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American Postal Workers Union, AFL-CIO

1300 L Street, NW, Washington, DC 20005

January 28, 2005

Susan M. Carney
Human Relations Director
(202) 842-4270 (Office)
(202) 216-2634 (Fax)

Dear President:

National Executive Board

William Burrus
President

Cliff "C.J." Guffey
Executive Vice President

Terry Stapleton
Secretary-Treasurer

Greg Bell
Industrial Relations Director

James "Jim" McCarthy
Director Clerk Division

Steven G. "Steve" Raymer
Director, Maintenance Division

Robert C. "Bob" Pritchard
Director, MVS Division

Regional Coordinators

Sharyn M. Stone
Central Region

Jim Burke
Eastern Region

Elizabeth "Liz" Powell
Northeast Region

Frankie L. Sanders
Southern Region

Omar M. Gonzalez
Western Region

Enclosed you will find a report as it relates to the USPS Long Island Outplacement Pilot Program. For reasons contained in the report, to date we have not found it necessary to initiate a national level grievance regarding the USPS Long Island District Outplacement Program. Additionally, we have not been advised by USPS headquarters or by the field that this pilot program has been expanded to or implemented in other Postal Districts or Areas. That being said, we are requesting that you keep us apprised of any USPS notifications, expansions or activities as it relates to this program.

If you become aware of any members of the APWU bargaining unit who have had their limited duty/rehabilitation jobs withdrawn in this manner (pilot/policy), we have also enclosed information to assist you in grievance handling and to guide you in providing assistance to our APWU members with the OWCP claims process.

As always I remain,

Yours in Unionism,

Susan M. Carney
Human Relations Director

Attachments (2)

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USPS Long Island District Outplacement Pilot Program Report

On March 17, 2004, USPS Headquarters informed APWU that the Long Island Postal District was initiating a pilot program which could result in the withdrawal by the Postal Service of certain limited duty/rehabilitation jobs.

At the follow-up Long Island Postal District meeting on April 1, 2004, USPS advised APWU representatives of the following information:

- That the USPS within this district no longer had medically suitable work available for partially disabled employees.
- The program would within a year's time potentially expand to the New York Metro Area.
- There initial focus would be on employees whose medical restrictions were accommodated in the clerk craft; primarily letter carriers and mail handlers.
- And that those partially disabled employees would be advised not to report to work, and would be given OWCP Form CA2A, Notice of Recurrence and would also be instructed to file OWCP Form CA-7, Claim for Wage Loss Compensation.
- That the USPS would place these employees on seven days of administrative leave to allow time for OWCP to process their CA-7, which would prevent impacted employees from suffering financial hardship
- USPS representatives also advised that they had partnered with OWCP regarding their Outplacement Program and that OWCP was in agreement with their impending action. As a result of their joint discussions, the USPS advised that these "outplaced" employees would not encounter any difficulties with their recurrence or wage loss compensation claims, and both forms would be processed in an expeditious manner to avoid unnecessary hardship to the employee.

The Division of Federal Employee Compensation OWCP was not present at the Headquarters or Long Island District meeting, so APWU met with DFEC at the national level on April 27, 2004 to discuss their involvement in the USPS Outplacement Program. DFEC advised APWU representatives of the following information:

- That they were not party to the USPS Outplacement Program, only that their NY District reps had been advised by USPS that they no longer would have medically suitable work available. These DFEC district reps advised DFEC Headquarters accordingly.
- There was no agreement to fast-track CA2a's or CA7's and that each new claim would be processed in the usual manner.
- There was no guarantee, nor automatic approval for any USPS employee who was "outplaced" as a result of this program and that each claimant would have to substantiate their medical restrictions remained causal to their approved injury / disease.
- That there was no agreement or provision that required USPS to pay the "outplaced" employee any administrative leave but stated if the USPS opted to do so, there was no provision that prevented it. They further noted if the employee was paid administrative leave, they should not request wage loss compensation for that time period.

- That DFEC did not have the authority to challenge any employer's claim that they no longer had medically suitable work available for partially disabled employees.

As a result of these meetings, a letter was sent by President Burrus to USPS Headquarters on June 22, 2004. The USPS responded by letter dated July 29, 2004, which we reviewed. The crux of their response is they [USPS] "will continue to comply with ELM Section 546, The Rehabilitation Act of 1973, FECA, and all other applicable rules, regulations, or statutes when conducting individualized assessments for employment."

To date we have received no specific information from the field indicating that any USPS activities or policies associated with this USPS Pilot are in violation of applicable handbook language, or Federal law or regulation, nor have we received any information that any APWU bargaining unit employees have been "outplaced" as a result of the same.

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USPS Withdrawal of Limited Duty/Permanent Rehabilitation Job Assignments

OWCP Claims Process

Any member of the APWU bargaining unit who has a limited duty/rehabilitation job withdrawn should file a grievance and should also file OWCP Form CA-7. In addition we suggest that OWCP Form CA-2a, *Notice of Recurrence*, be filed. Specifically, the recurrence of disability (inability to work) in these cases is the result of work stoppage caused by the Postal Service's withdrawal (for reasons other than misconduct) of a specific limited duty/rehab assignment which was created when the employee could not perform the full duties of his or her regular position. The employee should indicate in Block #16 on OWCP Form CA-2a that the recurrence claim is for "Time Loss from Work", and indicate in Block #21 that the recurrence is the result of work stoppage caused by the Postal Service's withdrawal of the limited duty/rehabilitation assignment. We suggest that if the employee has a copy of the original limited duty/rehab job offer that they attach it to the Form CA- 2a. Also, ask that the Postal Service document the withdrawal in writing and provide a copy to the employee. That can also be attached that to the CA-2a.

