

## Waiver of claims for erroneous payment of pay

**Y**ou've just received a letter of demand from the Postal Service for \$500. According to the letter of demand, the Postal Service made a pay calculation error after you bid, a year ago, from a carrier technician position (Grade 2) to carrier position (Grade 1). Should you file a request for a waiver and should you also file a grievance? In many cases, the answer is yes. You should file a grievance because your waiver request could be denied by the Accounting Service Center (ASC). The ASC may determine that you did not meet the criteria set forth in Part 437.6 of the *Employee and Labor Relations Manual (ELM)*.

While the waiver process is taking place, an Article 28 grievance prohibits the Postal Service from collecting a debt, regardless of the amount or type of debt until disposition of the grievance and/or petition has been had, either through settlement or exhaustion of contractual and/or administrative remedies. Additionally, Article 28 requires the employer to inform an employee in writing in advance of the reasons for any monetary demand. If the Postal Service fails to provide the employee in writing of the reasons for the monetary demand, a grievance should be filed.

**Part 437 of the ELM allows an employee or former employee** to request a waiver of certain types of mistakes that involve pay (among other items), including: salary, wages, and compensation for services, including premium pay, holiday pay, and payment for leave. The ASC waives a claim if an overpayment resulted from an administration error of the Postal Service. Excluded from consideration are errors in time keeping, keypunching, machine processing of time cards or time credit, coding, and any typographical errors that are adjusted routinely in the process of current operations.

You should also know that nothing contained in Part 437 of the *ELM* precludes an employee from requesting a waiver where the employer erroneously failed to withhold any employee insurance premiums. See Step 4 settlement Q98N-4Q-C 00187353, September 20, 2001 (M-01446).

Part 437 of the *ELM* sets forth the procedures for:

(a.) Requesting a waiver of a claim made by the Postal Service against a current or former employee for the recovery of pay that was erroneously paid; and

(b.) Applying for a refund of money paid by or deducted from a current or former employee as a result of such a claim.

Part 437.2 of the *ELM* defines pay as:


a. Pay—salary, wages, or compensation for services including all forms of premium pay, holiday pay, or shift differentials; payment for leave, whether accumulated, accrued, or advanced; and severance pay. Pay does not include rental allowances or payment for travel, transportation, or relocation expenses.

Waiver action may not be taken after the expiration of three years immediately following the date on which the erroneous payment of pay was discovered.

**Procedures for the submission of a request for a waiver of a claim** can be found in 437.32 PS Form 3074:

The applicant requests a waiver of a claim or a refund of money paid as a result of a claim by submitting PS Form 3074, *Request for Waiver of Claim for Erroneous Payment of Pay*, in triplicate to the installation head. The completed PS Form 3074 must contain:

- a. Information sufficient to identify the claim for which the waiver is sought, including the amount of the claim, the period during which the erroneous payment occurred, and the nature of the erroneous payment.
- b. A copy of the invoice and/or demand letter sent by the Postal Service, if available, or a statement setting forth the date the erroneous payment was discovered.
- c. A statement of the circumstances that the applicant feels would justify a waiver of the claim by the Postal Service.
- d. The dates and amount of any payments made by the employee in response to the claim.

The installation head investigates the claim and writes a report of the investigation on the reverse side of the PS Form 3074. There are specific elements that the installation head's written report should include. They can be found in *ELM* 437.4, *Review by Installation Head*. The installation head forwards the PS Form 3074 to the servicing Human Resources official, who a) reviews the file for accuracy and completeness, b) completes Part III of PS Form 3074, c) adds any pertinent comments to the file, and d) forwards the entire file to the payroll processing branch of the Eagan ASC for its determination of whether or not to waive the claim. 

# A time to review stewards' rights

**E**veryone knows that a steward has the right to use time on the clock for investigating and processing a grievance. Now, it is time to take a look at some of the rights stewards have that are less well-known. The following are some commonly asked questions and answers.

## 1 Does a shop steward on the work assignment overtime list have a right to overtime to investigate/process a grievance?

**Yes.** In Step Four (M-00910) the parties agreed that if the need for overtime on the steward's route is the result of investigation and/or processing of grievances, the resulting overtime is considered part of the carrier's work assignment for the purpose of administering the overtime desired list.

## 2 Can a union member actively employed at a post office be designated as a union representative for a grievance meeting at another post office?

