Your Official Personnel Folder

Who are you and what have you done for me lately? For most letter carriers, those questions could take days to answer. Aside from the normal duties of delivering the mail, there was the older gentleman who needed a spare hand while he took down a string of Christmas lights, the mother on the second floor who handed you the baby while she struggled to opened her door, and the burial services you officiated over when the kids on the corner were putting their deceased pet goldfish to rest. As cold as it may sound, for the Postal Service, absent all the stories, clock rings and experiences battling the elements, the story of who you are and what you've done lately is documented in your Official Personnel Folder (OPF).

For those who may not know, the *Employee and Labor Relations Manual* (*ELM*) describes your OPF this way:

> **349.1** The Official Personnel Folder (OPF) documents the employment history of individuals employed by the federal government. The records included in the OPF protect the legal and financial rights of the government and the employee. An OPF is established and maintained for each Postal Service employee, regardless of appointment type or duration.

With that definition in mind, your employment history—the "who are you?"—is documented in your OPF. But that is not all—*ELM* 349.2 details the contents of your OPF:

> The OPF contains personnel records that reflect the employee's official status, benefits, and service and includes other documents that are significant in the employee's Postal Service career. When an employee has former postal or federal civilian service, the OPF for that service must be merged into a single OPF.

These benefits might include your decisions concerning who is covered by your health insurance and your life insurance beneficiaries. Your OPF also contains any letters of commendation and awards you may have received in your career. Additionally, any discipline you have received within the last two years is documented in your OPF. Remember, stale discipline may be removed from your OPF upon request—discipline becomes stale when it is two calendar years old.

In 2007, the Postal Service notified the NALC of plans to convert the hard copy OPFs into an electronic format that would be available online—many of you will remember going into the personnel office to physically examine your OPF in years past. The Postal Service also stated that, when an OPF was scanned and converted into an electronic format, the new electronic version would become the "official" version of the OPF. This language can be found in the *ELM*:

> **349.3** The official record of a document in an OPF is the hard copy until the document is scanned and accepted into the Postal Service's electronic Official Personnel Folder (eOPF) system. At that point, the scanned image contained in the eOPF system is the official record of the document, and the hard copy ceases to be the official record.

In the fall of 2008, the Postal Service informed the NALC that the conversion of all hard copy OPFs to electronic OPFs (eOPF) was complete. In addition, NALC was notified the hard copy versions of the OPFs would be destroyed starting at the end of 2009.

With this notice—the destruction of the hard copy OPF—it is imperative that you review your eOPF to make sure it was accurately and completely scanned and that nothing was omitted when the conversion took place. In order to review your eOPF, you have some options: You can access it online or, if you don't have Internet access, you can request a printed hard copy.

If you have Internet access, you simply log on to https://liteblue.usps.gov and enter your Employee Identification Number (EIN) and PIN—this will direct you to the LiteBlue home page. On the right-hand side of the home page, you will find a link labeled for "go to eOPF," and you will again be prompted to enter your EIN and PIN. You will then be able to view each document in your eOPF individually, starting with the newest. You can print or save any or all of these pages from your web browser.

If you do not have access to the Internet to review your eOPF, you may make a written request to your local postmaster.

Upon review of your eOPF, if you believe your file is inaccurate or missing documents, contact your shop steward or National Business Agent immediately to request assistance in correcting any discrepancies. ✉

Revocation or suspension of driver's license

While Article 29 of the National Agreement gives protections to letter carriers who lose their driver's license, many carriers are still removed for driving a postal vehicle without a license.

Article 29 states in relevant part that:

> An employee's driving privileges will be automatically revoked or suspended concurrently with any revocation or suspension of State driver's license and restored upon reinstatement. Every reasonable effort will be made to reassign such employee to non-driving duties in the employee's craft or in other crafts.
>
> **An employee must inform the supervisor immediately of the revocation or suspension of such employee's State driver's license** (emphasis added).

Even if a revocation or suspension of driving privileges is proper, Article 29 provides that, "every reasonable effort will be made to reassign the employee in non-driving duties in the employee's craft or other crafts." This requirement is not contingent upon a letter carrier making a request for non-driving duties. Rather, it is management's responsibility to seek to find suitable work.

In I94N-4I-D 960276608 (C-18159), April 9, 1998, Arbitrator Snow held that Article 29 of the 1994 *National Agreement* with the NALC "requires the Postal Service to make temporary cross-craft assignments in order to provide work for letter carriers whose driver's licenses have been [temporarily] suspended or revoked." He rejected the Postal Service's argument that the USPS was no longer bound by cross craft provisions of Article 29 in light of the APWU/NALC bargaining split. However, he also agreed with the APWU that Article 29 of the NALC agreement could not be applied in a manner inconsistent with the APWU agreement.

Arbitrator Snow held that, if it is not possible to accommodate temporary cross-craft assignments in a way that does not violate the APWU agreement, a letter carrier who is deprived of the right to temporarily cross-craft assignment to a position in the APWU-represented crafts must be placed on *leave with pay* until such time as they may return to work without violating either unions' contracts.

