

ACTIVIST

NALC

A NEWSLETTER FOR BRANCH LEADERS OF THE NATIONAL ASSOCIATION OF LETTER CARRIERS
VOL. 22, NO. 2

July 2009

The successful grievance file:

From Formal Step A to Step B

You have just been appointed the union's Formal Step A designee. What now? This article will show both new and veteran stewards what goes in a successful grievance file at Formal A and if need be, what should be in a file when it is appealed to Step B. You will learn how to build a case file and negotiate from strength in your grievance meetings.

Preparing for Formal A

As soon as a grievance is appealed to Formal A, the union's Formal A representative needs to begin preparations for the meeting. The Formal A representative needs to review the file for completeness, then request any additional information that is needed and time to prepare for the Formal A meeting. This preparation should include a conversation with the steward who filed the grievance at Informal A. The union's designee should become familiar with the issues and why the grievance was not resolved at the lower step. Further investigation of the issues involved in the grievance may be undertaken if needed.

It is management's responsibility to meet with the union at Formal A within seven days of receipt of the Formal A appeal. As at the informal level, extensions are possible but should be the exception to the rule. Requests should always be in writing.

The Formal A meeting

At the Formal Step A meeting, the union must be prepared to describe their understanding of the facts of the case, to list the relevant contractual provisions involved, and to provide a detailed explanation of their position. As at the informal level, the Formal A parties have a responsibility to resolve the grievance if possible. The Formal A representatives are also required to jointly review the JCAM in attempting to settle the grievance. The parties must exchange all information and documentation during the meeting. This is a joint case file and the file should be complete at Formal A. If the file is not complete, the Formal A representatives should consider remanding the grievance to the Informal A step for

completion of the file and further discussion. In such cases, the Formal A parties should provide written instruction to the Informal Step A's explaining why the case was remanded.

Article 15 Section 2 Formal Step A (e) states that the parties

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YOUR CONTRACT

Transitional removals . . . *Are they different from career employees?*

inevitably, after the reintroduction of Transitional Employees (TEs) into the letter carrier workforce, comes the advent of removals of TEs. For the union representative the question is how are these removals different from similar discipline meted out to career employees? You can find the MOU that sets up the provisions for TE Removals in the box on page 3.

The first thing you must do is ensure that the TE has worked 90 days or has been employed for 120 days, whichever occurs first. If a dispute arises, time records will be required to show that the employee worked the requisite 90 days. If the issue is the 120 days, make sure you have a copy of the TE's PS Form 50 which will show the date the employee was hired. Remember that if the TE is in their second term, the above requirements are waived as agreed to by the parties in the April 2009 JCAM which states:

In the Step 4 Settlement F90N-4F-D 94022367, January 4, 1995 (M-01202) the parties agreed that when an NALC transitional employee has completed a previous 359 day term of employment in the same office and in the same position, a termination for cause during the first ninety work days (or 120 calendar days, whichever comes first) of an immediately subsequent appointment is subject to the grievance-arbitration procedure.

Once we have determined that the TE is covered by the grievance-arbitration procedures, the MOU says that the concept of progressive discipline does not apply. That means that even for minor infractions that would often lead to a letter of warning or suspension management may move directly to a removal notice for a TE. That also means that arguing disparate treatment between TEs and career employees will not be effective. You may, however, argue disparate treatment when one TE is issued discipline for misconduct for which other TEs have not been disciplined. The issue ultimately becomes can management show that the TE in fact did engage in the charged misconduct.

Progressive discipline?

The issue of progressive discipline is supported in the TE Questions and Answers (M-01701) which states:

26. Does the concept of progressive discipline apply to transitional employees?

No. If just cause exists for discipline, the only action that can be initiated against a transitional employee is separation. Such action is subject to the grievance/arbitration procedure, but the action cannot be modified by an arbitrator; the separation can only be upheld or rejected in its entirety. However, the parties are not prohibited from agreeing to a lesser penalty during discussions at earlier

steps of the grievance - arbitration procedure.

So let's assume that a TE is given a notice of removal and after a thorough investigation, you find that the TE did in fact engage in the misconduct charged. That's game, set and match, right? Not necessarily. Remember, that the MOU requires management to have "just cause" as contemplated in Article 16, Section 1 of the *National Agreement* when removing a TE.

The JCAM sets forth the basic principles that are required when management issues discipline. The April 2009 JCAM states:

16.1 Section 1. Principles

In the administration of this Article, a basic principle shall

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MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES POSTAL SERVICE AND THE NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

Re: Transitional Employees-Additional Provisions

ARTICLE 16

Transitional employees may be separated at any time upon completion of their assignment or for lack of work. Such separation is not grievable except where the separation is pretextual. Transitional employees may otherwise be removed for just cause and any such removal will be subject to the grievance-arbitration procedure, provided the employee has completed ninety (90) work days, or has been employed for 120 calendar days, whichever comes first. Further, in any such grievance, the concept of progressive discipline will not apply. The issue will be whether the employee is guilty of the charge against him or her. Where the employee is found guilty, the arbitrator shall not have the authority to modify the discharge. In the case of removal for cause, a transitional employee shall be entitled to advance written notice of the charges against him/her in accordance with the provisions of Article 16 of the National Agreement.

be that discipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject to the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

Just Cause Principle

The principle that any discipline must be for "just cause" establishes a standard that must apply to any discipline or discharge of an employee. Simply put, the "just cause" provision requires a fair and provable justification for discipline. "Just cause" is a "term of art" created by labor arbitrators. It has no precise definition. It contains no rigid rules that apply in the same

way in each case of discipline or discharge. However, arbitrators frequently divide the question of just cause into six sub-questions and often apply the following criteria to determine whether the action was for just cause. These criteria are the basic considerations that the supervisor must use before initiating disciplinary action.