**Yes.** A union member actively employed at a post office may be designated to process a grievance at another post office, so long as that employee is certified in writing to the employer at the area level. An employee so certified will not be compensated by the employer. (M-00233)

## 3 When a shop steward, as part of an investigation, interviews a supervisor, may the supervisor have a representative present?

**Yes.** In Step Four (M-01182) the parties agreed that there is no contractual prohibition to the supervisor being accompanied when he/she is being interviewed by the union as part of a grievance investigation.

## 4 Can a former employee of the Postal Service act as a shop steward?

**Yes.** A former employee properly certified will be allowed to enter a postal facility to perform the functions of a shop steward. (M-00798)

## 5 Can management develop a local form to request official time to conduct union business off the workroom floor?

**No.** According to Sylvester Garrett in National Arbitration Case MB-NAT-562 and 936 (C-00427), PS Form 7020, "Authorized Absence from Workroom Floor" is a nationally developed form and cannot be replaced by a locally developed form. In concluding that management could not use a locally developed form, Arbitrator Garrett states, "The

development of a new form locally to deal with Stewards' absence from assigned duties on Union business—as a substitute for a national form embodied in an existing Manual (and thus *in conflict with* that Manual)—thus falls within the second paragraph of Article 19."

## 6 Does a grievant have the right to accompany a shop steward during an Informal Step A meeting?

**Yes.** Article 15, Section 2, Informal Step A states in relevant part, "The employee, if he or she so desires, may be accompanied and represented by the employee's steward or a union representative."

## 7 Stewards may interview postal patrons. Do those interviews have to be conducted by telephone?

**No.** Stewards have the right to interview postal patrons, including a face-to-face interview, so long as such interview is reasonable (C-03219). National Arbitrator Benjamin Aaron determined that a shop steward has the right to interview a postal patron off postal premises.

## 8 When an employee needs representation from a shop steward, may management choose from all available shop stewards in the installation?

**No.** In Step Four (M-01342) the parties agreed that when requested, a steward certified to represent employees in the specific work location where the employee normally works should be provided, if available.

## 9 Do supervisors have to submit to and answer questions by a shop steward during the course of his or her investigation?

**Yes.** The parties have agreed (M-00012) that supervisors pursuant to Article 17, Section 3, are required to submit to investigative interviews, and to answer "reasonable and germane questions." That means that those questions must be directly related to the issue the shop steward is investigating.

## 10 Can a shop steward cite the *Joint Contract Administration Manual (JCAM)* in writing up a grievance?

**Yes.** The parties have taken the following position in the preface to the *JCAM*, "At each step of the grievance/arbitration procedure the parties are required to jointly review the *JCAM* to facilitate resolution of disputes." With this in mind, the new November 2005 *JCAM* has been mailed out to all offices with city carriers. When a problem occurs, review the new *JCAM*. ☒

## Documentation at Informal A

**A**s a shop steward at Station A, an issue comes to your attention that requires the filing of a grievance. What right to information do you have at Informal Step A of the grievance procedure? If you are unable to resolve the issue, should that information be included in the written appeal to Formal Step A with P.S. Form 8190?

As a starting point, let's look at Article 15, Section 2, Informal Step A (a) of the National Agreement which states in relevant part, "During the meeting the parties are encouraged to jointly review all relevant documents to facilitate resolution of the dispute." This language strongly indicates that the parties at Informal Step A are expected to review all relevant documents in an attempt to resolve the case. This view is strengthened by Article 15, Section 3.A of the National Agreement which states:

The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in resolution of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end. At each step of the process the parties are required to jointly review the *Joint Contract Administration Manual (JCAM)*.

This language, in tandem with Article 15, Section 2, Informal Step A (a), supports the proposition that in order to resolve issues at the lowest possible step, a review of all relevant documentation should be accomplished.

**Here's another question: "Management tells me that documentation can be requested at Formal Step A. Should I wait?"** No. Article 17, Section 3 of the National Agreement provides certain rights to stewards, including, "The right to obtain management information." Article 31, Section 3 amplifies that right and gives examples of information that, when relevant, must be provided. The 2005 *JCAM* states:

Article 31.3 provides that the Postal Service will make available to the union all relevant information necessary for collective bargaining or the enforcement, administration or interpretation of the Agreement, including information necessary to determine whether to file or to continue the processing of a grievance. It also recognizes the union's legal right to employer information under the National Labor Relations Act. Examples of the types of information covered by this provision include: attendance records; payroll records; documents in an employee's official personnel file; internal USPS instructions and memorandums; disciplinary records; route inspection records; patron complaints; handbooks and manuals; photographs; reports

and studies; seniority lists; overtime desired and work assignment lists; bidding records; wage and salary records; training manuals; Postal Inspection Service investigative memoranda (IM's).

