personal information from an individual, must obtain approval from the Postal Service records office.
- b. *Limitation.* The Postal Service may collect and maintain in its records only such information about an individual that is necessary and relevant to accomplish a purpose that the Postal Service is required to accomplish by statute or by Executive Order of the president.
- c. *Lead Time.* Allow 75 days to give notice in the *Federal Register* an review comments on new or changed systems.

Appendix
Privacy Act System of Records

A. Explanation

This appendix has three sections relating to systems of records regulated by the Privacy Act of 1974:

- a. Section B is a sequential inventory of personal records, provided for reference, listing record system descriptions by index number.

B. Personal Systems Sequential Inventory

010.000 Collection and Delivery Records

020.000 Corporate Relations
 030.000 Equal Employment Opportunity
 040.000 Customer Programs
 * * *

120.000 Personnel Records
 .020 Blood Donor Records System, 120.020
 .035 Employee Accident Reports, 120.035
 .036 Discipline, Grievance, and Appeals Records for
 Nonbargaining Unit Employees, 120.036
 .040 Employee Job Bidding Records, 120.040
 .050 Employee Ideas Program Records, 120.050
 .060 Confidential Statements of Employment and
 Financial Interests, 120.060
 .061 Public Financial Disclosure Reports for Executive
 Branch Personnel, 120.061
 .070 General Personnel Folders (Official Personnel
 Folders and Records Related Thereto), 120.070
 .090 Medical Records, 120.090 (*emphasis supplied*)
 .091 Vehicle Operations Controlled Substance and
 Alcohol Testing Records, 120.091
 .098 Office of Workers' Compensation Program
 (OWCP) Record Copies, 120.098
 .099 Injury Compensation Payment Validation Records,
 120.099
 .100 Performance Awards System Records, 120.100
 .110 Preemployment Investigation Records, 120.110
 .120 Personnel Research and Test Validation Records,
 120.120
 .121 Applicant Race, Sex, National Origin, and
 Disability Status Records, 120.121
 .130 Postmaster Selection Program Records, 120.130
 .140 Employee Assistance Program (EAP) Records,
 120.140
 .151 Recruiting, Examining, and Appointment Records,
 120.151
 .152 Career Development and Training Records, 120.152
 .153 Individual Performance Evaluation/Measurement,
 120.153
 .154 Employee Survey Process System Records, 120.154
 .170 Safe Driver Awards Records, 120.170
 .180 Skills Bank (Human Resources Records), 120.180
 .190 Supervisor's Personnel Records, 120.190
 (*emphasis supplied*)
 .210 Vehicle Maintenance Personnel and Operators

- Records, 120.210
- .220 Arbitration Case Files, 120.220
- .230 Adverse Action Appeals (Administrative Litigation Case Files), 120.230
- .240 Garnishment Case Files, 120.240

USPS 120.090

System Name

Personnel Records—Medical Records, 120.090

Categories of Individuals Covered by the System

Present and former Postal Service employees. . . .

Categories of Records in the System

Name, address, job title, Social Security number, installation, illness, supervisor's and physician's reports (on Authorization for Medical Attention); relevant medical history including physical examinations, treatment received at the health unit, occupational injuries or illnesses, substance abuse information, findings, diagnoses and treatment, doctor's statements and recommendations, records of immunizations, and medical findings related to employee's exposure to toxic substances. . . .

Authority for Maintenance of the System

39 U.S.C. 401, 1001

Purpose(s)

- a. To provide all employees with necessary health care and to determine fitness for duty.

* * *

Routine Uses of Records Maintained in the System, Including Categories of Users and Purposes of Such Uses

General routine use statements a, b, c, d, e, f, g, h, j, k, l, and m listed in the prefatory statement at the beginning of the Postal Service's published system notice apply to this system. Other routine uses are as follows:

* * *

- 3. Records in this system may be disclosed to an employee's private treating physician and to medical personnel retained by the Postal Service to provide medical services for an employee's health or physical condition related to employment.

USPS 120.190**System Name****Personnel Records—Supervisors' Personnel Records, 120.190.****System Location**

Any Postal Service facility

Categories of Individuals Covered by the System

Postal Service employees.

Categories of Records in the System

Records consist of summaries or excerpts from the following other Postal Service personnel records systems: 120.036, 120.070, 120.151, 120.152, 120.153, 120.180, 120.210; as well as records of discipline. In addition, copies of other Postal Service records and records originated by the supervisor may be included at the supervisor's discretion.

Authority for Maintenance of the System

39 U.S.C. 401, 1001

Purpose(s)

To enable supervisor's to efficiently manage assigned personnel.