Just cause: 6 tests

The six tests cited in the JCAM are:

- **Is there a rule?** If so, was the employee aware of the rule? Was the employee forewarned of the disciplinary consequences for failure to follow the rule? It is not enough to say, "Well, everybody knows that rule," or, "We posted that rule ten years ago." You may have to prove that the employee should have known of the rule. Certain standards of conduct are normally expected in the industrial environment and it is assumed by arbitrators that employees

should be aware of these standards. For example, an employee charged with intoxication on duty, fighting on duty, pilferage, sabotage, insubordination, etc., may be generally assumed to have understood that these offenses are neither condoned nor acceptable, even though management may not have issued specific regulations to that effect.

- **Is the rule a reasonable rule?** Management must make sure rules are reasonable, based on the overall objective of safe and efficient work performance. Management's rules should be reasonably related to business efficiency, safe operation of our business, and the performance we might expect of the employee.

- **Is the rule consistently and equitably enforced?** A rule must be applied fairly and without discrimination. Consistent and equitable enforcement is a critical factor. Consistently overlooking employee infractions and then disciplining without warning is improper. If employees are consistently allowed to smoke in areas designated as No Smoking areas, it is not appropriate suddenly to start disciplining them for this violation. In such cases, management loses its right to discipline for that infraction, in effect, unless it first puts employees (and the unions) on notice of its intent to enforce that regulation again. Singling out employees for discipline is usually improper. If several similarly situated employees commit an offense, it would not be equitable to discipline only one.

- **Was a thorough investigation completed?** Before administering the discipline, man-

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Significant TE arbitration decisions

Arbitrations you should review to give yourself a full and well rounded view of various TE issues.

Arbitrator: Richard Mittenthal
GATS #: G90N-4G-D 93040395
CIGAR #: 13837

DATE: August 18, 1994

Synopsis: National Arbitrator Mittenthal held that a Transitional Employee removed for cause is entitled to advance written notice of the charges against him/her and, in accordance with Article 16.5, is entitled to remain on the job or on the clock at the option of the employer during the notice period. This Award is currently incorporated into the April 2009 JCAM.

Arbitrator: Alan Walt
GATS #: J90N-4J-D 94029694
CIGAR #: 13930
DATE: September 15, 1994

Synopsis: This case is an example of an arbitrator who determined that the TE involved in a vehicle accident was not at fault and rescinded the discipline and made her whole. Significant in his decision is that a make whole remedy for a TE will normally

only be inclusive from the date of removal until the return to duty or as in this case the date when her 360 days end.

Arbitrator: J. Reese Johnston, Jr.
GATS #: G90N-4G-D 94014313
CIGAR #: 14970
DATE: October 3, 1995

Synopsis: This case provides an example of how an arbitrator may frame a back pay remedy for a TE since they have no per se guarantee to eight hours per day. In this case, Arbitrator Johnston required the USPS to use the TE's three previous pay periods prior to removal and average the hours worked including overtime to determine how many hours she should be paid.

Arbitrator: Elvis C. Stephens
GATS #: G90N-4G-D 95022306
CIGAR #: 15025
DATE: December 18, 1995

Synopsis: This case is supportive of a TE removal that was overturned based on a just cause violation. Specifically, the TE was is-

sued the Notice of Removal by the Senior Labor Relations Specialist and not by his immediate supervisor. Arbitrator Stephens made the employee whole for the remainder of his appointment period.

Arbitrator: John H. Abernathy
GATS #: F90N-4F-D 95034463
CIGAR #: 15302
DATE: March 29, 1996

Synopsis: Arbitrator Abernathy finds numerous due process violations sufficient to warrant a back pay remedy. Included in the due process violations are: failure to provide the TE her grievance rights in the notice; untimely issuance of the notice.

Arbitrator: Bruce Fraser
GATS #: A06N-4A-D 08269343
CIGAR #: 27963
DATE: December 18, 2008

Synopsis: A recent award by Arbitrator Fraser who made the TE whole based on just cause violations including the employee being unaware of the rule.

(Continued from page 3)

agement must make an investigation to determine whether the employee committed the offense. Management must ensure that its investigation is thorough and objective. This is the employee's day in court privilege. Employees have the right to know with reasonable detail what the charges are and to be given a reasonable opportunity to defend themselves before the discipline is initiated.

• **Was the severity of the discipline reasonably related to the infraction itself and in line with that usually adminis-**

tered, as well as to the seriousness of the employee's past record? The following is an example of what arbitrators may consider an inequitable discipline: If an installation consistently issues five-day suspensions for a particular offense, it would be extremely difficult to justify why an employee with a past record similar to that of other disciplined employees was issued a thirty-day suspension for the same offense. There is no precise definition of what establishes a good, fair, or bad record. Reasonable judgment must be used.

An employee's record of previous offenses may never be used to establish guilt in a case you presently have under consideration, but it may be used to determine the appropriate disciplinary penalty.

This provision is not applicable to TEs if you are comparing their level of discipline to that of career employees. Management must, however, treat TEs with similar records the same way. So if management does not issue discipline for an at-fault vehicle accident to one TE and then issues a removal notice for a similar vehicular accident, you

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OWCP appeal rights

Some OWCP claims have all the required components and fly through the system without a hitch. On the other hand, some claims are denied by OWCP for a litany of different reasons. The formal decision for all denied claims includes one or more of the three Federal Employees' Compensation Act (FECA) appeal routes. FECA appeal routes are: 1. Hearing; 2. Reconsideration; and 3. Employees' Compensation Appeals Board (ECAB). Not all of the appeal routes are applicable for every formal OWCP decision, but the appropriate appeal routes are identified on each formal decision.

Hearing

If a claimant is not satisfied with a formal decision, they may have the right to request either an oral hearing or a review of the written record by a representative from the Branch of Hearings and Review. If the hearing appeal route is chosen, the claimant has 30 days

from the date of the decision being appealed; the postmark determines the date of the appeal. Any such request for a hearing must be made before reconsideration is undertaken.

1. Oral Hearing – The oral hearing will be held within 100 miles of the claimant's home and will generally be scheduled within three to six months. New evidence and testimony may be presented in support of the claim. The hearing is recorded and transcribed.