**Articles 17 and 31 of the National Agreement do not limit** the right to information to Formal Step A, and, as stated above, all relevant information should be reviewed at Informal Step A in an effort to resolve the issue. Relevant information should be requested prior to meeting with management for your Informal Step A meeting. So what happens if you don't receive all your requested documentation prior to your Informal Step A meeting? If you do not resolve your case at Informal Step A, make sure that your appeal includes a list of all documents you requested. In addition, any documentation you receive after the case has been appealed to Formal Step A should be forwarded immediately to the Formal Step A representatives.

**Article 15, Section 2, Formal Step A (c) and the *JCAM* state** in relevant part: "The installation head or designee will meet with the steward or a Union representative as expeditiously as possible, but no later than seven (7) days following receipt of the Joint Step A Grievance Form."

This provision is often misconstrued by management. At a minimum, the union must, on appeal from Informal Step A, file the Joint Step A Grievance Form (P.S. Form 8190). It does not mean that documentation obtained at Informal Step A should not be included in the appeal. In fact, how could the parties adhere to the criteria set forth in Article 15, Section 2, Formal Step A (c)—meeting as "expeditiously as possible"—if no documentation has yet been developed when the P.S. Form 8190 is received at Formal Step A? Remember, in order to give your grievance the best possibility of resolution at Informal Step A, obtain as much documentation as you believe is necessary. If you have to appeal the case to Formal Step A, send all documentation to the Formal Step A representatives. ☒

### Contract Administration Unit

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# FMLA certification Q&A

**B**ecause of space limitation, answers are based on an employee's absence of three days or and the employee's condition has not been certified as a serious health condition, as required by the Family Medical Leave Act (FMLA).

**Q:** *Under what circumstances is it necessary for an employee to provide FMLA certification?*

**A:** The test is whether or not the absence is for a serious health condition. FMLA certification is not an automatic requirement. The Postal Service *may* require medical certification to support an employee's leave to care for a seriously ill family member or for the employee's own serious health condition that prevents the employee from being able to perform one or more of the essential functions of his or her position. This FMLA medical certification is to be issued by the health care provider of the employee or the employee's ill family member.

**Q:** *When must an employee provide medical certification to support FMLA leave?*

**A:** USPS must give notice of a requirement for medical certification each time a certification is required. When leave is foreseeable and at least 30 days' notice has been provided, the employee should provide the medical certification before the leave begins. When leave is not foreseeable, the employee must provide the requested certification to USPS within at least 15 calendar days after the request, unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

In most cases, USPS should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within two business days thereafter, or, in the case of unforeseen leave, within two business days after the leave commences. USPS may request certification at some later date if it later has reason to question the appropriateness of the leave or its duration.

**Q:** *29 CFR § 825.207(c) talks about the substitution of paid accrued vacation, personal, or medical/sick leave may be made for any unpaid FMLA leave. What does this regulation mean?*

**A:** Generally, FMLA leave is unpaid. However, the FMLA permits an eligible employee to substitute paid leave (in this case, sick leave) for unpaid leave. The FMLA precludes USPS from imposing


its own unpaid leave requirements if they are more stringent than those in the FMLA for unpaid FMLA leave.

USPS's sick leave plan certification requirements are contained in ELM 513.36, *Sick Leave Documentation Requirements*. ELM 513.361 regulations require that for periods of absence of three days or less, supervisors may accept the employee's statement explaining the absence. Medical documentation or other acceptable evidence of incapacity for work is required only when the employee is on restricted sick leave or when the supervisor deems documentation desirable for the protection of the interests of USPS.

If an employee has the need to use and is entitled to FMLA leave for three days or less because of a serious health condition and the employee elects to substitute paid leave for unpaid leave, USPS's 513.361 provisions apply consistent with its regulations.

ELM 513.364 outlines the medical documentation requirements. FMLA's medical certification requirements for unpaid leave require more information than USPS's paid leave medical documentation requirements. Moreover, USPS has acknowledged that information contained on an FMLA medical certification may also meet USPS's paid sick leave documentation requirements. This occurs only with regard to the particular absence triggering certification or recertification that contains information about incapacity during the current absence sufficient to justify paid leave. For an absence not triggering a request for certification or recertification, USPS may separately request sick leave documentation consistent with its regulations. See Arbitrator Das in case Q00C-4Q-C 03126482 (C-25724).