Accordingly, in cases where letter carriers temporarily lose driving privileges, the following applies:

- **Management should first attempt to provide non-driving** letter carrier craft duties within the installation on the carrier's regularly scheduled days and hours of work. If sufficient carrier craft work is unavailable then, an attempt should be made to place the employee in those duties on other hours and days, anywhere within the installation.
- **If sufficient work is still unavailable, a further attempt** should be made to identify assignments in other crafts, as long as placement of carriers in that work would not be to the detriment of those other craft employees.
- **If there is such available work in another craft, but the** carrier may not perform that work in light of the Snow award, the carrier must be paid for the time that the carrier otherwise would have performed that work.
- **Finally, if there is insufficient carrier craft work and also** insufficient work in other crafts to which the carrier could be assigned but for the Snow award, and it is expected to continue that way for an extended period of time, the employee has the option of not working and not being paid or being permanently reassigned to another craft if a vacancy exists.

In summary, this arbitration award establishes an automatic carrier entitlement to leave with pay in the circumstances discussed by the arbitrator. However, each case must be handled individually based upon management's making "every reasonable effort" to seek work.

Whether driving privileges were revoked or suspended automatically because of the loss of the employee's state drivers license, or because of an on-the-job situation, including an accident or unsafe driving, the above language applies. A carrier whose license was suspended by the state due to driving while intoxicated (DWI) has the same right as a carrier whose license was suspended by the Postal Service.

If management refuses to provide a carrier whose license has been suspended with temporary work in another craft, claiming that to do so would violate its obligations under a different agreement, the union should file a grievance asking that the carrier be placed on paid leave until work is found or the carrier's license is reinstated.

Article 29 requires employees to report the revocation or suspension of their driver's license immediately. It is simply not worth the chance you take for failure to report such a situation. ✉

The Department of Labor's new FMLA regulations

The Department of Labor last November published its "final rule" to implement the first-ever amendments to the Family Medical Leave Act (FMLA). The amendments come from the National Defense Authorization Act of 2008 and provide new military family leave entitlements. The final rule also substantially revised many other parts of the implementing regulations of the FMLA for the first time since 1995. The final rule became effective on January 16, just four days before President Bush left office.

While the new regulations provide important new entitlements to protected leave for letter carriers who have family members who serve in the Armed Forces, they also impose new burdens on employees who need leave for the already existing reasons for FMLA leave: birth, adoption, foster care placement and serious health conditions.

Military family leave entitlements

First, the good news: The changes have created two new categories of military family leave under the FMLA: Military Caregiver Leave and Qualifying Exigency Leave. Letter carriers and their family members have a long and proud tradition of serving in the Armed Forces, the Reserves and the National Guard at a level much higher than the population at large. The new military family leave will provide a measure of relief to them as they sacrifice to serve our country.

Military Caregiver Leave—The Postal Service must grant an eligible employee who is a spouse, son, daughter, parent or next of kin of a covered service member with a serious injury or illness up to a total of 26 workweeks of unpaid leave during a single 12-month period to care for the service member. Covered service members are current members of the Armed Forces, Guard or Reserves who are undergoing medical treatment, recuperation, therapy or are otherwise in outpatient status or on the temporary disability retired list because of a serious injury or illness. They must have incurred the injury or illness in the line of active duty and it must have rendered them medically unfit to perform the duties of their office, grade, rank or rating.

The single 12-month period runs independently of the Postal Service leave year that the USPS has established for all other types of FMLA leave. It begins on the first day the employee takes leave to care for a covered service member and ends 12 months later. The new rules allow an eligible employee to take a combined total of 26 workweeks of military caregiver leave and leave for any other FMLA-qualifying reason during the single 12-month period as long as the employee does not take more than 12 workweeks of leave for other FMLA-qualifying reasons during this period.

Qualifying Exigency Leave—The Postal Service must grant an eligible employee up to 12 workweeks of unpaid leave during the 12-month calendar year leave period that the Postal Service has established for FMLA leave for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter or parent is on active duty or has been notified of an impending call or order to active duty. Under the new rules, qualifying exigency leave is available to family members of a military member in the National Guard or Reserves and does not extend to family members of service members in the Regular Armed Forces. Qualifying exigencies include:

- **Short notice deployment**—Eligible employees may take leave to deal with issues arising when a covered service member is notified of deployment in seven or fewer days.
- **Military events and related activities**—Eligible employees may take leave for official ceremonies, programs or events sponsored by the military, military service organizations, the American Red Cross or military family support programs related to the active duty call.
- **Childcare and school activities**—Eligible employees may take leave to arrange for alternative school or child care, to provide childcare on an urgent non-routine basis, to transfer or enroll a child in a new school and to attend meetings with school or daycare staff if these reasons for leave arise out of the covered service member's call to active duty.

New FMLA regulations, continued

- **Financial and legal arrangements—**Eligible employees may take leave to make or update financial and legal arrangements to address a covered service member's absence.
- **Counseling—**Eligible employees may take leave to attend counseling by a health care provider other than a heal-care provider of the employee if the need for counseling arises from the active duty or call to active duty of the covered service member.
- **Rest and recuperation—**Eligible employees may take up to five days of leave to spend time with a covered service member who is on short-term rest and recuperation leave during deployment.
- **Post-deployment activities—**Eligible employees may take leave to attend arrival ceremonies, reintegration briefings and events, and other official ceremonies or programs sponsored by the military for a period of 90 days following the termination of the covered military member's active duty status and also to address issues arising from the death of a covered service member.
- **Any other event that the eligible employee and the** employer agree is a qualifying exigency.