2. Review of the written record – The OWCP hearing representative will review the official record and any additional evidence submitted since the date of the formal decision that is being appealed. Such reviews will not involve oral testimony or attendance by the claimant.

If making a hearing appeal, it is recommended the claimant initially select the oral hearing, especially if the file is lacking evidence. Select-

ing the oral hearing gives a claimant additional time to add needed evidence to the record. Once that evidence has been added to the case file, the claimant may at that point submit a written request for a review of the written record in place of the oral hearing.

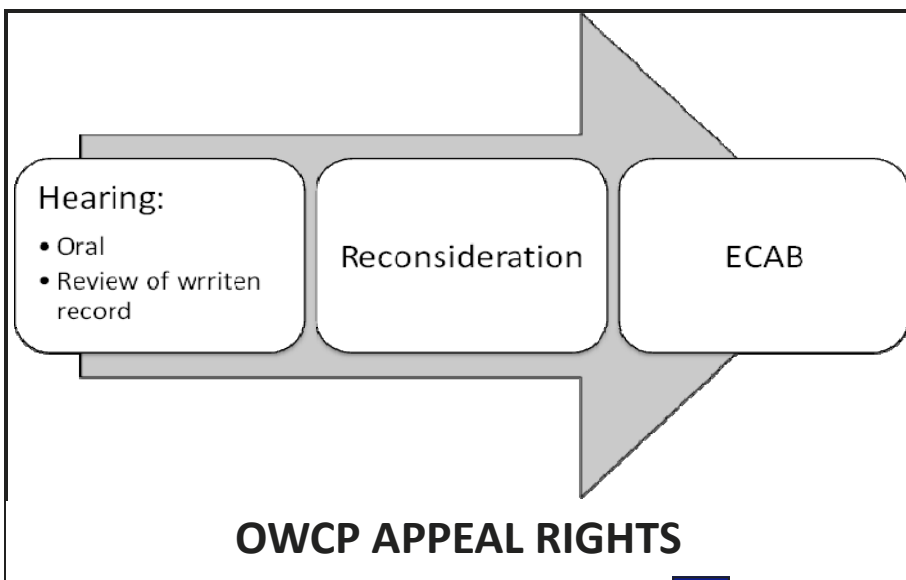
The OWCP hearing representative will issue a formal decision and that decision will include additional appeal routes available to the claimant.

Reconsideration

A claimant may ask OWCP to reconsider a formal decision made by the district office. The reconsideration request must be made within one year of the decision being appealed. The postmark determines the date of the appeal. OWCP will consider an untimely application for reconsideration, but *only* if the application demonstrates, on its face, clear evidence of error on the part of OWCP in its most recent merit decision.

A reconsideration appeal must be submitted in writing and include arguments and evidence that show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP, or constitute new evidence not previously considered. New evidence is the most common basis for a reconsideration appeal.

OWCP will issue a formal decision on the reconsideration appeal and that decision will include any additional appeal routes available to the claimant.



From Formal Step A to Step B

(Continued from page 1)

must make the Formal Step A decision and complete the Joint Step A Grievance Form **on the day of the meeting**, unless they agree to extend the time limit. This should be relatively simple if the parties agree to



It is in the local parties' best interests to fully develop the case before deciding it can't be resolved at the Formal Step A level.



dispute. If the grievance is resolved, copies of the completed form must be sent to the steward and supervisor who failed to resolve the dispute at Informal Step A. The designees are also encouraged to explain the settlement to the steward and supervisor who discussed the grievance at Informal Step A to guide them in future cases.

If after fully discussing the case the parties are unable to reach common ground and resolve the dispute, they must complete the grievance form on the day of the meeting, although in much greater detail than if the case were resolved. If necessary, the parties may mutually agree to extend the meeting for a day or two to accomplish this task.

Under the Dispute Resolution Process, the Joint Step A Griev-

ance Form (PS 8190) is the official record of the grievance. The same form that was used at the Informal A level is completed at Formal A. The Joint Step A Form should be completed in its entirety with each box filled in and appropriate signatures and telephone numbers provided. It is suggested that, rather than attempting to write in the limited spaces provided on the form, boxes #16 (undisputed facts) and #17 (union's disputed facts and contentions) should be completed on separate sheets of paper. These additional sheets should be attached to the 8190 rather than scattered throughout the file.

Undisputed facts

Undisputed facts are statistics, information, data, events or experiences that the parties agree are true or did occur. No case should be appealed without undisputed facts. It probably doesn't seem like it at times, but in most grievances the parties have more in common than it might appear at first. Even in the most contentious of cases, there are many facts that the parties should be able to agree are not in dispute. The local union and management designees can go a long way toward resolving those areas in which there is conflict if they will first try to identify those relevant facts that are not in dispute.

The parties should at a minimum try to provide a narrative or a list of the events leading to the dispute and describe what happened. Surely, there are facts upon which the parties can agree. For example, you can agree that John Smith worked overtime on the 15th and that John Smith is not on the ODL list. The parties can confirm agreement by providing their signatures at the bottom of the list of undisputed facts.

In Box #17, the union's disputed facts and contentions, the union's Formal A representative must list the facts that are in dispute and reference the documents in the file that support this version of the facts. The union should also explain in detail its position on the case by listing its contentions in the grievance. Be specific and remember that you are writing to someone who doesn't know the carriers in your office. **Don't use nicknames or slang.** Someone outside of your office doesn't know that Bubba is John Smith. Are there two carriers named John? What is called a swing or a pivot in one office may be called a bump or a ditch in another. You must make sure your arguments and contentions are clear in order to get the resolution you want.

The Formal A representative should begin this section by providing a narrative or explanation of the union's understanding of the facts. In other words, the union should describe from its perspective exactly what happened, making note of any evidence in the file that supports these facts.

After describing what happened, the representative should then explain why the union believes there was a violation of the contract. Each reason should be listed and explained in detail. The union should also note the specific contractual provisions that are involved and may refer to prior grievance decisions and arbitration awards which support its positions in the case.