Federal Regulations Part 825
The Family and Medical Leave Act of 1993
Title 29 — April 1995

Subpart E - What Records Must Be Kept to Comply with FMLA?**§ 825.500 What records must an employer keep to comply with the FMLA?**

- (a) FMLA provides that covered employers shall make, keep, and preserve records pertaining to their obligations under the Act in accordance with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with these regulations. . . .
- (b) *Form of records.* No particular order or form of records is required. These regulations establish no requirement that any employer revise its computerized payroll or personnel records systems to comply. . . .
- * * *
- (g) Records and documents relating to medical certifications, recertifications or

medical histories of employees or employees' family members, created for the purposes of FMLA, shall be maintained as confidential medical records in separate files/records form the usual personnel files, . . . , except that:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

* * *

ELM, Issue 12, 5-1-89

313 Collection, Use and Disclosure of Personnel Information Under the Privacy Act

313.11 The Privacy Act guidelines presented in this part only highlight the application of privacy to employment and placement record-keeping activities. Complete requirements and guidelines appear in the *Administrative Support Manual* (ASM 353).

313.12 Under the Privacy Act of 1974, the Postal Service must:

* * *

b. Comply with certain requirements regarding the collection, use, disclosure, and safeguarding of information about individuals.

313.431 Unauthorized Records. No Postal Service officer or employee may collect or maintain information to be retrieved by the individual's name or identifying symbol except as part of one of the authorized systems of records, and then only in an authorized manner relevant to the purpose of the system.

314.3 Medical Records

314.32 **Confidentiality.** All medical records and information are to be considered confidential. Such records must be kept under lock when left unattended.

314.33 **Maintenance.** Restricted medical records and information are not to be maintained in the OPF [Official Personnel File]. They must be maintained separate from all other employee records as the Privacy Act System USPS 120.090. . . .

314.5 Supervisor's Personnel Records and Personal Notes

314.51 General. Supervisors establish an adequate personal filing system for the performance of their daily responsibilities and to maintain compliance with the provisions of the Privacy Act. Supervisor's Personnel Records are maintained by the Postal Service within the privacy system of records identified as USPS 120.190.

* * *

314.541 Contents. Supervisor's personnel files may include such employee records as: discussions; letters of warning and other disciplinary records; copies of records filed in the OPF; copies of training and placement records; attendance records; travel records; skills bank information; estimates of potential; merit evaluations; vehicle operation's and safe driver awards records; letters of commendation; customer correspondence; and other information at the supervisor's discretion.

EL-806, TL-1, 1-12-82 CHAPTER 2 MEDICAL RECORDS

212 Definition

A medical record is any document maintained by the USPS or a contract physician that contains medical/surgical information about current or former employees, or tentatively selected applicants for employment.

214 Three Categories

There are three types of medical records maintained by the Postal Service.

214.1 Administrative Medical Records

.11 Content. These records provide medical information necessary for management decisions, and document management actions. They include such information as:

- a. Physician statements of employee ability to perform the duties of the position.
- b. Form 2485
- c. Form 3596

- d. Sick leave requests
- e. Blood donor records.

* * *

13. **Availability.** Administrative medical records may be made available to postal managers and other authorized officials when required for official business. However, legitimate need-to-know must be established before records will be released.

214.2 OWCP- Related Medical Records

* * *

214.3 Restricted Medical Records

31 **Content.** These records are limited to medical personnel/facilities only. They contain detailed medical information and are, for the most part, maintained in official employee medical folders (case files). Restricted medical records include such information as:

- a. Forms 2485. Both pre-employment and fitness-for-duty examination. . . .
- b. Forms 1752 and other records containing both personal medical information and internal health unit operations.
- c. Employee medical histories.
- d. Physician diagnoses and prognoses.
- e. Medical separation/retirement specifics.
- f. Dependent child determinations based on medical data.
- g. Employee exposure and reaction to toxic substances and related medical findings.

MANAGEMENT INSTRUCTION EL-860-98-2

Employee Medical Records

Definition

A medical record is any document maintained by the Postal Service or contracted medical provider that contains medical information about current or former employees or applicants for employment.

Categories of Medical Records

The Postal Service maintains three distinct types of medical records, each of which serves a particular function: (1) restricted medical records, (2)

administrative medical records, and (3) Office of Workers' Compensation Programs-related medical records. Regardless of the type, access must be limited to those individuals who have a legitimate need to know.

Custodians of Medical Records

Custodians are legally responsible for the retention, maintenance, protection, disposition, disclosure, and transfer of the records in their custody, and for seeing that records within the facilities are managed according to Postal Service policies.

* * *

For facilities without health units, it is the responsibility of the installation head to guarantee that the restricted medical records are maintained and secured by medical personnel. . . .

Restricted Medical Records

Definition

Restricted medical records contain medical information that is highly confidential, reflect the privileged employee-occupational health provider relationship, and have the most limitations placed on both their access and disclosure. . . . These records are maintained only in medical offices or facilities in employee medical folders (EMFs) unless otherwise directed by the national medical director.

Employee Medical Folder

An employee medical folder (EMF) is established for each employee or applicant for whom detailed medical records are obtained or created. There may be medically related documents found in the EMF that are not considered to be restricted medical records.