If USPS has made a request for an FMLA *medical certification* and they also make a request for *medical documentation* that conforms to 513.361, the employee's FMLA medical certification, if it meets FMLA requirements, will satisfy both requests. The employee does not have to get two separate documents: FMLA medical certification to certify that the absence was due to a serious condition and another to satisfy the 513.361 paid leave medical documentation.

The distinction is that, if required by the employer, the FMLA requires medical certification of a serious health condition for unpaid leave. 29 CFR § 825.207(c) defers to the employer's paid leave regulations when an employee elects to substitute paid leave for unpaid leave. 

# FMLA certification

**T**he Department of Labor (DOL) Wage and Hour Division posts letters of FMLA-related issues on their website: [www.dol.gov/esa/whd/](http://www.dol.gov/esa/whd/). Below is an excerpt from opinion letter FMLA-2005-2-A, the subject of which is new medical certification. This letter discusses the issue of an employer asking an employee to provide *new* FMLA certification, for the employee's first FMLA absence in a *new* leave year even though the employee's serious health condition was previously certified and FMLA leave was approved in prior leave years.

This is a relatively new circumstance that is the result of a clarification sought by the Postal Service from the DOL to confirm its understanding that an employee with an FMLA-protected serious health condition can be asked to provide a new certification, not just recertification, for a previously certified serious health condition with the first absence in a new 12-month leave year. When you read the excerpt below, keep in mind that employees are not required to automatically provide *new* certification for a previously certified FMLA medical condition when the employee first asks for leave for that same medical condition in the new leave year. (See M-01552.)

## **FMLA-2005-2-A:**

Medical certification issued by a health care provider may be requested [by the employer] for FMLA leave for a serious health condition of the employee or the employee's spouse, child, or parent. The purpose of the medical certification is to allow employers to obtain information from a health care provider to verify that an employee, or the employee's ill family member, has a serious health condition, the likely periods of absences, and general information regarding the regimen of treatment. When requested, medical certification is a basic qualification for FMLA-qualifying leave for a serious health condition, and the employee is responsible for providing such certification to his or her employer....Where the employer has reason to doubt the validity of the medical certification, the employer, at its own expense, may require the employee to obtain a second opinion and, if the employee's health care provider's certification and the second opinion certification conflict, a third opinion certification [may be required by the employer]. Subsequent recertification of the same serious health condition may be requested on a reasonable basis. The [29 C.F.R. §

825.308] regulations define the parameters under which recertification may be requested. Recertification is at the employee's expense unless the employer provides otherwise and second and third opinions may not be required on recertifications.

## **Medical Certification in a New 12-Month Leave Period:**

The FMLA entitle[s] an eligible employee to 12 workweeks of [unpaid] leave for a serious health condition during the 12-month period selected by the employer—subject to the medical certification requirements in 29 U.S.C. § 2613 of the Act. Medical certification in the new 12-month leave year is similar to the issue of retesting of the 1,250 hours-of-service employee eligibility criterion addressed in the FMLA-112 opinion letter dated September 11, 2000. In that letter, we opined that an employee's eligibility, once satisfied for intermittent leave for a particular condition, would last through the entire current 12-month period FMLA leave year designated by the employer for FMLA purposes. However, if the employee used leave in a new FMLA leave year, the employer could reassess the employee's eligibility for FMLA leave at that time. Our analysis was consistent with *Barron v. Runyon*, where the court concluded that FMLA leave "cannot be taken 'forever' on the basis of one leave request. Instead the statute grants an employee twelve weeks of leave per twelve-month period, not indefinitely." Given the statutory focus on the leave year, our interpretation regarding new medical certifications is consistent with our interpretation on retesting the 1,250 hours-of-service employee eligibility criterion for the first absence in a new 12-month leave year for employees taking intermittent leave for the same serious health condition. It is our opinion that an employer may reinstate the medical certification process with the first absence in a new 12-month leave year. A second and third medical opinion, as appropriate, could then be requested in any case in which the employer has reason to doubt the validity of the new medical certification [at the employer's expense]. This is the case despite the fact that the employer had requested recertification in the previous 12-month leave year. ☒