Completing form 8190

In some cases, completion of the form may take a considerable amount of time. The parties are encouraged to schedule enough time to do so on the day of the

meeting. The parties may also wish to complete their respective portions of the form after the meeting and then re-meet to exchange them. However, as noted above, the Joint Step A Grievance Form is to be completed on the day of the meeting, unless the parties mutually agree to an extension. The designees must legibly print their names, sign and date the form, and provide a telephone number where they each can be reached during normal business hours.

Additions and corrections

The union may submit written additions and corrections to the Formal Step A record **along with the Step B appeal within the time limit for filing an appeal to Step B. The filing of any corrections or additions does not extend the time limits for filing the appeal to Step B.** A copy of the additions and corrections must be sent to the management Formal Step A official.

Management may respond by sending additional information to the Step B team which is directly related to the union's additions and corrections provided that it is received prior to the Step B decision. A copy must be sent to the union Formal Step A representative. Any statement of additions and corrections must be included in the file as part of the grievance record in the case. A steward is entitled to time on-the-clock to write the union's statement of corrections and additions.

Normally, if the parties have fully developed the case at the Formal Step A meeting, additions and corrections from the union and a response from management should not be necessary. The presence of these documents in the file usually

Complete Grievance File

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Joint Step A Grievance Form (8190)

Triggering Document(s)

Documentary Evidence

Investigatory Notes

Contractual Cites and Prior Cases

Miscellaneous Items

suggests to the Step B Team that the file was not properly developed or the Step A meeting was deficient in some way. In such cases, the Team may give consideration to remanding the case to Step A for further development. Therefore, it is in the local parties' best interests to fully develop the case and discuss all aspects of it prior to deciding it can't be resolved at that level.

If the grievance is not resolved at Formal Step A, the union may appeal the grievance to Step B within seven calendar days of the Step A decision date (unless the parties agree to an extension of time for appeal). Again, the appeal of the grievance is the responsibility of the union and the steward should not rely on management to mail the joint grievance file.

The appeal to Step B

In order to get the result you want from a grievance appealed to Step B of the grievance procedure, it is very important that the file is complete and easy to understand.

Stewards must clearly tell the story of what happened and why they believe there was a violation of the National Agreement. The file should be in a logical order that is easily read and understood.

A complete grievance file would contain each item described below in the following order:

Table of Contents

The grievance file should contain a table of contents listing the documents contained in the appeal. Each document should be identified. For example, if the table of contents lists the Joint Step A Grievance Form as exhibit "A," the letter "A" could be placed on the form.

Joint Step A Grievance Form (8190)

The completed 8190 and attachments must be included with the appeal and they should be easily found near the front of the file. It is very important that all relevant sections of the 8190 are complete. You need to make it clear right up front what the grievance is about. If your undisputed facts and both the union's and management's contentions are not written on the 8190, they are attachments and should be clearly identified.

Note: If your entire argument and contentions can be written on form 8190 you probably have more work to do in order to win your case.

Triggering Document(s)

The next item in the file should be the triggering document(s) in the case, if any. This might be a letter of warning, a suspension, or a removal notice in a disciplinary case. It could be an administrative action such as a letter placing an employee on restricted sick leave,

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From Formal Step A to Step B

(Continued from page 7)

a letter of demand or an improper Form 50. The triggering document could also be a policy notice, a denied leave slip or some other method of written communication in which the form or content is in dispute. This is the reason for the grievance. Of course, some cases will not have triggering documents, such as a grievance challenging a request for medical certification.

Documentary Evidence

This is "where the rubber meets the road" because the documentary evidence contained in a file usually determines the outcome of the grievance. It does not matter how articulate or persuasive the arguments of a case if the documentary evidence is not there to support them. Thus the saying: "It's not what you say happened that counts, but what you can **prove** happened."

Documentary evidence includes forms, documents, records, photographs, written statements or other tangible items that prove or are purported to prove a fact. For example, the document used to establish whether someone is on the overtime desired list would be a copy of the ODL itself.

In preparing the documentary evidence for an appeal, the steward should review each fact that needs to be established in the grievance and make every effort to ensure that there is some piece of written or printed evidence to prove it. Care should be taken to avoid writing on, marking, or in any way permanently altering or adding to an original piece of documentary evidence. If it is necessary to draw attention to something on a document, do so on a second copy

which is attached to the original, or use post-it type notes. Never deface, alter or mark an original document.

Investigatory Notes

During the course of investigating a grievance, the shop steward or manager normally takes notes of conversations and interviews. These may be interviews held at the request of management, such as an investigatory interview, or interviews that the steward has initiated while investigating the grievance. Such notes are important as they record answers to pertinent questions relevant to the

**Documentary
evidence:
It's not what you
say happened
that counts, but
what you can
PROVE happened.**

grievance while the events are still fresh in the witness' minds.

Investigatory notes should be identified as to time, date, location, interviewee, others present and authorship. Remember, if the Step B Team, the advocate or an arbitrator cannot read your writing, your notes won't help your case. If this is the case your notes should be rewritten or typed. As with other evidence, original contemporaneous notes should remain unaltered. If rewritten, typed, clarified or summa-

rized, the original notes should be attached and included in the file.

Contractual Cites and Prior Cases

Copies of contractual language or any handbook, manual, external law or other provisions cited as a basis for the action or the grievance should be included in the file. Prior arbitration or grievance decisions that are being cited for precedential or persuasive value should be included as well. As these are normally not considered as "evidence," they may be marked to highlight pertinent parts. There is no need to reprint the JCAM. If you need to highlight a particular provision, that's fine, but a reprint of article 8, for example, is not necessary.

Miscellaneous Items

This is kind of a catch-all category for those items generated by the processing of the grievance itself. This includes items such as information and steward time request forms, extension letters, and mailing receipts. These also should not be marked upon or altered. In certain cases, such as a grievance regarding denial of steward time, such items may not be miscellaneous items but be the triggering document.

The Union should retain a copy of the entire file for their records. These files may be needed for future reference should the case be remanded by the Step B Team or impasse to arbitration.