Note that qualifying exigency leave is not an additional 12 weeks of leave but rather a new reason for an eligible employee to take FMLA leave along with the other existing reasons for FMLA leave.

Changes to the existing FMLA rules

While the final rule does not reduce eligible workers' entitlement to FMLA leave, the new regulations have imposed additional burdens on employees that make it harder for them to use the leave. Here are some of the changes that will likely affect letter carriers:

- **The final rule has clarified the definition of "serious** health condition" cases involving continuing treatment. Such a condition must involve incapacity of more than three days plus "two visits to a health care provider" or one visit which results in a regimen of continued treatment under the health care provider's supervision. Under the final rule, the two visits must now occur within 30 days of the beginning of the incapacity and the first visit must take place within seven days of the first day of incapacity. Notably, the health care provider—not the employee—must determine if the second visit within the 30 days is required. Another definition of serious health condition involves incapacity of more than three days plus a regimen of continuing treatment. The first visit in this instance would also have to take place within seven days of the first day of incapacity. Again, the health care provider—not the employee—must determine if the regimen of continuing treatment is required. Lastly, the final rule has defined "periodic visits" for chronic serious health conditions as at least two visits to a health care provider per year.
- **If an employee takes a full workweek of FMLA during a** holiday week, the final rule makes clear that the employee should be charged for a full week of leave against their FMLA entitlement, including the holiday. (If the employee takes leave in increments of less than a week, the holiday would not be counted against the leave entitlement.)
- **Under the previous regulations, an employee did not** have to assert their rights under the FMLA or even mention it by name when seeking leave for a FMLA-qualifying reason. Under the final rule, this applies only to when an employee seeks leave for the first time for the FMLA qualifying reason. Once FMLA leave has been granted for an employee's health condition, the employee, in making future requests for leave, must specifically reference either the qualifying reason or the need for FMLA leave.

The NALC is currently updating *The NALC Guide to the* *Family and Medical Leave Act* and NALC FMLA forms to reflect the new regulations, as well as developing new forms for the two categories of military family leave. Until the new NALC forms are published, letter carriers applying for FMLA by using the current NALC forms who are told by their local managers that certain NALC forms do not meet the requirements of the new law should request that local management advise them as to what required information is missing. If you are not sure local management has a right to that information, please contact your National Business Agent for assistance. ✉

TEs working in lieu of PTFs

The language previously in Article 7.1.C.1.b of the National Agreement that dealt with the requirement to work PTF carriers at the straight-time rate of pay prior to working transitional employees is now in Article 7.1.B.3 of the National Agreement. This language states:

> Over the course of a **pay period**, the Employer will make every effort to ensure that qualified and available part-time flexible employees are utilized at the straight-time rate prior to assigning such work to transitional employees working in the same work location and on the same tour, provided that the reporting guarantee for transitional employees is met (emphasis added).

Stewards have been dealing with grievances regarding the working of casuals in lieu of PTFs for years and are now having to deal with a new twist in the language. The differences in the language, "service week" in one provision and "pay period" in the other, has caused confusion for some union activists. While the "in lieu of" language in Article 7.1.B.3 is slightly different than the language regarding a PTF's right to work at the straight time rate prior to casuals, there is no substantive difference in what a steward has to show to prevail in a grievance on this issue.

A steward needs to be able to show the PTF carrier worked fewer than 40 hours at the straight-time rate of pay for the week in question and he or she was available to work at the straight-time rate when a TE carrier was worked instead. It doesn't matter if the PTF works more hours than the TE or that the PTF works more than 40 total hours for the week. The issue is straight-time hours. Should management argue that the work performed by the TE and the PTF was done simultaneously, the union will need to show how all, or a portion of, the work done by the TE could have been done by the PTF when he or she was available at the straight-time rate of pay.

As stated in the *JCAM*, the parties agreed to the following in the Step 4 Settlement E90N-4E-C 94026528, February 12, 1996 (M-01241):

> The issue in these grievances involves the scheduling priority to be given part-time flexible employees over transitional employees. During our discussion, we mutually agreed as follows: During the course of **a service week**, the Employer will make every effort to ensure that qualified and available part-time flexible employees are utilized at the straight-time rate prior to assigning such work to transitional employees working in the same work location and on the same tour, provided that the reporting guarantee for the transitional employee is met (emphasis added).

As shown by the above Step 4, even when the contractual language itself says "pay period," management's obligation is during the course of a service week. The term "pay period" instead of "service week" has not changed what stewards have to show to make their case in this type of grievance. While a violation does not occur until the end of the pay period, if there is a violation in Week 1, it can't be made up or fixed in Week 2. The only difference is that the language allows the union 14 days from the end of the pay period to file a grievance.

"The term 'pay period' instead of 'service week' has not changed what stewards have to show to make their case in this type of grievance."

In cases where a clear contractual violation can be shown, a "make whole" remedy involving the payment at the appropriate rate for the work missed would be appropriate for the available, qualified PTF carrier who had a contractual right to the work. This would include pay at the straight-time rate up to 40 hours for the week for the hours the PTF should have worked and an agreement that these hours count toward the maximization provisions of Article 7.

Don't let the language in Article 7.1.B.3 confuse you. This is not new language; it is simply that most stewards are used to dealing with grievances concerning casuals and not TEs. If you have any questions on this issue, contact your NBA's office for assistance.