The EMF includes, but is not limited to, the following:

* * *

-Family Medical Leave Act medical documentation, when it includes restricted medical information, diagnoses and/or does not involve workers' compensation claim.

Security of Restricted Medical Records

All records containing restricted medical information must be marked "RESTRICTED MEDICAL" and filed in locked cabinets. Keys must be kept by the medical personnel unless otherwise directed by the nation medical director. These records may be reviewed or released only under specific conditions and authority.

Administrative Medical Records

Administrative Medical Records

Definitions

Administrative medical records are documents that may contain medical information and have limitations placed upon their access or disclosure. These documents provide medical information necessary for management decisions and document management actions.

Custodian: There may be multiple custodians of administrative medical records. Custodians are legally responsible for retention, maintenance, protection, disposition, disclosure, and transfer of the records in their custody, and for seeing that records in the facilities are maintained according to Postal Service policies.

This medical information is maintained by non-medical personnel and is filed in the official personnel folder or within other related files.

Administrative medical records include, but are not limited to:

- Physician statements relative to the employee's fitness for duty that contain no restricted medical information.
- * * *
- Medical suitability waivers.
- Dependent child determinations based on medical information.

Access

Administrative records may be accessed by postal managers or their designees who have a legitimate need to know.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that the system of records which is kept by Supervisor Dugas for use by supervisors in granting FMLA leave and which contains medical information is not one of the system of records permitted by the Privacy Act. The Privacy Act System of Records, incorporated in the ASM Appendix, recognizes only specific types of records that may be kept by an employer, including the Postal Service. Under Personnel Records (120.000), Medical

Records (120.090) are listed separately from Supervisor's Personnel Records (120.190). According to EL-806 section 212, a medical record is any document maintained by the USPS that contains medical information about a current employee.

In order to qualify for FMLA leave, an employee is obligated to provide medical documentation to substantiate that the employee's or his family's condition makes the employee eligible under FMLA. The form collected and maintained by the Postal Service for FMLA purposes contains medical information and is kept by Supervisor Dugas in the ATAL office.

The Union argues that the medical information kept by Dugas may only be kept in an employee's official medical record which is kept by medical personnel. ASM 351.131. The Union asserts that any distinction the Postal Service tries to make between restricted and unrestricted medical information is irrelevant. All medical information must be kept in one of the types of files designated in the system of records in the Privacy Act. There is no system of records for keeping medical information in a separate file for FMLA purposes.

To establish a medical file, such as that kept by Ms. Dugas, which is separate from that designated under the Privacy Act, the Postal Service must publish a proposal to do so in the *Federal Register* and forward advance notice to the Office of Management and Budget. The Union argues that the Postal Service did not do so and, therefore, had no authorization to establish the system of records kept by the ATAL and Ms. Dugas. Consequently, the Union asserts that the Postal Service is in violation of the Privacy Act and Postal Handbooks and Manuals that incorporate the Privacy Act.

The Union requests that the grievance be sustained, and that the Postal Service be required to abolish the system of records that is in conflict with the ASM and ELM.

Additionally, the Union requests appropriate penalties and remedies for the past violation and to ensure that it commit no future violations, as delineated in the Privacy Act and incorporated through the Handbooks and Manuals into the collective bargaining agreement.

Postal Service's Position

The Postal Service argues that the file with FMLA certification forms, which is kept in the ATAL office, does not violate the Privacy Act or Postal Service Handbooks and Manuals. The FMLA certification forms do not contain detailed medical information about an employee and/or his family and should not contain restricted medical information. If the form does contain restricted information, it is forwarded to medical records.

Section 825 of the Federal Regulations states that, for FMLA purposes, employers must maintain records and documentation relating to medical certifications, recertifications and medical history of employees and/or employees' family members as confidential medical records separate from the usual personnel files. The Postal Service argues that it does not require that the records be kept in the medical unit. Additionally, under Supervisor's Records, 120.190 of the Privacy Act system of records, supervisors may maintain copies of Postal Service records at the supervisor's discretion. The FMLA certification forms which are kept in the ATAL office are Administrative Medical Records that provide only enough information necessary for management decisions and to document management actions, pursuant to EL-806, Section 214.11.

The Postal Service asserts that it has not violated the record keeping policy of the Privacy Act or the Postal Service. FMLA medical certification forms are kept for determining leave

qualifications only and are kept confidential. The Postal Service requests that the grievance be denied.

DISCUSSION

In the opinion of the Arbitrator, the grievance must be sustained. The medical records kept in the ATAL office for FMLA purposes is not one of the system of records authorized by the Privacy Act.

A *record* is recorded information developed or received by the Postal Service during the transaction of business and retained in its custody. ASM 351.11. A *system of records* contains information about individuals which is retrieved by the name of the individual or some personal identifier, such as Social Security number. ASM 353.121. The systems of records approved by the Privacy Act are listed in the ASM Appendix and are the only current systems of records in which information about individuals may be maintained in the Postal Service. ASM 353.21. "No Postal Service officer or employee may collect or maintain information to be retrieved by the individual's name or identifying symbol, except as part of one of the authorized system of records, and then only in an authorized manner relevant to the purpose of the system." ELM 313.431.

