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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 §

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.

AML:pad  
GATDAMUCORBURRUS.MEM

### 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 employees 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 from 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.

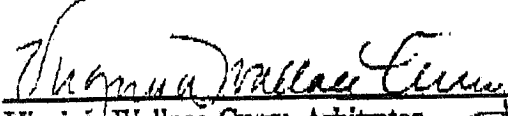
Therefore, while some medical information may be less restricted than others, no medical records may not be kept in a file separate from the medical file kept in the medical unit by medical personnel, unless authorized under the Privacy Act, even if they are kept confidential and locked, as Ms. Dugas 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,

  
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 (FMLA). 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.