Withholding and excessing

Notices of withholding and excessing have been, and are being, received by almost every branch, and these notices directly affect tens of thousands of individual letter carriers. Article 12 gives management the right and responsibility to withhold full-time and part-time positions for employees who may be involuntarily reassigned. Involuntary reassignment of career employees into other installations is a result of triggering events that dictate the reduction of the workforce in a craft or locale due to a variety of reasons. The advent of DPS was an event that triggered withholding/excessing in the past, and the implementation of FSS, plant closures and declining mail volume are the current triggers.

Withholding full-time and part-time vacancies under the provisions of Article 12 is not merely a management right, it is an obligation in order to keep "dislocation and inconvenience" to full-time and part-time flexible employees to a minimum, consistent with the needs of the service and compliant with the terms of the contract.

In years past, withholding notices were issued and were reasonably manageable—in terms of the number of simultaneous notices and the lack of territorial overlap of these notices. Today, the number of simultaneous overlapping withholding notices is large—accelerated by the decline in mail volume. There are branches currently covered by as many as seven separate notices at one time. The USPS calls withholding notices "events;" that is, the individual reasons for and withholding of positions both large and small. Currently, there are more than 3,000 events nationwide this fiscal year.

Management may not withhold more positions than are reasonably necessary to accommodate any planned excessing. Article 12.5.B.2 only authorizes management to withhold "sufficient...positions within the area for full-time and part-time flexible employees who may be involuntarily reassigned."

There are no blanket rules that can be used to determine whether management is withholding an excessive number of positions or withholding positions for an excessive period of time. Rather, each situation must be examined separately, based upon local fact circumstances. Generally, this involves calculating the number of positions that will be reduced, the length of time over which the reductions will occur, and then determining if the reductions will occur faster than can be accommodated by normal attrition.

Withholding positions for excessing is only justified when positions in the losing craft or installation must be reduced faster than can be accomplished through normal attrition. Projections of anticipated attrition must take into account not only local historical attrition data but also the age composition of the employees. Installations with a high percentage of employees approaching retirement age can reasonably anticipate higher attrition than installations with younger employees. Thus, accurate projections require an examination of the local fact circumstances rather than the mere application of a national average rate.

In order to determine whether withholding is necessary, the union must determine whether management's projections of the number of employees who will be excessed is reasonable. Additionally, with the large number of simultaneous/overlapping withholding notices, it has become difficult to accurately track the progress of these "events" to determine if one notice has been satisfied or whether positions are withheld for another simultaneous/overlapping notice. To that end, President Young has authorized the NALC Internet Technology Department to create a software program to track Article 12 withholding and excessing. As with all computer programs, however, the end result is only as good as the information entered.

National Business Agents have been tasked with the continuous process of collecting information concerning withholding notices in their regions for input into the Article 12 tracking system. If NALC is to be successful in tracking and ensuring contractual compliance protection for letter carriers, branches must be prepared to assist in gathering information. In the near future, NBAs will begin the process of reaching out to local branches for assistance in collecting information for Article 12 tracking. The requested information will be specifically tailored to track every withholding event in the nation.

If you have questions concerning withholding notices that apply to your branch, contact your NBA for guidance. This process is going to take a national effort to achieve success and every letter carrier should be ready to join the fight. If we are going to keep dislocation and inconvenience to a minimum, it will require *maximum* effort.

Notice of Proposed Removal

The Veterans' Preference Act guarantees "prefer-ence eligible" employees certain special rights concerning their job security. One example: Instead of a Notice of Removal, a preference eligible employee is issued a Notice of Proposed Removal and then a decision on that proposed removal. There is a difference and a steward needs to know the difference and how to handle a "proposed removal."

The time limits for filing a grievance on a proposed removal are the same as for any removal: 14 days from the date of issuance. While management is required to issue a letter of decision on the proposed removal, the union does not file a separate grievance on the decision letter. Rather, the union may make additions to the file based on the decision letter at either Step A or Step B. This does not preclude any arguments by management regarding the relevance of the additions. Grievances concerning proposed removal actions that are subject to the 30-day notification period in Article 16.5 will be held at Formal Step A of the grievance procedure until the decision letter is issued.

Consistent with the Dispute Resolution Process memorandum, the employee will remain on the job or on the clock until after the Step B decision has been rendered or 14 days after the appeal is received at Step B, except for emergency or crime situations as provided for in Articles 16.6 and 16.7. Grievances concerning proposed removal actions that are not subject to the 30-day notification period in Article 16.5 are not held at the Formal A step pending receipt of the decision letter. Rather, the union may later add the decision letter to the proposed removal grievance. This does not preclude any arguments by management regarding the relevance of the additions. In any case, only one grievance is filed.

"Grievances concerning proposed removal actions that are subject to the 30-day notification period will be held at Formal Step A until the decision letter is issued."

While a preference eligible city letter carrier may appeal a removal or suspension of more than 14 days to the MSPB, as well as file a grievance on the same action, the employee is not entitled to a hearing on the merits in both forums. This provision is designed to prevent the Postal Service from having to defend the same adverse action in an MSPB hearing as well as in an arbitration hearing. If a city letter carrier has an MSPB appeal pending on or after the date the arbitration scheduling letter is dated, the employee waives the right to arbitration. The national parties agree that the union will be permitted to reactivate an employee's previously waived right to an arbitration hearing if that employee's appeal to the MSPB did not result in a decision on the merits of the adverse action, or the employee withdraws the MSPB appeal prior to a decision on the merits being made.