## What recourse do you have?

**I**t has been 20 years since the conflict regarding sections 5.C.2.d, 5.G and 5.D of Article 8 was resolved. Despite that resolution, management continues to assign overtime to non-ODL letter carriers based on the obsolete language of Article 8.5.C.2.d and Article 8.5.D. Arbitrator Richard Mittenthal outlined the history of these Article 8 changes in Case No. H4N-NA-C-21 (C-6297):

Prior to the 1984 National Agreement, all of the overtime distribution rules were found in Article 8, Section 5. Prior to the start of each calendar quarter, full-time regular letter carriers “who wish to work overtime ... shall place their names on an ‘Overtime Desired’ list”... When overtime is needed, “employees with the necessary skills having listed their names will be selected from the list” (Section 5.C.2.a)... There is, however, one significant exception:

Recourse to the ‘Overtime Desired’ list is not necessary in the case of a letter carrier working on the employee’s own route on one of the employee’s regularly scheduled days...(Section 5.C.2.d)

Thus, no ODL employee would have a legitimate complaint where a non-ODL employee worked overtime on his own route on his regularly scheduled day.

However, in 1984 the parties agreed to a memorandum of understanding on overtime. The NALC signed the MOU only after the Postal Service agreed to include what is referred to as the “Letter Carrier Paragraph,” which states:

In the Letter Carrier Craft, where management determines that overtime or auxiliary assistance is needed on an employee’s route on one of the employee’s regularly scheduled days and the employee is not on the overtime desired list, the employer will seek to utilize auxiliary assistance, when available, rather than requiring the employee to work mandatory overtime.

These two cited provisions were discussed by Arbitrator Mittenthal in the same award:

A close comparison of Article 8, Section 5.C.2.d and the “letter carrier paragraph” of the Memorandum is most revealing. Section 5.C.2.d says Management may work a non-ODL carrier overtime on his own route on his regularly scheduled day without having to resort to the ODL. Or, should Management so choose, it may work this overtime with someone from the ODL. Article 8 thus gives Management substantial discretion in assigning a

carrier to overtime in this situation. The “letter carrier paragraph,” when read along with the May 1985 supplemental agreement, establishes a quite different set of priorities. It requires Management to work a non-ODL carrier overtime on his own route on his regularly scheduled day if he has signed up for such “work assignment” overtime. If he has not signed up, then the Memorandum requires Management to “seek” people from the ODL before “requiring” the carrier in question to work “mandatory overtime” on his own route. In short, the very discretion granted Management by Section 5.C.2.d is taken away by the “letter carrier paragraph.”

All of this would be understandable if the parties had, in agreeing to the “letter carrier paragraph”, eliminated Section 5.C.2.d. But that was not done. Both provisions are presently part of the National Agreement. It should be stressed that the Memorandum states, in clear and unequivocal language, that “the parties agree this memorandum does not give rise to any contractual commitment beyond the provisions of Article 8...” The “letter carrier paragraph”, as I have already explained, nullifies Management’s discretion under Section 5.C.2.d....

In 1988, the parties entered into a memorandum of understanding (*M-00884*) which further explained the requirement to seek to use auxiliary assistance before requiring letter carriers not on the ODL or work assignment list to work overtime on their own route on a regularly scheduled day. The parties defined “auxiliary assistance” on *JCAM* page 8-14.

The parties also agreed to an additional restriction related to NS days and off-assignment overtime. The *JCAM* page 8-14 states, “Before requiring a non-ODL carrier to work overtime on a non-scheduled day or off his/her own assignment, management must seek to use a carrier from the ODL, even if the ODL carrier would be working penalty overtime.”

The NALC has provided union activists with excellent resources for challenging management’s continued violation of Article 8. In addition to what the parties agreed to in the *JCAM* (pages 8-13 through 8-20), the NALC Contract Administration Unit has recently published a white paper titled “*Overtime, Staffing, and Simultaneous Scheduling (M-01548)*”. ☒

# It's sundown. Now what?

**I am on the overtime-desired list and lately have been working late enough that it is often dark before I have finished my work on the street. Can I refuse to carry mail in the dark because it is unsafe?**

**A**s a general rule, darkness does not necessarily mean it is unsafe to deliver mail as stated in a Step Four (M-00483). That said, darkness could contribute to hazardous conditions. Section 133.1 of the *M-41* applies to all unsafe conditions including dogs, road hazards, faulty equipment, and weather among others. It states: *Always exercise care to avoid personal injury and report all hazardous conditions to the unit manager (see part 812 for vehicle safety).*

