REGULAR ARBITRATION PANEL

In the Matter of Arbitration	( )	Grievant Sue Keen
between	( )	Postal Facility Tampa, Florida
UNITED STATES POSTAL SERVICE	( )	USPS Case No. H98C-4H-D 99290624
and	( )	APWU Case No. S-7
AMERICAN POSTAL WORKERS UNION, AFL-CIO	( )	

BEFORE: Arvid Anderson, Arbitrator

APPEARANCES:

For the U.S. Postal Service:	Gerald E. Keegan, Labor Relations Specialist
For the Union:	Randy Sutton, National Arbitration Advocate
Place of Hearing:	Tampa, Florida
Date of Hearing:	March 15, 2000
Date of Award:	March 31, 2000
Relevant Contract Provision:	Article 5, Article 10, Article 16, Section 3
Contract Year:	1998-2000
Type of Grievance:	Discipline

Award Summary:

An employee, who is eligible for Family Medical Leave at the time medical leave commences, but due to intermittent leaves for the same condition, falls below the 1250 hour minimum required in the previous 12 month period, is, nevertheless, eligible for medical leave.

The issue to be decided is whether the Management violated the national agreement when they deemed the grievant unqualified for intermittent Family Medical Leave Act do to the recalculation of her qualifying hours for each absence for the same Family Medical Leave Act condition; and if so, what shall the remedy be?

The grievant, Sue Keen, is an Accounting Technician employed in the Suncoast Finance District. In January 1999, the grievant was placed under the Family Medical Leave Act in order to care for her daughter who suffers from a chronic respiratory condition. The grievant, at the time, had more than 1250 hours during the previous 12 month period, which is required for eligibility under the Family Medical Leave Act. Her intermittent absences continued for a period of time and she was advised by the Postal Service in March 1999 that she was no longer qualified for the Family Medical Leave Act for her previously approved condition for intermittent Family Medical Leave.

In May 1999, she was given a letter of warning regarding her absences. Since that time she had five more absences during June and July, and was suspended for one week in September. All of the absences were to take care of her chronically ill daughter.

The Union filed a grievance and the suspension was ultimately withdrawn. However, the warning notice was still in affect and is the subject of this grievance. Thus, the issue is whether a person, who is eligible for Family Medical Leave at the time that their leave commences, but subsequently, due to intermittent leaves for the same medical condition, falls below the minimum required 1250 hours in the previous 12 month period, still eligible for medical leave? The Postal Service says no and the Union says yes.

POSITION OF THE PARTIES

Randy Sutton, the Union's National Advocate, presented an outstanding and comprehensive overview of the Family Medical Leave Act and its application to these facts as part of his opening statement. After meeting the requirement for 1250 hours of service during the previous 12 month period, the employee becomes eligible to a total of 12 work weeks of leave during any 12 month period. Leave is allowed if one of those purposes is to care for a spouse, or

a son, or a daughter, or a parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition. That is a provision of Section 102 Leave Requirement, Section (a) In General (1)(C). There is no dispute that the care in this case was for a daughter.

Section 102(a) 2 provides:
" *Expiration of Entitlement - The entitlement to leave under subparagraphs (A) and (B) of* paragraph (1) for a birth or placement of a son or daughter shall expire at the end of the 12 month period beginning on the date of such birth or placement."

Section 102(b) provides:

"Leave Taken Intermittently or on a Reduced Leave Schedule.--

(1) In General. -- Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employer of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and section 103(b)(5), leave under subparagraph (C) or (D) of subsection (a)(1) may be taken intermittently or on a reduced leave schedule when medically necessary. The taking of leave intermittently or on a reduced leave schedule pursuant to this paragraph shall not result in a reduction in the *total amount of leave to which the employee is entitled under subsection* (1) beyond the amount of leave actually taken."

The regulations of the Department of Labor, Wage and Hour Division applied to the Family Medical Leave Act are also important.

"Sec. 825.100 What is the Family and Medical Leave Act?

(a) The Family and Medical Leave Act of 1993 (FMLA or Act) allows "eligible" employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her job (see Sec. 825.306(b)(4). In certain cases, this leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule."

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Sec. 825.203 Does FMLA Leave have to be taken all at once, or can it be taken in parts?

(a) FMLA leave may be taken "intermittently or on a reduced leave schedule" under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) When leave is taken after the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part-time after the birth of a child, or takes leave in several segments. The employer's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition. (emphasis added)

(c) Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition. It may also be taken to provide care or psychological comfort to an immediate family member with a serious health condition.

(1) Intermittent leave may be taken for a serious health condition which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave or periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider.

(d) There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. However, an employer may limit leave increments tot he shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less. For example, an employee might take two hours off for a medical appointment, or might work a reduced day of four hours over a period of several weeks while recuperating from an illness. An employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave, except as provided in Secs. 825.601 and 825.602."

Also very relevant is a joint APWU and USPS memo of May 27, 1998 which outlines a series of questions and answers on the Family and Medical Leave Act. The introduction states, "The American Postal Workers Union (APWU) and the United States Postal Service (USPS) have worked jointly to produce answers to the most frequently asked Family and Medical Leave Act (FMLA) questions. The parties agree that referral to these questions and answers should eliminate disputes concerning basic FMLA issues. Our expectation is that proper interpretation of the FMLA will improve communication and increase the understanding between labor and management so that employees can fulfill the Postal Service's mission in a workplace climate that promotes fairness and concern for workers entitled to FMLA job-protected absences." Quoted below are the most relevant questions and answers for this case.