There is no requirement for the NALC to represent a carrier in an MSPB appeal. The notice of proposed removal should inform the preference eligible employee of his or her right to appeal to the MSPB. To file an appeal and to get the information needed, the grievant should be directed to mspb.gov.

Additional information on discipline issued to preference eligible carriers and the filing of grievances for this discipline can be found in the new April 2009 *JCAM* on pages 15-6, 16-6 through 16-7, and 16-10 through 16-11. The *JCAM* can be found in the Contract Administration section on the NALC website at nalc.org/depart/cau/index.html.

Medical information an employer can obtain under amended FMLA regulations

Current 29 CFR Section 825.306 addresses how much information an employer can obtain in the medical certification to substantiate the existence of a serious health condition (of the employee or a family member) and the employee's need for leave due to the condition. This section also explains that the Department of Labor provides optional forms (Form WH-380-E and WH-380-F) for use in the medical certification process; other forms may be used, but they may only seek information related to the condition for which leave is sought, and no additional information beyond that contained in Section 825.306 may be required.

Section 825.306(a): Required information:

(1) The name, address, telephone number, and fax number of the health care provider and type of medical practice/specialization; **(2)** The approximate date on which the serious health condition commenced, and its probable duration; **(3)** A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment; **(4)** If the employee is the patient, information sufficient to establish that the employee cannot perform the essential functions of the employee's job as well as the nature of any other work restrictions, and the likely duration of such inability (see §825.123(b) and (c)); **(5)** If the patient is a covered family member with a serious health condition, information sufficient to establish that the family member is in need of care, as described in §825.124, and an estimate of the frequency and duration of the leave required to care for the family member; **(6)** If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee's or a covered family member's serious health condition, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery; **(7)** If an employee requests leave on an intermittent or reduced schedule basis for the employee's serious health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and **(8)** If an employee requests leave on an intermittent or reduced schedule basis to care for a covered family member with a serious health condition, a statement that such leave is medically necessary to care for the family member, as described in §§ 825.124 and 825.203(b), which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave. (See §825.123(a)-(b) below.)

Section 825.306(d)-(e):

(d) If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), as amended, the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA. Any information received pursuant to these procedures may be considered in determining the employee's entitlement to FMLA-protected leave.

(e) While an employee may choose to comply with the certification requirement by providing the employer with an authorization, release, or waiver allowing the employer to communicate directly with the health care provider of the employee or his or her covered family member, the employee may not be required to provide such an authorization, release, or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. See §825.305(d). (See §825.305 (c) for complete and sufficient certification.)

With respect to Section 825.306(a)(3), it is important to note that the preamble explained what the DOL meant when it referenced examples of medical facts that may be included in the medical certification. The DOL preamble at 73 FR 68014 (November 17, 2008) stated that:

> The Department notes that the determination of what medical facts are appropriate for inclusion on the certification form will vary depending on the nature of the serious health condition at issue, and **is appropriately left to the health care provider**. Accordingly, the Department **declines to set forth a mandatory list of medical facts that must be included in the FMLA certification**. Similarly, the Department continues to believe that it would not be appropriate **to require a diagnosis as part of a complete and sufficient FMLA certification. Whether a diagnosis is included in the certification form is left to the discretion of the health care provider and an employer may not reject a complete and sufficient certification because it lacks a diagnosis**. (Emphasis added.)

The USPS may try to rebut the above by stating that if a diagnosis is not required, why would the DOL have ▶

Medical information (continued)

questions 3 and 4 under Part A: Medical Facts on optional Forms WH-380-E and WH-380-F? The DOL preamble at 73 FR 68016 (November 17, 2008) responded to that question by stating that:

> Several commenters objected to the wording of question 3, which asks the health care provider to describe the relevant medical facts, arguing that as worded in the proposed form health care providers would not be aware that the medical facts listed, including diagnosis, were not mandatory.
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> …As discussed above regarding proposed §825.306 (a)(3), the determination of what medical facts are appropriate for inclusion on the certification form is within the discretion of the health care provider and will vary depending on the nature of the condition for which leave is sought. The Department has revised the certification form to clearly indicate that the medical facts listed are merely examples and are not required in all cases.

Section 825.306(a)(4) references Section 825.123(b) and (c). Please note, there is no Section 825.123(c) in 29 CFR Part 825. With respect to the essential functions of the employee's job referenced in Section 825.306(a)(4) and the use of the phrase "unable to perform the functions of the position" referenced in Section 825.123(a), the DOL preamble at 73 FR 67953 (November 17, 2008) responded by stating:

> In response to the concern of some commenters, the Department notes that the rule gives employers the option of providing a list of essential functions when it requires a medical certification; an employer is not required to do so. Finally, in order to explain why the term "functions" and not "essential functions" is used in paragraph [§825.123](b), **the final rule clarifies that a certification will be sufficient if it provides information regarding the functions the employee is unable to perform so that an employer can then determine whether the employee is unable to perform one or more essential functions of the job**. This revision reflects the fact that the determination of whether a particular job duty is an essential function is a legal, not a medical, conclusion, and is in accord with the medical certification requirements in § 825.306 and the Department's prototype medical certification form. (Emphasis added.)
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> **Section 825.123(a)-(b):**
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> (a) Definition. An employee is "unable to perform the functions of the position" where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. 12101 et seq., and the regulations at 29 CFR 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.
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> (b) Statement of functions. An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform so that the employer can then determine whether the employee is unable to perform one or more essential functions of the employee's position. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier. See §825.306.