The question is the proper way to report the condition to your manager. ELM Section 824.631 provides instruction: *Any employee, or the representative of any employee, who believes that an unsafe or unhealthful condition exists in the workplace may do any or all of the following: a. File a report of the condition on Form 1767 with the immediate supervisor and request an inspection of the alleged condition. b... c. Report alleged unsafe conditions to a steward, if one is available, who may then discuss the condition with the employee's immediate supervisor. Discrimination against an employee for reporting a safety and health hazard is unlawful.*

Further, ELM 824.62 states, *Supervisors must maintain a supply of Forms 1767 in the workplace in a manner that provides employees with both easy and (if an employee so chooses) anonymous access.* The employee completes the first section: a box designating the Area (Specify Work Location) and a box to Describe Hazard, Unsafe Condition or Practice, Recommended Corrective Action.

For example: Work Location: "Route 1212 delivery area." Describe Hazard: "During the daylight hours it is noticeable that numerous sidewalks, stairs and porches are uneven, broken or cracked. When it begins to get dark, the lack of streetlights and other lighting along the route makes walking on sidewalks or up stairs to porches unsafe. With limited visibility and uneven surfaces, delivering mail by foot

is extremely hazardous. In addition, numerous dogs are out at this time of the evening and because of the darkness are not readily seen, increasing the chance of being bitten."

After you have completed your portion of the form, give it to your immediate supervisor, who then must follow the instructions in the ELM. Specifically, section 824.632: *The immediate supervisor must promptly (within the tour of duty): a. Investigate the alleged condition.; b. Either initiate immediate corrective action or make appropriate recommendations.; c. Record those actions or recommendations on Form 1767.; d. Forward the original 1767 and one copy to the next appropriate level of management (approving official).; e. Give the employee a copy signed by the supervisor as a receipt.; f. Immediately forward the third copy to the safety office.*

**When you are aware of an unsafe condition you should report** this condition to your manager immediately via PS Form 1767. Completing the form and giving it to your immediate supervisor places the ball in management's court. They *must* investigate the alleged condition. If they do not, have your shop steward file a grievance.

If a supervisor investigates the reported condition and gives you instructions, recommendations and specific actions to take, give them due consideration. If you are still of the opinion that an unsafe condition exists, you could complete another report and/or file a grievance.

If you believe that an unsafe or unhealthful condition is so hazardous you could refuse to perform those duties, you do run the risk of being disciplined. This is especially true if the supervisor has investigated the hazard. So, before you refuse any instructions, consider them carefully, and then gather all the evidence you have to in order to support your claim. The evidence is needed to defend your position if discipline is issued. Remember, darkness is not a hazard in and of itself; you must identify specific hazardous conditions. If your route consists of NDCBU's that are well lighted, and no other unsafe conditions exist, then refusal to work in the dark is not a viable option. ☒

# Red line

**R**ed line, non-recurring office functions, time wasting practices, whatever the term used, letter carriers are no strangers to time disallowances during route count and inspections. The manner in which time disallowances are factored into route count and inspections are limited only by management's imagination. Fortunately, information on how to address these issues can be found in the NALC *Route Protection Program* and the *M-39* and *M-41* handbooks.

There are two basic types of office time disallowances that management makes on the Form 1838-C Carriers Count Mail-Letter Carrier Routes worksheet. Management will either change the designation of a line item or reduce the amount of time used to perform a specific function.

Management may not reduce or make any estimates of representative time for lines 14, 15, 19 or 21. Instead, any proposed disallowances for these line items must be supported by appropriate comments on the 1838 and 1840. To be considered appropriate, those comments must set forth the reasons for the conclusion that the less than average actual time is sufficient for the carrier to perform that function. In no event may the time for these functions be below the base minimum.<sup>1</sup>

When management changes the designation of a line item, they do so most often by converting a line 21 entry to line 22. Line 21 is used for any miscellaneous recurring office function not listed in lines 14 through 19. Line 22 is a lot like line 21, but the activities it covers are non-recurring, non-continuing office functions. Non-recurring functions are tracked because activities that are not part of a carrier's normal routine cannot become part of the assignment. Recurring (line 21) office functions are discussed in detail in the *Route Protection Program*, chapter one, pages 46–48.