If you have done your research and followed the suggestions above you have a much better chance of being successful with your grievance. You will have given the union at the higher levels of the grievance procedure a greater opportunity to settle the grievance in the union's favor.

New FMLA requirements

In November 2008, the Department of Labor (DOL) published its final rule to implement the first-ever amendments to the Family Medical Leave Act (FMLA). These became effective on January 16, 2009, just four days before President Bush left office. The amendments come from the National Defense Authorization Act (NDAA) of 2008 and provide some new military family leave entitlements which were addressed in the previous issue of the *Activist*. The final rule also substantially revised other parts of FMLA's implementing regulations for the first time since 1995; these revisions are addressed below.

New definitions

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. For example, the final rule has redefined the definition of "serious health condition" in cases involving continuing treatment. Prior to the change, a serious health condition could involve incapacity of more than three consecutive calendar days plus "two visits to a health care provider" or one visit which resulted in a regime of continuing treatment under the health care provider's supervision. The new rule changes that requirement to more than three **full** consecutive calendar days. Partial days no longer count.

Also under the new rules, the two required 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. The previous rules contained neither a 30 day nor a seven day requirement.

Finally, the final rule has defined "periodic visits" for chronic serious health conditions as at least two visits to a health care provider per year. There was no two visit requirement prior to the change.

Physician contact

The revised regulations also permit employer representatives to contact the employee's physician concerning the medical condition involved in the leave request, if the employer chooses to require medical certification of the need for leave. Under the prior regulations DOL allowed a health care provider retained by the employer (the Medical Unit in the USPS) to contact the employee's provider to clarify the certification. In doing so DOL was clear to note both that the inquiry may not seek additional information regarding the employee's condition, and that this contact may only be made by a health care provider representing the employer, as most employers are not medically qualified to pose clarifying questions to the employee's health care provider.

The recent changes now permit an employer representative, either a "health care provider, a human resources professional, a

leave administrator, or a management official" (other than the employee's "direct supervisor") to obtain clarifying information concerning the certification.

Revised forms.

Similarly, DOL also revised its FMLA forms in a way that provides the employer with far greater leeway to deny or question leave requests. On the original certification (WH-380), the employee's health care provider specified which of the statutory definitions of a serious health condition was involved in the relevant leave request and provided a description of the relevant medical facts supporting the certification. The revised forms WH-380-E and WH-380-F only ask the employee's doctor for information concerning the condition. The question of medical judgment as to whether the condition qualifies as a serious health condition is left to the employer. The NALC has addressed their concerns on these issues with DOL.

Requesting FMLA leave

In addition to the changes discussed above, under the previous regulations an employee did not have to assert his or her rights under FMLA or even mention it by name when seeking leave for a FMLA-qualifying reason. Under the final rule, this applies only 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

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STEWARDS' CORNER

The duty of fair representation . . .

What's your duty?

Imagine this situation. Bob thinks he has a problem and goes to his steward.

"I didn't get paid for the holiday last Friday," he says.

"Do you know why?" Sally the steward asks.

"The boss says it's because I didn't work the day before the holiday," Bob says.

"Well did you?" Sally asks.

"No, but I had a good reason not to. The boss has been getting on my back and I needed to teach him a lesson, so I didn't come in on Thursday."

"You know the contract says you have to work the last hour before or the first hour after a holiday to get holiday pay. We may not like it, but for now that's the way it is," says Sally.

"Well, my boss is a jerk and I can prove it. I want to file a grievance," Bob insists.

A big part of our job as union representatives is to protect the gains we have won in our contracts, to fight to improve our wages, hours and working conditions and to defend carriers against injustice from management. Sometimes, as the above example illustrates, it can be tough, but it is our duty.

We also know that sometimes we have to defend carriers we or others may not personally like, because we must defend a principle bigger than the individual person.

Represent all workers

Throughout the years a legal principle has been developed by the National Labor Relations Board called "the duty of fair representation" (DFR). The legal principle quite simply states that a union must represent all workers equally and without prejudice. A union cannot refuse to represent or improperly represent a worker due to the worker's age, sex, creed, nationality, race, religion, political beliefs, union status or personality.

The legal obligation of DFR requires representation of all bar-

an exclusive representative to

A union must represent all workers equally and without prejudice.

represent of all bargaining unit employees: 1) without discrimination; and 2) without regard to whether the employee is a dues paying member of the exclusive representative. DFR is grounded in the principle that when a union attains the status of exclusive representative, it must use that power

to fairly and equally represent all members of the unit.

First, let's look at the aspect of DFR which involves the alleged disparate treatment by the union of an employee based on union membership. This usually concerns situations where a non-dues paying bargaining unit employee claims disparate treatment from that received by dues paying union members. In other words, an employee alleges he/she was treated differently just because he/she was not a union member.

Basically, an exclusive representative may not treat non-union members differently than dues paying union member in matters over which the union has exclusive control. Thus, the duty not to discriminate based on union membership attaches only when an employee has not right to choose a representative other than the union to represent employees in the underlying dispute.

A second aspect of DFR concerns situations where either a union member or a non-member in the bargaining unit claim the union was ineffective in its attempt to represent an employee in a dispute with management. Under the law, a simple mistake is not grounds for a failure in your duty to represent employees, but failure to act in good faith is.

The duty to represent all workers is especially true in cases where non-members or anti-union workers present a complaint which could be a grievance. Personal feelings or the

feelings of the membership cannot be allowed to interfere with the processing of that person's grievance.

The key factor in a "failure to represent" case is that the union knowingly commits these acts because of prejudice or hostility towards an individual. If an honest mistake is made, that is not considered to be "failure to represent." If basic principles in grievance handling are followed there should not be a problem with "failure to represent" charges.