You can submit an FMLA medical certification using NALC's FMLA forms, the DOL's optional forms WH-380-E, WH-380-F or another form. If the USPS notifies you that your certification is not complete and sufficient, the USPS is required to "state in writing what additional information is necessary to make the certification complete and sufficient." See Section 825.305(c) below.

> **Section 825.305(c):**
>
> (c) Complete and sufficient certification. The employee must provide a complete and sufficient certification to the employer if required by the employer in accordance with §§ 825.306, 825.309, and 825.310. The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous, or non-responsive. The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave, in accordance with §825.313. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.

Separation for disqualification of 'letter carriers'

We have seen several cases in which clerks are being reassigned under Article 12 into the letter carrier craft, failing some aspect of the EL-804 driving tests, and being administratively separated for failing the test. Notwithstanding any position concerning Article 12, which will not be addressed at this time, this Contract Talk article will provide you with some of the arguments which should be addressed in the grievance file for administrative separations. Regardless of the assistance this article may provide, if you are faced with this situation, contact your NBA for specific guidance.

The first item of defense is to answer the Just Cause Test. Currently, the Postal Service issues a GATS number to these cases coded with a "D," which typically refers to discipline—although these are administrative separations. It is important to address just cause from the standpoint that it does not apply to an administrative separation. There isn't a rule that was broken; it isn't discipline, so there wouldn't be a thorough investigation, nor was the severity of the discipline reasonably related to...etc., etc. Discipline is not the issue; failure to pass a test is.

What provision of the National Agreement applies to administrative separations for disqualification? Article 19, Handbooks and Manuals states:

> **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....

The *Employee Labor Relations Manual* (*ELM*) is covered by Article 19, and section 365.3 refers specifically to Separations-Involuntary:

> **365.31** Removal
>
> **365.311** Definition. Removal is an action involuntarily separating an employee, other than an employee serving under a temporary appointment or a career employee who has not completed the applicable probationary period, for cause.
>
> **365.32** Separation-Disqualification
>
> **365.321** Applicability. This type of separation applies only to employees who have not completed their probationary period.
>
> **365.322** Reasons for Action. Separation-disqualification is an action that results from the failure to meet conditions specified at the time of appointment (such as failure to qualify by conduct or capacity during the probationary period).
>
> **365.323** Probationary Period. Separation-disqualification must be effected during the probationary period. Action is initiated at any time in the probationary period when it becomes apparent that the employee lacks capacity for efficient service.

A cursory reading of this *ELM* provision makes it clear an administrative separation based on a failure to pass a test—disqualification—must be completed during the probationary period. If the grievant is a post-probationary employee, then you must include these violations in the grievance file. You should request to review the grievant's OPF and include a copy of the grievant's Form 50s, which demonstrate their appointment/hiring date and date of reassignment. These documents will establish the grievant is not a probationary employee.

To bolster your argument that disqualification separations outside the probationary period are a violation, you should add the national-level arbitration decision of Shyam Das—C-26852—to your file. Das acknowledges the applicability of separation by disqualification must be within the probationary period. Typically, submission of arbitration decisions in a grievance packet is frowned upon, but the submission of national awards is always appropriate.

In addition to the above, the following provisions in the EL-312 should be reviewed:

> **517.61 Purpose**
> The Initial Road Test…before entering rural and city carrier positions…An eligible rating on this examination indicates that the applicant has demonstrated the minimum, basic driving skills expected of a new rural or city carrier.

The language is clear. An employee reassigned into the carrier craft must pass the initial road test prior to being reassigned. Request a copy of the initial road test to assess whether it was given *prior* to reassignment.

The driving test(s) are those administered through Handbook EL-804. The EL-804 indicates an employee who requests a transfer to another craft outside the installation must successfully complete all the driving requirements in the losing installation *prior* to being reassigned. If the grievant was reassigned outside the installation and the testing was not done prior to the reassignment, you must include this violation in the grievance file. Request a copy of the grievant's test scores and the location of the testing. This will demonstrate the time and location of the testing was not compliant with the specific provisions of EL-804.

As stated earlier in the article, it is imperative you work with your National Business Agent to prepare these types of grievances.

An old provision resurrected

The *Handbook M-39—Management of Delivery Services* Section 126.3 has been around for a long time. However, a relatively recent arbitration award has brought to light several possible uses. The language states:

> **126.3 Record of Carrier Work Hours, Absences, Replacements, and Overtime**
>
> Complete PS Form 3997, Unit Daily Record, as per instructions on the form or electronic equivalent from a nationally approved computer system that provides equivalent information. (See exhibit 126.3.) Prepare PS Form 3997 *several days in advance.* Since scheduled absences and scheduled replacements are known, add only the unscheduled absences and their unscheduled replacements. *(Emphasis added.)*

Between withholding and staffing issues, we are seeing an increase in the number of assignments that are regularly left uncovered. In many instances, management leaves those vacant duty assignments open and fills them on the day of the vacancy by having carriers curtail and pivot. More often than not, management forces non-ODL letter carriers to work off of their bid assignments. While not a magic bullet, this provision can force management to handle vacant duty assignments in different manner.