"24. Q. Do the 12 workweeks of FMLA protected leave have to be continuous?

A. No, the leave may be taken intermittently or on a reduced schedule basis as long as taking it in that manner is medically necessary. when leave is taken because of the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the supervisor agrees.

28. Q. Is the employer's approval required for an employee to use intermittent leave or work a reduced schedule if the employee, spouse, child or parent has a serious health condition?

A. The absence must be allowed provided proper medical certification and notice is provided. However, in foreseeable cases, the employee must attempt to schedule the absences so as not to disrupt the employer's operation. The employee may be assigned to an alternative position with equivalent pay and benefits that better accommodates the intermittent or reduced leave schedule, in accordance with National Agreement.

34. Q. May an employee be removed, disciplined, or placed on restricted sick leave as a result of protected absences under the FMLA?

A. No.

40. Q. While absences for conditions covered by the FMLA cannot be cited as a basis for discipline, can they be discussed in periodic absence reviews concerning the importance of regular attendance?

A. Yes."

In addition to the pertinent provisions of the Act, the regulations of the Department of Labor and the questions and answers of the APWU and USPS memo of May 27, 1998, the Union also introduced two U.S. District Court decisions supporting its position. This arbitrator deems relevant the case of Willie Barron vs Marvin T. Runyon as most important. Runyon is the Postmaster General. The decision was issued by the U.S. District Court for the Eastern District of Virginia on July 7, 1998. Quoting from the court, "The second, and central, issue is whether an employee who takes intermittent leave under the Act for a valid medical reason must qualify as an 'eligible employee' each time he is absent from work for that reason, or whether his eligibility must be established only the first time he is absent for that reason." The court held that "an employee who is eligible for intermittent leave need only establish his eligibility on the occasion of the first absence and not on the occasion of each subsequent absence."

The court further observed that, "the crux of the matter, then, is what the term leave means. If the term encompasses all absences that together make up a period of intermittent leave, then an employee's eligibility would be determined only at the time the first absence is taken; that point in time would constitute 'the commencement of the leave.' If, on the other hand, the term

leave is synonymous with absence, then an employee's leave would commence again each time the employee left work to care for his own family member's medical condition, and he would therefore be required to reestablish his eligibility at the beginning of each absence." ... "Adopting this latter position would render the term intermittent leave meaningless, essentially reading it completely out of the statute."

The court added, "Thus a series of absences separated by days during which the employee's at work, but all of which are taken for the same medical reason, subject to the same notice and taken during the same twelve month period, comprises one period of intermittent leave. From this it follows the plaintiff must establish his eligibility only on the occasion of the first absence, and not on the occasion of every absence thereafter."

On the basis of its presentation the Union asks that the warning letter be dismissed and that the grievant be made whole for any losses she may have suffered.

It is the position of the Postal Service that the employee must have the 1250 hours of work in the previous 12 month period for every time the leave commences. The Postal Service cited two recent decisions, one by this arbitrator on December 6, 1999 involving the Postal Facility at Sarasota, the grievant was Karen Churchill. However, in that case, it was abundantly clear that the grievant at no time relevant to a determination in her case was ever eligible for the Family Medical Leave Act.

In the subsequent case, issued on January 10, 2000, by Arbitrator Walter D. McCoy at St. Petersburg, the grievance involving Tiffany Sotello, the arbitrator concluded that the employee was not eligible under the Family Medical Leave Act. Furthermore, the evidence indicates that the grievant ignored numerous requests by the Postal Service to determine the employee's eligibility for work. The grievant was subsequently discharged as being AWOL. No medical evidence was produced that the grievant was available for work.

The Postal Service also argues that the determinations of two Federal District Courts in the Eighth Circuit are not applicable. This arbitrator agrees that those decisions are not governing, but they are persuasive.

DISCUSSION

This arbitrator concludes that the grievance must be sustained for the following reasons. First, it is abundantly clear, from the joint American Postal Workers Union and USPS Family Medical Leave Act, Questions and Answers, May 27, 1998, that the grievance should be sustained. There is no dispute that the grievant had an initial eligibility for Family Medical Leave. She then had to take leave on an intermittent basis to care for a chronic condition of her sick child. Question 24 asks, Do the 12 workweeks of FMLA protected leave have to be continuous? The answer is no. When leave is taken because of the birth or placement of a child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the supervisor agrees. However, the provisions of Section 825.203(b) point out that in caring for a sick child "The employer's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition."

Question 28 asks, Is the employer's approval required for an employee to use intermittent leave or work a reduced schedule if the employee, spouse, child or parent has a serious health condition? The answer is, "The absence must be allowed provided proper medical certification and notice is provided." This was provided.

And the crucial question, "34, May an employee be removed, disciplined, or placed on restricted sick leave as a result of protected absences under the FMLA? The answer is no." However, question 40 states such absences "can be discussed in periodic absence reviews concerning the importance of regular attendance." This was done.

Thus, it is abundantly clear that the grievance should be sustained. The employee was eligible for Family Medical Leave and continued to be eligible for the FMLA due to the intermittent absences required for the care of her daughter.

Thus, it is my

AWARD

1. That the Postal Service shall cease and desist from disciplining the employee for utilizing the FMLA.

2. That the letter of warning issued to Sue Keen should be removed.

March 31, 2000
Fort Myers, Florida

Arvid Anderson