What should be done

Here are some basic guidelines for proper grievance handling:

- Listen to the worker's complaint(s)—don't blow it off.
- Investigate what happened; don't accept the bosses' word as fact.
- If the worker wants to file a first step grievance, meet with the supervisor at Informal Step A, even if you're not sure of the merits.
- Keep all notes of the investigation and meeting.
- Discuss the grievance with the chief steward, if you have one, or the NBA's office if you are unsure.
- Keep the carrier or carriers involved in the grievance fully informed about what is happening to their grievance. If you must make a compromise settlement, make sure the reason for that decision is explained and fully understood.
- Never allow prejudicial statements to be made about the grievant in a discussion on whether to file their grievance.

What we don't have to do

- If a grievance has no merit, there is no obligation to process it past the first step. Make sure the carrier is told why this is happening. If necessary, have another steward or office explain the reasoning behind the decision.
- A steward does not have to pound the table over a grievance that is questionable or non-existent. Present the carrier's case in a straight forward manner if they ask you to do so.
- Sometimes a carrier has suffered an injustice that we cannot win by pointing out a specific contract violation. Make sure the individual understands that you agree an injustice has occurred but it cannot be won as a contractual violation
- There is no obligation to process a "non-grievance" all the way to the final step of the grievance procedure. If the union decides not to process a grievance make sure the investigation is complete and the facts are in order
- There is no obligation to take every case to arbitration. As long as the issue has been dealt with on its merit, there should be no problem.

Our role in fighting discrimination or harassment

We have always felt it is the role of the union to fight against any kind of discrimination or har-

assment a carrier may be suffering. An injury to one is an injury to all. If a carrier approached a steward or an officer and has a complaint of harassment or discrimination, it must be taken seriously. The incident must be investigated and, if necessary, action must be taken. If the harassment is coming from another employee the union must approach it just as seriously as if the harassment was coming from a member of management.

The grievance procedure and the union exist to improve the conditions of working people and by keeping this in mind we won't have to worry about complaints of failing to represent the membership or non-member workers.

Finally, what should Sally do?

Sally talks to the chief steward. Neither one of them think Bob has a good case although both agree Bob's boss is a jerk and maybe he has been harassing Bob. Sally decides to investigate more on the possible harassment of Bob. She is going to present Bob's case at Informal Step A, but will turn the discussion to deal with the attitude of Bob's boss. Sally and Bob agree he doesn't have a chance to get the holiday pay, and won't pursue it past the first step, but they will pursue the question of harassment. Ralph agrees in the future his best way of dealing with the harassment is through the grievance process.

Bottom line; represent all carriers conscientiously, thoroughly, and equally. That is your duty!

How to use the Materials Reference System

The Materials Reference System (MRS) is a collection of contract administration materials assembled by the headquarters Contract Administration Unit. It has been designed to assist all NALC representatives who enforce and administer the National Agreement. MRS should be used as a supplement to the Joint Contract Administration Manual (JCAM) which is authoritative and controlling in the case of any ambiguities or contradictions.

The MRS contains summaries--and in some cases the full text--of many important national-level materials including settlements of Step 4 grievances, other national-level settlements and memorandums, USPS policy statements and so forth. The MRS also contains cross-references to significant national and regional arbitration awards.

The MRS has two parts:

Index and Summaries.

When researching an issue this is the place to start. This MRS Index contains indexes by contract provision, manual provision, and subject (e.g. "Seniority").

After locating the right entry in the index, a researcher should review the related summaries section. Here, each of the collected materials has been reproduced or described by a short paragraph. Note that each item has been assigned either an "M" (for MRS) number, or a "C" (for Cigars)

number. Items with C numbers are arbitration decisions, and may be located in the NALC Computer Arbitration search program and DVD collection, available from the headquarters supply department.

Source documents.

Copies of the original (typically signed) M-numbered materials are stored on NALC's Contract DVD, available from the headquarters sup-

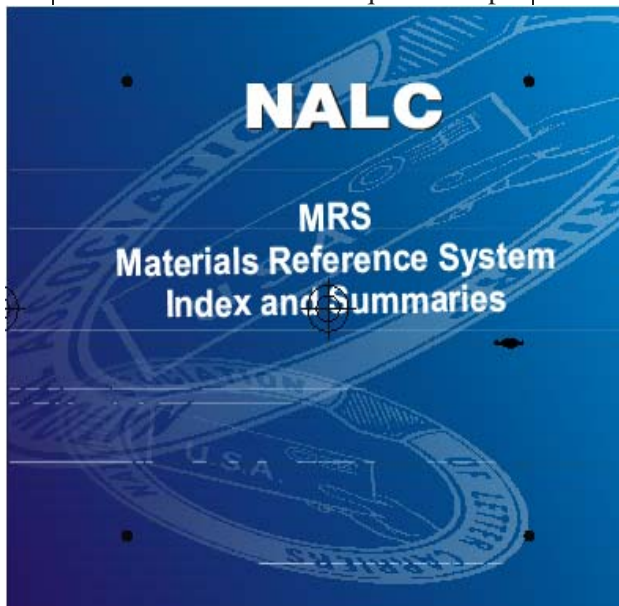
Users who already know the M number of the document they are seeking can go directly to the MRS>Choose an M-Number selection on the Contract DVD or the CAU section of the NALC website. It is not necessary to load the entire Index and Summaries document first.

NALC contract enforcers should review, use and submit these source documents when enforcing the contract. The MRS summaries are not substitutes for the actual Step 4 settlements, arbitration decisions or other original source documents. Submission of the MRS summaries is discouraged—always use the original source document instead.

Users should note that the materials collected in the MRS do not necessarily reflect NALC's current position. The MRS is reasonably exhaustive but older documents may be rendered moot as a result of subsequent National Agreements, national level

Arbitration decisions, and national level pre-arbitration settlements. To resolve doubts concerning the current applicability of any item, contact the NALC National Business Agent.

The MRS is updated and re-issued periodically to add new materials. Users should check the NALC website for information about the latest edition. This is a valuable tool for contractual enforcement—learn to use it effectively.



ply department. The entire MRS, including the M-numbered source materials, as well as new M-numbered documents added later, are also available on the CAU section of the NALC web site (<http://nalc.org>).