In Regional Arbitration Case No. C01N-4C-C 05149941 (C-26543)*, May 2006, Arbitrator Jonathan I. Klein determined that management must fulfill its obligation to *M-39* Section 126.3 by assigning carriers into vacant duty assignments two days in advance of the vacancy. The USPS took the position that the language of 126.3 was merely "instructional" and that, by assigning carriers on the day of the vacancy, they had satisfied the requirements. Arbitrator Klein disagreed and stated, "The arbitrator finds 126.3 of the *M-39* to be clear and unambiguous. It requires that the Unit Daily Record, Form 3997, be prepared 'several days in advance.'" Arbitrator Klein noted Exhibit 126.3 in *M-39* even requires management to fill auxiliary assignments in advance. Arbitrator Klein issued a cease-and-desist order in this case.

While filling vacant assignments in advance closes a loophole and lessens the likelihood of pivoting, it does not preclude it. If there are no available employees to be assigned to these vacant assignments in advance, or if the assignment becomes vacant unexpectedly, such as when an employee calls in sick, etc., management may not be able to fill the assignment in advance. However, oftentimes, part-time flexible carriers, transitional employees and overtime-desired-list carriers are left home while non-ODL carriers are forced either to curtail and work those vacant assignments or to cover those assignments in an overtime status.

So, when you file a pivoting or overtime grievance based on 126.3 of the *M-39*, what additional arguments and evidence do you need to develop? First, you need to continue to make all the arguments that you have made in the past. Nothing has changed in that regard. What has changed is, when you make the 126.3 argument, you need to prove how, if management had assigned carriers to those vacant assignments in advance, the outcome would have been different.

Exhibit 126.3
Form 3997, Unit Daily Record

For example, if a route is left uncovered while an ODL carrier is non-scheduled, and non-ODL carriers are forced to curtail and pivot and/or are forced to work overtime off of their assignments, an argument easily can be made that, had the ODL carrier been scheduled in advance on the vacant assignment, many, if not all, of the non-ODL carriers would not have been required to work overtime off of their assignments.

Think of Section 126.3 of the *M-39* as another tool in your toolbox, one that will help keep some of the forced overtime by non-ODL letter carriers to a minimum.

* Regional arbitration awards are citeable but not precedent-setting. Because the NALC National Agreement makes an arbitrator's award final and binding, "final and binding" applies only to the case before the arbitrator.

PS Form 2488—do not patronize

The USPS recently made changes to PS Form 2488, Authorization for Medical Report, June 1987. Ostensibly, these changes were made to comport with the Health Insurance Portability and Accountability Act (HIPAA). HIPAA requirements are set forth at 45 C.F.R. 164.508c. In addition, the revised form has been renamed Authorization to Use or Disclose Protected Health Information.

Historically, PS Form 2488 has had one major function—to obtain medical information from applicants for employment in the Postal Service. Generally, the NALC has no standing with respect to the hiring process.

The completion of PS Form 2488 by current employees is totally voluntary. The form states that its completion is voluntary on the part of the employee in the "Privacy Act Statement" on the form's bottom. In addition, the NALC has a national level pre-arbitration decision (M-1441) dated April 19, 2001, stating that PS Form 2488 is voluntary.

It should be understood that there could be a negative consequence for not providing the USPS with medical information the USPS has the legal and/or contractual right to obtain. However, the fact that the Postal Service may have an interest in acquiring an employee's private medical information does not automatically translate into a legal or contractual right to demand or obtain it.

The NALC has written numerous articles over the years concerning this form, including Contract Talk November 2000, Contract Talk December 2002 and in the *NALC Activist* March 2008, "Protecting Medical Privacy." A letter carrier should review the aforementioned articles before releasing any individually identifiable personal medical information to the USPS.

On this page is a copy of the recently updated PS Form 2488. One concern is that management may attempt to expand the use of the form. Management may attempt to use this form to gain access to an employee's medical records when virtually any issue that involves the employee's medical condition arises. Under Section I, the portion titled "Applicant/Employee Personal Information," there are a number of check boxes. Excluding the "New Hire Candidate Physical" box, which is not applicable to current employees, there is never a reason why a letter carrier should check any of those boxes or sign this form. Once an employee signs the PS Form 2488, they are agreeing to release all of their individually identifiable personal medical information held by a physician that the doctor believes relates to that issue.

For example, if an employee releases information for a specific medical condition for FMLA approval, under PS Form 2488 they have given permission to their physician to determine which medical information is pertinent and which is not. Conversely, if the employee directs their doctor as to what specific medical information is necessary to provide the Postal Service, they have control over which medical information is released.

UNITED STATES POSTAL SERVICE

Authorization to Use or Disclose Protected Health Information

I. Applicant/Employee Personal Information

☐ New Hire Candidate Physical

II. Postal Service™ Requester/Recipient of Information

III. Authorized Health Care Provider

IV. Disclosure Information and Privacy Act Statement

Expiration of Authorization

PS Form 2488

We need to educate our membership to not sign PS Form 2488 under any circumstances and NALC officers and stewards should review Management Instruction EL-860-98-2, which replaces Chapter 2 of Handbook EL-806, Health and Medical Services. This management instruction provides specific guidelines for handling and security of employee medical records. Remember, do not patronize PS Form 2488.