The ASM Appendix lists 22 categories of records in the Privacy Act system of records, one of which is Personnel Records. Within the category of Personnel Records, 31 types of records are authorized. Among these are Medical Records and Supervisor's Personnel Records. The type of records in question kept by the ATAL office could only conceivably be categorized as either one of these.

Medical Records, USPS 120.090, may contain relevant medical history, physical examinations, treatment received at the health unit, occupational injuries or illnesses, substance abuse information, finding, diagnoses and treatment, doctor's statements and recommendations, records of immunizations and medical findings related to an employee's exposure to toxic substances. Medical records must be maintained by the senior medical personnel, ASM 351.131, and must be kept separate from all other personnel files. 29 C.F.R. § 825.500; ELM 314.33 (must be kept within the privacy system of records identified as USPS 120.090).

Supervisor's Personnel Records and Notes may contain information such as disciplinary records, copies of OPF records, training and placement records, skills bank information, estimates of potential, letters of recommendation, etc. ELM 314.541. The Privacy Act system of records lists the specific USPS personnel records that may be maintained in a Supervisor's Personnel Record. They are USPS 120.036, 120.070, 120.151, 120.152, 120.153, 120.180, 120.210; as well as records of discipline. In addition, copies of other Postal Service records and records originated by the supervisor may be included at the supervisor's discretion. ASM Appendix. Conspicuously absent from the list is USPS 120.090, copies of medical records. Neither ELM 314.541 nor the ASM Appendix make any reference to supervisors being authorized to keep any kind of medical records in their file.

Therefore, it must be concluded that the Privacy Act authorizes only one kind of medical record to be kept, USPS 120.090, and that file is to be kept in the medical unit. No unauthorized type of file may be maintained. The medical information that is kept by the ATAL office is an unauthorized system of records that cannot be maintained without seeking the appropriate authorization.

To establish a new system of records about individuals, any headquarters or field organization must obtain from the Postal Service records office. ASM 353.241. The Postal Service must in turn publish its proposal in the *Federal Register* and forward adequate advance notice of the proposal to Congress and the Office of Management and Budget. ASM 353.112. Any officer or employee who willfully maintains a system of records that contains information about individuals without giving appropriate notice in the *Federal Register*, may be fined up to \$5,000. ASM 353.131. The Postal Service submitted no evidence that indicated that it sought authorization of the ATAL record-keeping system that contains FMLA related files.

The Postal Service argues that the information kept in the ATAL office is not restricted medical information, but merely administrative medical records which contain only medical information necessary for management decisions. EL-806, 214, states there are three categories of medical records, Administrative Medical Records, Restricted Medical Records and Office of Workers' Compensation Program Records. Administrative Medical Records may include physician's statements of an employee's ability to perform the duties of the position, as well as sick leave requests and various Postal Service forms. *Id.* However, unlike the other two categories of records, Administrative Medical Records is not listed in the Privacy Act system of records.

The Privacy Act does not distinguish between restricted and non-restricted medical information. Even EL-806, which lists Administrative Medical Records as a category of medical records, states in section 221.1, Privacy Act, that medical records are maintained in four Privacy Act Systems of records: USPS 120.020 (Blood Donor Records); USPS 120.090 (Medical Records); USPS 120.098 (OWCP Records); and USPS 1201.51 (Recruiting, Examination, and

Appointment Records). Administrative Medical Records is not a separate category listed.

Therefore, Administrative Medical Records must be a type of information within the Medical Records system of records of the Privacy Act. One system of records for keeping two distinct types of medical information with varying restrictions on their disclosure. According to EL-806, 221.3, only medical personnel may have access to restricted medical information. However, administrative medical records may be available to Postal Service managers and officials when required for official business, if a legitimate need-to-know basis is established. EL-806 214.14. But, because all medical records are to be kept in the medical unit, medical personnel are the custodians of all medical records, whether restricted or non-restricted.


Therefore, while some medical information may be less restricted than others, no medical records may not be kept in a file separate from the medical file kept in the medical unit by medical personnel, unless authorized under the Privacy Act, even if they are kept confidential and locked, as Ms. Dugas at the ATAL office contends the FMLA files are. Consequently, the system of records kept in the ATAL office for FMLA purposes is an unauthorized system that must be abolished or kept in the Medical Records, USPS 120.090, by medical personnel.

The Union has requested that the Postal Service also be fined for a violation of the Privacy Act, which provides for criminal penalties of up to \$5,000, "for any officer or employee of a federal agency, including the Postal Service, who . . . [w]illfully maintains a system of records that contains information about individuals without giving appropriate notice in the *Federal Register*." Because the ATAL files that contain medical information about individuals is a system of records that the Postal Service has willfully maintained without giving notice in the *Federal Register*, a fine is appropriate. However, the medical file was not kept for malicious

or illegal purposes, but to facilitate the granting of a right of employees to FMLA leave. Therefore, the penalty need not be harsh, but it must stress the importance of following the Privacy Act provisions. The fine shall be \$500, to be paid to the Union.