If a document consists of multiple pages, each of the pages is identified with the M number assigned to that item. To view a specific item, simply double click on the link (e.g. M-01000) and the original source document will be displayed.

NALC . . .

Strength in Diversity

In the previous edition of *NALC Activist*, we provided a brief overview of the demographics of our union. As leaders in a union with a membership that stretches across every state and territory, it is important to remember the breadth of backgrounds and experiences that our sisters and brothers bring to the NALC.

In the spring, we learned that our demographics have changed a great deal in the past thirty years. Today's NALC is much more diverse than in the past, and increasingly so as women and minorities account for a larger proportion of the union's membership.

In this issue, we'll address some of the strengths – and some of the challenges – that come with a more diverse membership.

Why diversity matters

In the life of a union leader, one of the key advantages of a diverse membership is that each person brings a unique outlook to the table. An effective union leader will look at diversity not as impediment to progress, but rather as an opportunity to gather different perspectives on the road to achieving a common goal.

The first step to embracing the changing nature of our membership is to recognize those changes. How has your branch changed in the last 10, 20 or even 30 years? No matter where you are in the country, it's not likely that your membership looks exactly like it

did when you joined the union. And remember that diversity doesn't just mean people of different ethnicity, but of different ages, varied work experiences, education levels and family situations.

Once you've recognized the composition of your group, you can then assess the various attributes each member brings to your branch. A young female letter carrier may contribute different ideas and have different expectations of her branch than a veteran male carrier. Some members may bring a knack for technology to the branch's business; others can contribute by sharing their long experience in the Postal Service.

These differences can, of course, lead to disagreement. An effective leader respects these differences and expects the same from the rest of the group. Rather than squabbling over minor details, it's important to see how each perspective fits into our common goals and how each one contributes to the furtherance of our objectives.

The great American philosopher Ralph Waldo Emerson once wrote, "No member of a crew is praised for the rugged individuality of his rowing." You might remember from Scouts that if one side of the boat is rowing at a different pace than the other, you'll quickly find you've circled back to where you started. Even though everyone might have a slightly different stroke, a good leader finds a way to incorporate each of them and steer the boat straight.

Practical considerations

Of course, a changing membership means more than just a new set of perspectives. Just as it's important to recognize the different ideas and contributions that each member brings to the branch, it's also important to be aware of their needs. So, in conducting union business with a diverse membership, there are practical considerations to take into account, as well.

One practical area you may want to consider is the balance your members seek between their lives at work, with the union and at home. Maybe that branch meeting in the middle of soccer or baseball season needs to be pushed back a few hours to ensure better attendance. Or perhaps this is the year to save a little more room for lemonade in the cooler at the branch picnic. Active participation in the branch by all members matters and it's up to the branch leaders to make that participation as easy as possible.

In that same vein, to fully harness all aspects of the union's membership, it's important to reach out to members that have not always been active in the branch. The mere presence of various diverse backgrounds in an organization is not enough; it is the unique perspectives that come with those backgrounds that can benefit the branch. Indeed, the benefits of harnessing the changing demographics of the union's membership work in both directions. As members become more involved, the branch gains from

(Continued on page 14)

Transitional removals

(Continued from page 4)

should argue this as a violation of the just cause provisions.

• **Was the disciplinary action taken in a timely manner?** Disciplinary actions should be taken as promptly as possible after the offense has been committed.

One additional note, Article 16, Section 5 rules apply to TEs when they are issued a Notice of Removal. Pursuant to National Arbitrator Richard Mittenenthal in Case No. G90N-4G-D 93040395 (C-13837), TEs removed for just cause are entitled to advance written notice of the charges in accordance with Article 16, Section 5, and are entitled to remain on the job or on the clock at the option of the employer during the notice period.

Arbitrators are limited to either rescinding the discipline in its entirety, or denying the grievance. They are barred from modifying the removal, for example by reducing the removal to a thirty day suspension. As a union representative, you are free to negotiate a modified settlement during all the steps of the grievance procedure. That includes settling the case via a pre-arbitration agreement.

Review the significant arbitration decisions dealing with TE issues summarized in the box on page 12. Using all of this information, you should be able find viable arguments when they present themselves to help our brother and sister TEs retain their employment. ■

OWCP appeal rights

(Continued from page 5)

ECAB

The ECAB is independent of OWCP. ECAB's jurisdiction is strictly appellate and extends to questions of fact and law and the exercise of discretion. ECAB has the authority to review final decisions of OWCP.

ECAB will *only* consider the evidence that was in the case record at the time of the OWCP final decision that is being appealed. Accordingly, if the claimant has new evidence that needs to be part of the record, one of the other appeal options is advisable.

The notice of appeal to ECAB must be filed within 180 days from the date of the OWCP final decision. The ECAB has discretion to extend the period for filing an appeal if an applicant demonstrates *compelling circumstances*. Compelling circumstances mean circumstances beyond the appellant's control that prevent the timely filing of an appeal and do not include any delay caused by the failure of an individual to exercise due diligence in submitting a notice of appeal.

ECAB will issue a formal decision on the appeal and that decision will include additional appeal routes available to the claimant.

Deciding on the proper appeal route

First, you should determine the actual reason for the denial. If you are unsure, seek assistance from the branch or your NBA's office. Once you know the reason for the denial, weigh the options, and choose the route that will get the matter resolved in the shortest amount of time. For instance, if the physician

failed to articulate a specific diagnosis and that was the only reason for the denial, that may be easily remedied with a new medical narrative from the physician. In such a case, a request for reconsideration along with the new medical evidence would probably be the quickest way to get the claim accepted.

If the reasons for the denial are more complex or need to be explained in greater detail than simply providing new evidence, an oral hearing would probably be the best option. Such a case may include claims that are denied for a performance of duty issue, such as an emotional reaction claim. In those cases, it would probably be easier to present clarifying testimony from the claimant and other possible witnesses.