Assignment of new delivery

A **little over a year ago, NALC and USPS entered into** agreement concerning the assignment of new deliveries to city delivery. The Memorandum of Understanding, Re: Assignment of City Delivery (M-01694) provides that all new deliveries will be assigned to city delivery in offices with both city and rural delivery within certain conditions.

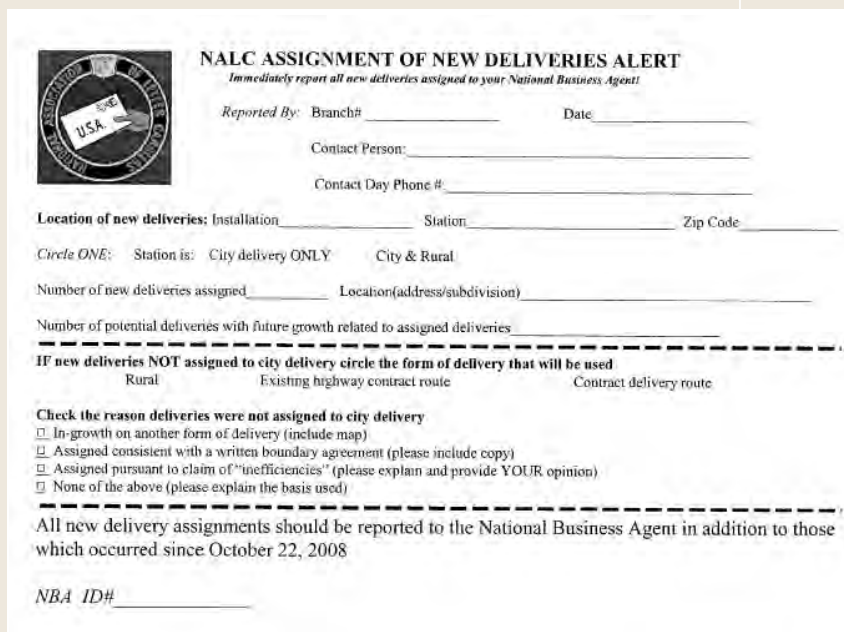
Those conditions are: in offices with established city/rural boundary agreements; new deliveries that are "in-growth" in existing routes assigned to another form of delivery; and, if the assignment to city delivery would result in inefficiencies. (In-growth refers to new deliveries or small pockets of new deliveries between existing points being assigned to the same delivery craft or service.) This agreement will increase the number of city deliveries we currently have and substantially contribute to the stability of the city letter carrier craft.

While this agreement between the NALC and USPS has national application, each national business agent, branch officer and letter carrier has a role in making sure the agreement is fulfilled and honored. Last February, NALC sent a letter to every branch president charging each branch to "closely monitor the assignment of all new deliveries to ensure compliance with the Postal Service's commitment." To that end, each branch was provided with an NALC Assignment of New Deliveries Alert form to fill out to notify their NBA of all new deliveries assigned.

It might seem an easy task for your branch leadership to fill out this form, but it is a large undertaking. Most branches request a copy of U.S. Postal Service-Address Management System-New Delivery Point Report, which lists all new deliveries and the form of delivery the new addresses were assigned to. While the form is quite comprehensive, it is still necessary to locate the new assignment and determine if the deliveries are within existing boundaries or are in-growth. This is a time-consuming task, but one that is essential to ensure compliance.

Handbook *M-41,* Section 253.3 says, "Report any new building, conversions from single to multiple delivery or vice-versa, subdivisions, developments...as soon as known to you." While this applies to providing the information to the manager, the same information should be provided to your branch leadership as well. Each member has a job to do in identifying new deliveries. The importance of helping identify all new deliveries cannot be overstated. These new deliveries are *your* new deliveries—we all have a stake in seeing as many new deliveries assigned to city delivery as possible.

Each branch is supposed to report new deliveries to the NBA office any time they are assigned, retroactive to October 22, 2008, the date of the memo. As we all know, letter carriers know their routes and lines of travel better than anyone—we deliver them or drive through them every day. To assist your branch leadership, make a note of any new construction, new developments or other new deliveries and pass the information along to your branch president.



NALC ASSIGNMENT OF NEW DELIVERIES ALERT

Immediately report all new deliveries assigned to your National Business Agent!

Reported By: Branch# ______________ Date ______________

Contact Person: ______________

Contact Day Phone #: ______________

Location of new deliveries: Installation ______________ Station ______________ Zip Code ______________

Circle ONE: Station is: City delivery ONLY City & Rural

Number of new deliveries assigned ______________ Location(address/subdivision) ______________

Number of potential deliveries with future growth related to assigned deliveries ______________

IF new deliveries NOT assigned to city delivery circle the form of delivery that will be used

Rural Existing highway contract route Contract delivery route

Check the reason deliveries were not assigned to city delivery

☐ In-growth on another form of delivery (include map)
☐ Assigned consistent with a written boundary agreement (please include copy)
☐ Assigned pursuant to claim of "inefficiencies" (please explain and provide YOUR opinion)
☐ None of the above (please explain the basis used)

All new delivery assignments should be reported to the National Business Agent in addition to those which occurred since October 22, 2008

NBA ID# ______________

The signing of the Memorandum of Understanding, Re: Assignment of City Delivery (M-01694) is the first time in decades that the Postal Service has agreed, in most instances, to assign new deliveries to city delivery. We cannot miss this opportunity to protect and expand our craft and at the same time ensure our future. We all have a job to do! ✉