AWARD

The grievance is sustained. The Postal Service is directed to abolish the system of keeping medical records in the ATAL office for FMLA purposes. The records must be destroyed in accordance with ASM 351.6, or transferred to the medical unit to be kept in accordance with the Privacy Act system of records. The Postal Service is fined \$500 for violation of the Privacy Act, which is to be paid to the Union.


Virginia Wallace-Curry, Arbitrator

Shaker Heights, Ohio
January 20, 1999

LABOR RELATIONS



September 15, 1995

Mr. William Burrus
Executive Vice President
American Postal Workers
Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4128


Dear Bill:

This letter is in response to your correspondence of July 26 concerning the need to provide additional instruction to the field on the maintenance of restricted medical records and the provisions of the Privacy Act as it applies to restricted medical records.

A letter to the field is presently being prepared by a staff attorney that will address these issues. It is anticipated that the letter will be sent out by the end of this month.

If you have any questions regarding the foregoing, please contact Charles Baker of my staff at (202) 268-3832.

Sincerely,


Joe Anthony J. Vegliante

Manager
Contract Administration APWU/NPMHU

SEP 1995

ISSUE: Privacy of Restricted Medical Information

BACKGROUND:

Complaints were received at the national level that supervisors are requiring employees to provide a diagnosis and prognosis (restricted medical information) to substantiate Family and Medical Leave (FML). Several interrelated factors that are involved are discussed below.

DISCUSSION, Part A: The Privacy Act

The Privacy Act, itself, does not prohibit authorized postal officials, including line supervisors, when acting in an official capacity and needing information on a "need to know" basis, to request confidential medical information. However, the Privacy Act does prohibit postal officials from violating employees' privacy by inappropriately disclosing medical information. Penalties and fines can be levied against the Postal Service for such disclosures.

DISCUSSION, Part B: Restricted Medical Records

Postal Service handbook, EL-806, "Health and Medical Service" provides procedures for personnel in Postal Service medical/health units to carry out their responsibilities in an employee health program. It identifies "physician diagnosis and prognosis" as restricted medical records. The medical unit is assigned custodial responsibility for the maintenance of restricted medical records. Therefore, any documentation received by a supervisor which contains a diagnosis or prognosis must be forwarded to the medical unit and not filed outside the medical unit. The release of medical records from their files is controlled by the EL-806.

In response to the complaints received at the national level, Dr. Reid, National Medical Director, wrote a letter dated June 22 to the Managers of Human Resources, restating the existing Postal policy. It also noted that a health care provider can provide an acceptable explanation of medical facts for leave approval purposes without specifying a diagnosis or prognosis.

DISCUSSION, Part C: Documentation

There are no specific forms required to be filled out under FMLA in order to certify a FMLA absence. In fact, just like certifications for sick leave, any form is acceptable so long as it provides the required information. The requirements for FMLA absences are set forth in Publication 71. The APWU developed five different forms for their members to use which Postal Management reviewed and approved for use to certify FMLA. In addition, form WH-380, developed by the Department of Labor, also can be used to certify FMLA. No

matter what form an employee or health care provider uses, if a supervisor questions the completeness of the information on the form, he or she should refer to Publication 71 to determine if the necessary information has been provided.

The APWU has told employees they could send medical documents containing restricted information (diagnosis and prognosis) to the Medical Unit, and bypass the supervisor. This may be fine where it can reasonably be accommodated. However, the employee is responsible for providing information required to designate the leave as FML to the supervisor. Employees should request their health care providers to avoid providing private details on the certification. Failure to provide documentation requested may result in denial of FML.

In addition to providing the FMLA certification requested for absences, employees who request leave must submit a PS Form 3971, "Request for or Notification of Absence," for each pay period and for each type of leave to be charged.

As previously mentioned, any certification format is acceptable as long as it provides the necessary information. However, in some cases a certification form may be useful. This may be true when an employee provides only a brief or incomplete certification and the supervisor needs additional information to determine if the absence qualifies as FML. In such cases, the Department of Labor form WH-380, "Certification of Health Care Provider" may be used. It was developed with employees' privacy in mind. It allows employers to obtain sufficient information from health care providers to verify that an employee has a serious health condition and the likely periods of absence by the employee, but unnecessary information is not requested. The form requests medical facts, it does not request a diagnosis or prognosis.

C. Privacy Act Systems of Records

1. Application

The following points are relevant to Postal Service systems:

- a. The Postal Service's Privacy Act regulations and systems of records apply only to living persons. They do not apply to deceased persons, business firms identified by the names of individuals, sole proprietorships, partnerships, or corporations.
- b. The "purpose" portion of each system notice is included to provide clarity and promote understanding of the system by the layman. It may be defined as that activity performed by those officers and Postal Service employees who have a need for component records of the system in the performance of their duties. Disclosure accounting is not maintained by the Postal Service for any activity listed as a "purpose."
- c. All Postal Service records described in this list are subject to:
 - (1) Disclosure pursuant to an order of a court of competent jurisdiction.
 - (2) Review by Congress or one of its committees or subcommittees on request.