Time constraints are usually a factor when considering an appeal route. If a claimant is unable to secure needed evidence in a timely manner, reconsideration may be the best option, because there is a one-year time limit on reconsiderations. ■

NALC: Strength in diversity

(Continued from page 13)

their new perspectives and the individuals benefit by better voicing their needs and opinions.

Realizing the benefits and challenges that come with a changing membership is crucial to being better union leaders. In the next few weeks, consider just how the union has changed and what those changes might mean for your branch. And as Emerson might tell us, there's always more room on the boat, so reach out to members to get them more involved. When we have all our sisters and brothers on board, everyone benefits. ■

Training Seminars & State Conventions

Listed below are the educational and training seminars planned for April—August 2009. For more information, contact your National Business Agent. Regions not listed have no training scheduled in this time frame.

Region 1—NBA Manny Peralta, (714) 750-2982
California, Hawaii, Nevada, Guam

Oct. 22-23 Northern CA CSCLS Training, Burlingame, CA

Oct. 23 Northern CA Rap Session, Burlingame, CA
Oct. 24 Congressional Breakfast, Burlingame, CA

Region 2—NBA Paul Price, (363) 892-6545
Alaska, Utah, Idaho, Montana, Oregon, Washington
Sept. 21-26 UT Shop Steward College/ State Convention, TBA

Sept. 28-Oct. 1 ID Shop Steward College, McCall, ID
Oct. 1-3 ID State Convention, McCall, ID
Oct. 5-9 MT Shop Steward College, Seeley Lake, MT
Oct. 18-22 WA Shop Steward College, Gold Bar WA
Oct. 25-29 OR Shop Steward College, Sublimity, OR
Nov. 15-19 OR Shop Steward College II, Sublimity, OR

Region 3—NBA Neal Tisdale, (217) 787-7850
Illinois

Oct. 25-28 Region 3 Training Seminar, Peoria, IL

Region 4—NBA Roger Bledsoe, (501) 760-6566
Arizona, Arkansas, Colorado, Oklahoma, Wyoming
July 10-11 Arizona State Convention, Prescott, AZ
Sept. 11-12 Region IV Rap Session, Hot Springs, AR

Region 5—NBA Mike Weir, (314) 872-0227
Missouri, Iowa, Nebraska, Kansas

Oct. 24-25 Nebraska Fall Training, Grand Island, NE
Oct. 25-27 Iowa Fall Training, Coralville, IA

Region 6—NBA Pat Carroll, (586) 997-9917

Kentucky, Indiana, Michigan

Oct. 10-12 KIM Regional Training, Merrillville, IN

Region 7—NBA Chris Wittenburg, (612) 378-3035
Minnesota, North Dakota, South Dakota, Wisconsin

Sept. 18-20 SDALC Training, Chamberlin, SC

Oct. 4-7 MSALC Training, Brainerd, MN

Oct. 23-25 NDSALC Training, Bismarck, ND

Nov. 7-8 WSALC Training, Eau Claire, WI

Region 9—NBA Judy Willoughby (954) 964-2116
Florida, Georgia, North Carolina, South Carolina
Sept. 25-27 Region 9 Rap Session, Charlotte, NC

Region 10—NBA Kathy Baldwin (281) 540-5627
New Mexico and Texas

Oct. 10-12 Regional Training Seminar Fall School, Austin, TX

Region 11—NBA Dan Toth, (518) 382-1538
Upstate New York, Ohio

July 22-25 Ohio State Convention, Akron, OH

Sept. 2-4 New York State Convention, Saratoga, NY

Oct. 24-26 Region 11 Training Seminar, Cleveland, OH

Region 12—NBA Bill Lucini (215) 824-4826
Pennsylvania, South and Central New Jersey
Sept. 24-26 Pa State Convention, Scranton, PA

Region 13—NBA Timothy Dowdy (757) 934-1013
Delaware, Maryland, Virginia, West Virginia, Washington, DC

Oct. 11 Delaware State Convention, Wilmington, DE

Oct. 12-13 MD/DC Convention, Ocean City, MD

New FMLA requirements

(Continued from page 9)

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*, revising NALC FMLA forms to reflect the new regulations, and developing

new forms for the two categories of military family leave discussed in the March *Activist*. Until the new NALC forms are published, letter carriers applying for FMLA 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 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.

More information on FMLA can be found at the Dept. of Labor's web site:

<http://www.dol.gov/esa/whd/fmla/>

USPS

BY THE NUMBERS

USPS Operations

<u>FY 2009—2nd Quarter</u>	<u>Number</u>	<u>Change from SPLY*</u>
Total mail volume year-to-date (YTD) (Millions of pieces)	93,255	-11.9%
Mail volume by class (YTD in millions)		
First-Class	44,109	-8.5%
Periodicals	4,115	-5.6%
Standard (bulk mail)	44,281	-15.1%
Packages	401	-11.4%
Shipping Services	845	-13.1%
Workhours (YTD in thousands)		
City delivery	216,223	-6.2%
Mail processing	134,172	-13.9%
Customer service & retail	93,144	-12.1%
Rural delivery	91,159	-4.8%
Other	112,274	-4.3%

Employment and Wages

<u>FY 2009 —Pay Period 7</u>	<u>Number</u>	<u>Change from SPLY*</u>
Career city carriers	204,488	-5.7%
Fulltime	182,645	-4.8%
PT regular	942	-6.9%
PTF	20,901	-12.3%
Transitional	6,778	-54.8%
MOU Transitional	7,637	n/a
City carriers per delivery supervisor	15.8	-5.6%
Career USPS employment	641,348	-5.0%
Non-career USPS employment	96,854	-10.6%

Finances

FY 2009—Quarter 2 (millions)

Operating Revenue	\$16,938	-8.3%
Operating Expenses	\$18,840	-4.0%
Operating Income	-\$1,902	

Full Year 2009—Quarter 2 (millions)

Operating Revenue	\$16,938	-8.3%
Operating Expenses	\$18,840	-4.0%
Operating Income	-\$1,902	



A NEWSLETTER FOR BRANCH LEADERS OF THE
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