Management is required to review the 1838-C and provide the carrier with a copy (usually the next day). Any errors or irregularities on the form must be discussed with the carrier so the mistake will not be repeated; management provides carriers with a copy of the 1838-C so they have an opportunity to correct any errors or dispute a management notation.<sup>2</sup>

The carrier should review the form, and challenge any inappropriate time disallowance(s). To assist activists who suspect that a time disallowance was transferred from the 1838-C without the carrier's knowledge, or to verify management data transfers, NALC has created the Route Inspection Kit as a means for tracking the data.

Management may also attempt to artificially reduce the evaluated street time with a creative blend of street time disallowances. Found on Form 3999, street time disallowances are often related to alleged "improper" practices that management specifically identifies, such as failure to properly finger mail or take proper short cuts.<sup>3</sup>

Often management will simply assign a time value to these "improper" practices and unilaterally reduce the evaluated time of the route. However, if these perceived practices are sufficient enough to warrant a time adjustment, a re-inspection will be made after the carrier has been instructed regarding the proper procedures to be used. Every effort will be made to conduct such re-inspection prior to the implementation of the adjustments in the unit. This is perhaps one of the most overlooked management requirements and management should not be allowed to implement a time adjustment without making every effort to re-inspect the route.

Management may also attempt to adjust the street time due to operational changes or claims that certain days were not normal and should be excluded from the street time calculations. Any such time adjustments must be documented by appropriate comments on the reverse of Form 1840 or attachments thereto, and must be provided to the carrier at least one day prior to the consultation. These time adjustments must be discussed during the consultation, and if the carrier notes the absence of such written documentation, the carrier should initial and date the 1840. If management does not supply the documentation to the carrier, within one week, the time adjustment will be disallowed.<sup>4</sup>

Carriers and shop stewards should remain alert to management's attempts to improperly disallow legitimate office and street time during route count and inspection. ☒

<sup>1</sup> Route Protection Program Chapter 2 pages 133–136

<sup>2</sup> Route Protection Program Chapter 2 pages 53–55

<sup>3</sup> Route Protection Program Chapter 2 pages 137–138

<sup>4</sup> Route Protection Program Chapter 2 pages 137–138



# Restrictions on USPS right to demand medical certifications

**I**n the past, the Postal Service had the right, in certain circumstances, to automatically require employees to provide specified medical information. Think of the old *ELM* provision requiring detailed medical reports to return to work after a medical absence of more than 21 days, or the long-existing provision for automatic certification of a medical absence in excess of three days.

Today, however, the Rehabilitation Act places restrictions on the Postal Service's right to make medical inquiries of employees. The restrictions apply to demands made to all employees, not just those with disabilities. Unlike most Rehabilitation Act regulations, which only protect disabled employees, the medical inquiry restriction protects all employees. The restrictions are based in federal law and are thus never superseded by any Postal Service programs, policies or regulations.

One Postal Service program is called eRMS. That software has the capability for a supervisor to flag an individual letter carrier with a "deems desirable" marker.<sup>1</sup> Once this is done, the Postal Service will automatically require medical certification every time the individual calls in sick. The "deems desirable" function of eRMS is currently being discussed by the parties at the national level. Its application may constitute violations of *ELM* provisions regarding restricted sick leave, or other provisions. The ultimate outcome of those discussions is not yet determined. However, all letter carriers should know that any automatic demand for medical certification may run afoul of the Rehabilitation Act restriction on medical inquiries, including if made pursuant to an eRMS "deems desirable" designation.

**The Rehabilitation Act requires the Postal Service to make an individual assessment and have reliable, objective evidence that an employee may be unable to perform the essential functions of the position or may pose a direct threat to self or others, prior to making a medical inquiry. The individual assessment cannot be based on general assumptions.**

If the Postal Service requires an employee to provide medical certification that includes diagnosis or nature of injury, that would generally constitute a medical inquiry in the context of the Rehabilitation Act.

Every medical inquiry is potentially subject to grievance investigation to determine if management had reliable, objective evidence that the employee may be unable to perform the essential functions of the position or may pose a direct threat to self or others. A grievance might be filed

in the absence of such determination.

Violations of the Rehabilitation Act by the Postal Service may be grieved. The *JCAM* at page 2-2 states, "Article 2 gives letter carriers the contractual right to object to and remedy alleged violations of the Rehabilitation Act through the grievance procedure."

A decision by the Postal Service to flag an employee as "deems desirable" in eRMS, triggering an automatic requirement to provide medical certification for every sick leave call-in, may not have been preceded by an individual assessment producing objective evidence. The flagging may have been based on a general assumption or even a blanket policy. If so, any subsequent demand for medical certification may violate the Rehabilitation Act.