2. Prefatory Statement of Routine Uses

Where applicable, the following routine uses are incorporated by reference into each system of records set forth below (the letter "i" was not used in this list):

- a. *Disclosure for Law Enforcement Purposes.* When the Postal Service becomes aware of an indication of a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule, or order issued pursuant thereto, or in response to the appropriate agency's request on a reasonable belief that a violation has occurred, the relevant records may be referred to the appropriate agency, whether federal, state, local, or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto.
- b. *Disclosure Incident to Litigation.* Records from this system may be disclosed to the U.S. Department of Justice or to other counsel representing the Postal Service, or may be disclosed in a proceeding before a court or adjudicative body before which the Postal Service is authorized to appear, when (a) the Postal Service; or (b) any postal employee in his or her official capacity; or (c) any postal employee in his or her individual capacity whom the Department of Justice has agreed to represent; or (d) the United States when it is determined that the Postal Service is likely to be affected by the litigation, is a party to litigation or has an interest in such litigation, and such records are determined by the Postal Service or its counsel to be plausibly relevant

to the litigation, provided, however, that in each case, the Postal Service determines that disclosure of the records is a use of the information that is compatible with the purpose for which it was collected. This routine use specifically contemplates that information may be released in response to relevant discovery and that any manner of response allowed by the rules of the forum may be employed.

- c. *Disclosure Incident to Requesting Information.* Records may be disclosed to a federal, state, or local agency maintaining civil, criminal, or other relevant enforcement or other pertinent information, such as licenses, when necessary to obtain information from such agency that is relevant to a Postal Service decision about the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, permit, or other benefit.
- d. *Disclosure to Requesting Agency.* Records may be disclosed to a federal, state, local, or foreign agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the conduct of a security or suitability investigation of an individual, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.
- e. *Congressional Inquiries.* Disclosure may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the prompting of that individual.
- f. *Disclosure to Agents and Contractors.* Records or information from this system may be disclosed to an expert, consultant, or other individual who is under contract to the Postal Service to fulfill an agency function, but only to the extent necessary to fulfill that function. This may include disclosure to any individual with whom the Postal Service contracts to reproduce by typing, photocopy, or other means, any record for use by Postal Service officials in connection with their official duties or to any individual who performs clerical or stenographic functions relating to the official business of the Postal Service.
- g. *Storage.* Inactive records may be transferred to a Federal Records Center for storage prior to destruction.
- h. *Disclosure to Office of Management and Budget.* Records from this system may be disclosed to the Office of Management and Budget in connection with the review of private relief legislation as set forth in OMB Circular No. A-19 at any stage of the legislative coordination and clearance process as set forth in that Circular.
- j. *Disclosure to Outside Auditors.* Records in this system may be subject to review by an independent certified public accountant during an official audit of Postal Service finances.
- k. *Disclosure to Equal Employment Opportunity Commission.* Records from this system may be disclosed to an authorized investigator, administrative judge, or complaints examiner appointed by the Equal Employment Opportunity Commission, when requested in connection

with the investigation of a formal complaint of discrimination filed against the U.S. Postal Service under 29 CFR Part 1614.

- l. *Disclosure to Merit Systems Protection Board or Office of the Special Counsel.* Records from this system may be disclosed to the Merit Systems Protection Board or Office of the Special Counsel for the purpose of litigation, including administrative proceedings, appeals, special studies, investigations of alleged or possible prohibited personnel practices, and such other functions as may be authorized by law.
- m. *Disclosure to Labor Organizations.* Pursuant to the National Labor Relations Act, records from this system may be furnished to a labor organization when needed by that organization to perform properly its duties as the collective bargaining representative of postal employees in an appropriate bargaining unit.

040.000 Customer Programs

- .010 Memo to Mailers Address File, 040.010
- .020 Sexually Oriented Advertisements, 040.020
- .030 Auction Customer Address File, 040.030
- .040 Customer Holiday Address List File, 040.040

050.000 Finance Records

- .005 Accounts Receivable Files, 050.005
- .010 Employee Travel Records (Accounts Payable), 050.010
- .020 Payroll System, 050.020
- .040 Uniform Allowance Program, 050.040

060.000 Consumer Protection Records

- .010 Fraud, False Representation, Lottery, and Nonmailability Case Records, 060.010
- .020 Pandering Act Prohibitory Orders, 060.020
- .030 Appeals Involving Mail Withheld From Delivery, 060.030
- .040 Appeals From Termination of Post Office Box or Caller Service, 060.040

070.000 Inquiries and Complaints

- .010 Correspondence Files of the Postmaster General, 070.010
- .020 Government Officials' Inquiry System, 070.020
- .040 Customer and Employee Complaint Records, 070.040