Grievance Handling

In regards to any grievances being filed as a result of the Postal Service declaring that a limited duty/rehab job is "non-productive" or is no longer available, the language referenced below highlights some controlling language which may be relevant to the dispute (*the cited language may not apply in every fact circumstance*):

ELM 546.11 "The USPS has legal responsibilities to employees with job-related disabilities under 5 USC 8151 and the Office of Personnel Management's (OPM) regulations..." (See CFR 353.306 cited below for OPM regulations)

ELM 546.14 "When an employee has partially overcome a compensable disability, the USPS must make every effort toward assigning the employee to limited duty consistent with the employee's medically defined work limitation tolerance...the USPS should minimize any adverse or disruptive impact on the employee."

ELM 546.65 and **EL 505, *Injury Compensation, Chapter 11-6***. Both of these cites establish in detail that if management refuses to accommodate a partially disabled employee that employee must be provided with a copy of Postal Service Headquarters final concurrence of such refusal, be notified in writing of the USPS refusal to accommodate, and also be notified of their right to appeal to the Merit System Protection Board (MSPB). See also EL 546.3 and 546.4.

EL 505, *Injury Compensation Chapter 11. "Procedures."* "It is the policy of the USPS to make every effort to reemploy or reassign IOD employees with permanent partial disabilities..."

CBA, Article 3, "Management Rights" directs that the application of management rights must be "consistent with applicable laws and regulations." **Part 353.306 of Title 5, Code of Federal Regulations (CFR)**, states that "agencies must make every effort to

restore, according to the circumstances in each case, an employee or former employee who has partially recovered from a compensable injury and who is able to return to limited duty.”

CBA, Article 21.4, “Benefit Plans” establishes that employees are covered by the Federal Employees Compensation Act (i.e., subchapter I of chapter 81 of Title 5) and that the USPS will promulgate (publish officially) regulations which comply with the applicable regulations of OWCP. **Part 10.505 of Title 20, CFR** reads:

“What actions must the employer take?... (a) Where the employer has specific alternative positions available for partially disabled employees, the employer should advise the employee in writing of the specific duties and physical requirements of those positions. (b) Where the employer has no specific alternative positions available for an employee who can perform restricted or limited duties, the employer should advise the employee of any accommodations the agency can make to accommodate the employee’s limitations due to the injury”.

CBA, Article 2, “Non-Discrimination and Civil Rights” states that “In addition, consistent with the other provisions of this Agreement, there shall be no unlawful discrimination against handicapped employees, as prohibited by the Rehabilitation Act. ((see EL 307, *Reasonable Accommodation* (January, 2000) for further discussion on reasonable accommodation. For example: “In other words, the Rehabilitation Act requires the employer to look for new or innovative ways to alter, restructure, or change the ways of doing a job in order to allow a qualified person with a disability to perform the essential functions of a particular job”..))

CBA, Article 5, “Prohibition of Unilateral Action” establishes that “the employer will not take any actions affecting wages, hours and terms and conditions of employment as defined in Section 8 (d) of the National Labor Relations Act which violate the terms of this agreement or are otherwise inconsistent with its obligations under law.”

CBA, Article 34, “Work and/or Time Standards” establishes in “Part B” that “the employer agrees that any work measurement systems or time or work standards shall be fair, reasonable, and equitable”. Article 34 then goes on to describe in “Part B” through “Part I” the detailed process that must be followed if the USPS intends to change current, or institute new, work measurement systems, or work or time standards. The USPS at the Headquarters level has not given the APWU any notification, nor have they even suggested that they intend to create a specific standard of “productivity” for injured employees in rehab positions. The current applicable work standard for **all** employees is cited in “Part A” of Article 34: “The principle of a fair day’s work for a fair day’s pay is recognized by all parties to this agreement.” In support of the argument that a partially disabled employee working in a rehabilitation job is in compliance with the principle of “a fair days work” we refer to the **ELM, Chapter 546.21, “Compliance”** which states that: “Reemployment or reassignment under this section must be in compliance with applicable collective bargaining agreements. Individuals so reemployed or reassigned must receive all appropriate rights and protection under the newly applicable Collective

Bargaining Agreement". We argue, then, that a rehab employee is protected by Article 34 language from arbitrary work measurement systems or work or time standards just like any bargaining unit employee.

In summary, when the USPS arbitrarily withdraws limited duty and/or a permanent rehabilitation jobs the union should argue, *as appropriate*, that such action:

- (1) Violates Clear CBA and handbook language;
- (2) Is inconsistent and noncompliant with USPS obligations under applicable law and regulations;
- (3) Contravenes the long standing criteria, *i.e.* whether the job assignment is medically suitable/medically appropriate, which has been applied consistently and uniformly both by the USPS and OWCP when restoring partially disabled employees to rehabilitation positions;
- (4) Is inconsistent with clear and unambiguous controlling language and a longstanding mutually recognized practice;
- (5) Is arbitrary and capricious in that any criteria based on "productivity" is necessarily subjective, vague, and reliant on individual judgment. In addition, because "productivity" is neither an established, appropriate, nor an objective work standard it is highly susceptible to abuse, misuse, and erratic application;
- (6) Violates Article 34 protection against arbitrarily created and selectively applied work measurement systems, or work or time standards;
- (7) May give the appearance of violating **ELM 544.25, "Penalty For Refusal to Process Claim"** in that if the USPS arbitrarily denies medically suitable employment to partially disabled employees, such inappropriate behavior may induce and/or compel injured employees to forego filing claims because they observe the employer taking what arguably is retaliatory and punitive action against an employee who has an accepted OWCP claim.

We will keep you informed of any further developments regarding this issue.

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