Therefore, if the Postal Service requires a letter carrier, upon calling in sick, to submit medical certification that includes diagnosis or nature of injury, even if the carrier was flagged in the eRMS as "deems desirable," the local union should initiate a grievance investigation of that specific demand for medical certification.

That investigation should include certain necessary elements. The union should require the Postal Service to identify the specific supervisor or manager who made the decision to require medical certification. The union should then require the Postal Service to completely identify all of the objective evidence that it relied on in making the decision to require medical certification. If the Postal Service had insufficient objective evidence, as required by the Rehabilitation Act, a grievance should be filed.

**If grievances are necessary, they should reference the following two points.** First, the Postal Service implicitly recognized the general Rehabilitation Act restrictions on medical inquiries by revising *ELM* 865 last year to delete the automatic requirement to provide medical clearance following absence of 21 days. Second, a Postal Service memorandum, in the MRS at M-01547, explicitly acknowledges the restriction.

For additional information on the Rehabilitation Act restriction on medical inquiries, please see the Contract Talk column in the November 2005 *Postal Record*. ☒

<sup>1</sup> "Deems desirable" is a reference to *ELM* 513.361 which states, "Medical documentation or other acceptable evidence of incapacity for work or need to care for a family member is required only when the employee is on restricted sick leave or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service."

# Route and Unit Review

**B**elieve it or not, letter carrier routes that are properly adjusted don't just happen. Whether or not a delivery route is properly maintained begins with chapter two of the *M-39 Management of Delivery Services* handbook. The *M-39* provides that management has the responsibility to keep delivery routes on as nearly an eight-hour daily basis as possible. Section 211.1 of the *M-39* states that management will conduct annual unit reviews in order to maintain the appropriate daily workload for delivery units and routes.

Such reviews are referred to as a Route and Unit Review and they consist of making an analysis of work hours, volumes, and possible deliveries. These reviews are to be utilized to verify route adjustments that management has made, or needs to make, in order to maintain efficient service. Management is required to share the results of the reviews with the local NALC president or designee, and the regular letter carrier serving the route that requires adjustment.

The Route and Unit Review is not only an important function, it is a required one. When utilized properly, it provides every letter carrier with a working knowledge of how man-

agement views his or her assignment. The information from a Route and Unit Review places every letter carrier in the position to become an integral part in the proper maintenance of his or her assignment. If a carrier does not receive a consultation with management following a review, he or she could make the logical assumption that the route, as it exists, has an appropriate daily workload sufficient for an eight-hour day. Otherwise, the supervisor would have provided a consultation as required by Section 211.1:

The results of the review will be shared with... the regular carrier(s) serving the route(s) that require adjustment.

Therefore, management's decision not to conduct a consultation indicates that the route is being maintained with an appropriate daily workload. This would serve to contradict any DOIS-based claim that a supervisor might make that there is less than a full day's workload on a route on a

given day. If, on the other hand, management has not consulted with you and you are of the opinion that your assignment has not maintained efficient service, you should contact your shop steward to determine whether or not a review has in fact taken place. If one has taken place, the union can investigate to determine whether or not it was completed in accordance with the regulations.

It is a requirement that the annual Route and Unit Review consist of, at a minimum, a review of over a dozen specific items. The things that must be reviewed include processes that can have a significant impact on letter carriers' working conditions. For instance, case equipment or labels may be inadequate or in poor condition. If so, the review should bring these deficiencies to management's attention and any unsatisfactory conditions should be corrected.

Other specific items that the Route and Unit Review should examine include the amount of mis-sent/mis-thrown mail, DPS handling procedures, preferential mail volume

**“Management has the responsibility to keep delivery routes on as nearly an eight-hour daily basis as possible.”**

received on each dispatch prior to the carrier's leaving time, etc. These and the rest of the specific items are listed in Section 214. According to the *M-39*, items in Section 213 may also be utilized in the review process. These include an analysis of undelivered mail, overtime usage, late leaving and returning reports, and so on.

Carriers are encouraged to remain alert for unsatisfactory conditions and to bring them to management's attention in an effort to ensure that their assignments have been properly evaluated and to correct any adverse conditions.

If local management has not been doing annual Unit and Route Reviews, or failed to comply with other regulations of the *M-39*, branch leaders should address the non-compliance with management. Additional information about the Unit and Route Review and Route Count and Inspection requirements can be found in the *Route Protection Program*, chapter two. 