080.000 Inspection Requirements

- .010 Investigative File System, 080.010
- .020 Mail Cover Program Records, 080.020
- .030 Vehicular Violations Records System, 080.030

090.000 Nonmail Services

- .020 Passport Application Records, 090.020

100.000 Office Administration

- .010 Carpool Coordination/Parking Services Records System, 100.010
- .020 Commercial Accounts Communicator Letter, 100.020
- .050 Localized Employee Administration Records, 100.050

110.000 Property Management

- .010 Accountable Property Records, 110.010
- .020 Possible Infringement of Postal Service Intellectual Property Rights, 110.020

120.000 Personnel Records

- .020 Blood Donor Records System, 120.020
- .035 Employee Accident Records, 120.035
- .036 Discipline, Grievance, and Appeals Records for Nonbargaining Unit Employees, 120.036
- .040 Employee Job Bidding Records, 120.040

- .050 Employee Ideas Program Records, 120.050
 - .060 Confidential Statements of Employment and Financial Interests, 120.060
 - .061 Public Financial Disclosure Reports for Executive Branch Personnel, 120.061
 - .070 General Personnel Folders (Official Personnel Folders and Records Related Thereto), 120.070
 - .090 Medical Records, 120.090
 - .091 Vehicle Operators Controlled Substance and Alcohol Testing Records, 120.091
 - .098 Office of Workers' Compensation Program (OWCP) Record Copies, 120.098
 - .099 Injury Compensation Payment Validation Records, 120.099
 - .100 Performance Awards System Records, 120.100
 - .110 Preemployment Investigation Records, 120.110
 - .120 Personnel Research and Test Validation Records, 120.120
 - .121 Applicant Race, Sex, National Origin, and Disability Status Records, 120.121
 - .130 Postmaster Selection Program Records, 120.130
 - .140 Employee Assistance Program (EAP) Records, 120.140
 - .151 Recruiting, Examining, and Appointment Records, 120.151
 - .152 Career Development and Training Records, 120.152
 - .153 Individual Performance Evaluation/Measurement, 120.153
 - .154 Employee Survey Process System Records, 120.154
 - .170 Safe Driver Awards Records, 120.170
 - .180 Skills Bank (Human Resources Records), 120.180
 - .190 Supervisors' Personnel Records, 120.190
 - .210 Vehicle Maintenance Personnel and Operators Records, 120.210
 - .220 Arbitration Case Files, 120.220
 - .230 Adverse Action Appeals (Administrative Litigation Case Files), 120.230
 - .240 Garnishment Case Files, 120.240
- 130.000 Philately**
- .010 Ben Franklin Stamp Club Coordinators and Project Leaders List, 130.010
 - .020 Educators *Stamp Fun* Mailing Lists, 130.020
 - .040 Postal Product Sales and Distribution, 130.040
 - .050 United States Postal Service Olympic Pen Pal Club, 130.050
- 140.000 Postage**
- .020 Postage Meter Records, 140.020
- 150.000 Records and Information Management Records**
- .010 Information Disclosure Accounting Records (Freedom of Information Act), 150.010
 - .015 Freedom of Information Act Appeals and Litigation Records, 150.015

System Manager(s) and Address

VICE PRESIDENT
HUMAN RESOURCES
UNITED STATES POSTAL SERVICE
475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-4200

Notification Procedure

Employees wanting to gain access to their official personnel folders must submit requests to the facility head where employed. Headquarters employees must submit requests to the system manager. Former Postal Service employees must submit requests to any Postal Service facility head giving name, date of birth, and Social Security number. Former Post Office Department employees having no Postal Service employment (prior to July 1971) must submit the request to the Office of Personnel Management (formerly the U.S. Civil Service Commission) at:

OFFICE OF PERSONNEL MANAGEMENT
COMPLIANCE AND INVESTIGATIONS GROUP
1900 E STREET NW
WASHINGTON DC 20415-0001

Record Access Procedures

Requests for access must be made in accordance with the notification procedure above and the Postal Service Privacy Act regulations regarding access to records and verification of identity under 39 CFR 266.6.

Contesting Record Procedures

See Notification and Record Access Procedures above.

Record Source Categories

Individual employee, personal references, former employers, and USPS 050.020 (Finance Records — Payroll System).

Systems Exempted From Certain Provisions of the Act

The Postal Service has claimed exemption from certain provisions of the Act for several of its other systems of records as permitted by 5 U.S.C. 552a(j) and (k). See 39 CFR 266.9. To the extent that copies of exempted records from those other systems are incorporated into this system, the exemptions applicable to the original primary system must continue to apply to the incorporated records.

USPS 120.090

System Name

Personnel Records — Medical Records, 120.090.

System Location

Postal Service medical facilities and designee offices; Postal Service Corporate Health Fitness Center (Headquarters only).

Categories of Individuals Covered by the System

Present and former Postal Service employees, individuals who have been offered employment but failed the medical examination before being placed on the rolls, and employees of other agencies that have entered into an agreement with the Postal Service to have the Postal Service perform medical services for the agencies' employees; also, Headquarters employees who participate in the corporate health/fitness program.

Categories of Records in the System

Name, address, job title, Social Security number, installation, illness, supervisor's and physician's reports (on Authorizations for Medical Attention); relevant medical history including physical examinations, treatment received at the health unit, occupational injuries or illnesses, substance abuse information, findings, diagnoses and treatment, doctor's statements and recommendations, records of immunizations, and medical findings related to employee's exposure to toxic substances. In addition, Headquarters employees who participate in the corporate health/fitness program will voluntarily provide data about their lifestyle, exercise schedule, smoking habits, knowledge about personal health, personal and family medical history, nutrition, stress levels, and other data relevant to making a health risk appraisal. Records of participant employees' individualized schedules and progress may be kept.

Authority for Maintenance of the System

39 U.S.C. 401, 1001.

Purpose(s)

- a. To provide all employees with necessary health care and to determine fitness for duty.
- b. To provide a comprehensive individualized health promotion program for Headquarters employees and to determine the employee and organizational benefits of that program.

Note: Personal information about employee participants in the Corporate Health Fitness Program at Headquarters is under the exclusive custody of the contractor operating the program and is not available to postal management. These data are maintained only for those employees who voluntarily provide it and under conditions assuring that it will not be disclosed without the written authority of the subject employee. Aggregated data may be provided to postal management for its use in determining the employee and organizational benefits of the program, but those data will have no personal identifiers affixed to it.

Routine Uses of Records Maintained in the System, Including Categories of Users and the Purposes of Such Uses

General routine use statements a, b, c, d, e, f, g, h, j, k, l, and m listed in the prefatory statement at the beginning of the Postal Service's published system notices apply to this system. Other routine uses are as follows:

1. Information in these records may be provided to the Office of Personnel Management in making determinations related to:
 - (a) Veterans Preference.
 - (b) Disability Retirement.
 - (c) Benefit Entitlement.
2. Information in these records may be provided to officials of the following federal agencies responsible for administering benefit programs
 - (a) Office of Workers' Compensation Programs.
 - (b) Retired Military Pay Centers.
 - (c) Department of Veterans Affairs.
 - (d) Social Security Administration.
3. Records in this system may be disclosed to an employee's private treating physician and to medical personnel retained by the Postal Service to provide medical services for an employee's health or physical condition related to employment.
4. May be disclosed to an outside medical service when that organization performs the physical examinations and submits the evaluation to the Postal Service under a contract with the Postal Service as part of an established Postal Service health program for the purpose of determining a postal employee's fitness for duty.
5. May be disclosed to the Occupational Safety and Health Administration, Department of Labor, when needed by that organization to perform its duties properly under 29 CFR Part 19.
6. May be disclosed to the National Institute of Occupational Safety and Health when needed by that organization to perform its duties properly under 29 CFR Part 19.

Policies and Practices for Storing, Retrieving, Accessing, Retaining, and Disposing of Records in the System

Storage

Preprinted forms and paper files (Official Medical Folders); Preprinted forms and paper files and hard copy computer storage (Corporate Health Fitness Center records).

Retrievability

Employee name.

Safeguards

Kept in locked files. Access to automated Corporate Health Fitness Center records is restricted by password protection to medical screening personnel and health/fitness specialists under contract to operate the Corporate Health Fitness Program facility at Headquarters.

Retention and Disposal

- a. Employee Medical Folder — Medical records considered permanent are maintained until employee is separated and then are sent to the National Personnel Records Center for storage, or to another federal agency to which the individual transfers employment. The records are kept for 30 years from the date the employee separates from federal service.
- b. Failed Eligibles — Retained in personnel office with employment application and destroyed by shredding when 2 years old.
- c. Authorization for Medical Attention (Form 3956) — Destroy when 2 years old.
- d. Corporate Health Fitness Center records — Retained by contractor operating Center until termination of contract, at which time they must be returned to the Postal Service.

System Manager(s) and Address

VICE PRESIDENT
HUMAN RESOURCES
UNITED STATES POSTAL SERVICE
475 L'ENFANT PLAZA SW
WASHINGTON DC 20260-4200

Notification Procedure

An employee wanting to know whether information about him or her is maintained in this system of records must address inquiries to the head of the facility where employed. Headquarters employees must submit requests to the system manager. Failed eligibles must address inquiries to the head of the facility where application for employment was made. Inquiries must contain full name.

Record Access Procedures

Requests for access must be made in accordance with the notification procedure above and the Postal Service Privacy Act regulations regarding access to records and verification of identity under 39 CFR 266.6.

Contesting Record Procedures

See Notification and Record Access Procedures above.

Record Source Categories

Postal Service employees, selected eligibles, and Department of Veterans Affairs and Postal Service medical staff.