Real numbers vs. DOIS

Are there any other numbers that are more important than DOIS? Actually there are, and they have a direct effect on your assignment. Unlike DOIS, these numbers are based on fact and reality. They are derived from information found on some specific forms that management, based on regulations in USPS handbooks, is required to review and analyze.

Form 1571—Undelivered Mail Report (*M-39* 213 *et al.*)

This form is used to report all delayed (curtailed) pieces of mail on a delivery assignment on any given day. Some carriers may be unaware that, unless authorized by a manager, they are required to case all mail distributed to the route they are serving. They are not allowed, without authorization from management, to curtail or eliminate any scheduled delivery or collection trips. Form 1571 plays an important role because it provides a written record of any management instruction to curtail mail. After the authorization is given to curtail mail and Form 1571 completed, management is required to verify the type and amount of mail curtailed to see if it agrees with that shown on Form 1571 (*M-39* 126.12). Carriers are also required to record any mail that was not delivered and returned to the office. Finally, supervisors are to report to the appropriate manager the total amount of curtailed mail recorded by carriers on Form 1571.

Form 1813—Late Leaving and Returning Report

Management is required to establish leaving schedules for delivery routes, and once the time has been established, management is responsible for ensuring that carriers leave and return to the office on time every day. Managers must be aware of, and record, the daily workload for each route and provide assistance where necessary for carriers to meet scheduled leaving times. They also must recognize when a judicious use of curtailment of non-preferential mails is appropriate to maintain the schedule.

If a carrier leaves and/or returns late, management must record this information on Form 1813 along with notes to explain the reasons for leaving late. When analyzing Form 1813, managers must determine whether one or more carriers frequently leave late. If a carrier frequently leaves late it may be an indication that their route may not be adjusted properly, that starting or leaving times are improper, or that possible inefficiency exists (*M-39* 131.213 et al.).

Form 3996—Carrier-Auxiliary Control

Managers are required to analyze all auxiliary assistance and/or overtime used on carrier assignments. This information is found on Form 3996. As most carriers know, the purpose of this form is to document if overtime or auxiliary assistance is authorized in the office or on the street. Carriers should not only complete Form 3996 when provided, they should also request a copy of the completed form for their records. This is because a completed form provides a detailed written record of the mail to be carried as well as the travel and delivery times of the auxiliary assistance. When Forms 3996 demonstrate that overtime or auxiliary assistance is frequently used on a route, management is required to make a determination on whether the route is properly adjusted (*M-39* 131.223). In addition, carriers often use the data to substantiate requests for special route inspections in accordance with *M-39* 271.g.

Carriers are reminded that the real numbers for an assignment come from the collection and analysis of hard data and not from a DOIS calculation. The handbooks and manuals do not provide for routes to be evaluated on a daily basis in the way management tries to do with DOIS.

Rather, the *M-39* requirements obligate management to analyze real data. Chief among the requirements is that management must conduct a Review and Analysis of Carrier Control Forms (*M-39* Section 213) either during the Unit and Route Review (see Contract Talk, December 2006), or 3 to 4 weeks prior to the scheduled period of formal mail counts and route inspections. In addition, these forms must be completed daily, as well as reviewed periodically, in order to ensure routes are being administered correctly. Management may have to be reminded that evaluations of delivery assignments are conducted in accordance with the M-39 Handbook and not with DOIS (May 2006 *Postal Record* Director of City Delivery column). ✉

Route count and inspection wrap-up

NALC has engaged in a considerable effort to provide letter carries with all of the tools necessary to obtain the fairest route count and adjustments possible. The effort includes *The Route Protection Program* (*RPP*) *Manual*, the companion *Carrier Pocket Handbook* and the most recent addition, the Route Inspection Kit (RIK) CD. *The Route Protection Program* and Route Inspection Kits have been mailed to every NALC branch and updates to the RIK CD are made available on the NALC website. Further, a recent series of "Contract Talk" articles has been provided to reinforce the contractual provisions that address a letter carrier's right to a fair evaluation and adjustment of his or her assignment.

The CAU would like to wrap up this latest effort by reminding carriers of an often forgotten provision of the *M-39 Management Handbook*—Section 243.6, Evaluation of Adjustments. This provision requires that after an adjustment of a route has been placed in effect, the manager must carefully study and analyze a number of Postal Service forms. The results of this final analysis should trigger any number of actions to be taken.

Some of the review and action requirements are:

> **243.611** After the adjustment of routes has been placed in effect, the manager must carefully study and analyze PS Form 3997…PS Form 3997-B…Form 1813; street management records, volume recording data; and carrier's time records to see that the objective has been met, especially for those routes where extensive changes have been made…
>
> **243.62 Time Records** Review the carrier's time records for the periods following adjustment. The frequent use of overtime or auxiliary assistance on adjusted routes may indicate that the basis uses was not sound and should be examined.
>
> **Corrective Action 243.681** If the route is found to be adjusted properly, this must be brought to the carrier's attention and the carrier given an opportunity to improve his or her performance... If the route is found to be too heavy, relief should be granted, and conversely if found to be light, work should be added. If the carrier frequently uses overtime or receives auxiliary assistance, determine if the route is in adjustment or if the carrier is not serving it efficiently, a special inspection may be in order.

Activists should be aware that attempts to place the blame on the letter carrier for failed adjustments by alleging poor work performance should be met with skepticism. The *M-39* requires management to actively identify and correct, as soon as possible, letter carrier performance deficiencies. References include *M-39* Sections 242.2 and 242.22, which require management to address any irregular performance prior to any route adjustments. In addition, *M-39* Section 243.21 requires management to correct any improper practices prior to providing relief to a route. And finally, *M-39* 242.344 states,

> If during the route inspection, the supervisor notes that the letter carrier fails properly to finger mail or to take proper short cuts, and that those failures were sufficient enough to warrant a time adjustment for the route, a reinspection will be made after the letter carrier has been instructed regarding the proper procedures to be used. Every effort will be made to conduct such reinspection prior to the implementation of the adjustments in the delivery unit.

"If the route is found to be too heavy, relief should be granted."

Because of the many provisions instructing management to identify and correct any deficiencies prior to implementation of any adjustments, all claims of insufficiencies made after an evaluation of the adjustment should be investigated thoroughly to determine their validity.

By reviewing the documents required by Section 243.6, management is coming full circle from the required pre-Inspection Route and Unit Review in *M-39* Section 211.1, et al. ("Contract Talk," November 2006). The fact that route evaluations and adjustments are in a constant cycle underscores management's responsibility to balance the daily workload of letter carriers. More importantly, this responsibility must be met with "real" numbers. That is, there are no provisions for meeting the responsibilities as outlined in the *M-39 Handbook* through the utilization of DOIS. ✉

eRMS and "Deems Desirable"

Enterprise Resource Management System (eRMS) is a web-based application that management uses to track numerous employee attendance-related records. "Deems Desirable" is a function within eRMS. The term Deems Desirable is derived from the *Employee Labor Management Manual* (*ELM*) Section 513.36, Medical documentation for absences of three days or less, "….when the supervisor deems documentation desirable for the protection of the interests of the Postal Service."

eRMS and the Deems Desirable function are available only to installations that utilize Interactive Voice Response (IVR) Call Agent or Attendance Control Supervisors (ACS) to record employee absences. A supervisor is able to place an employee in the Deems Desirable category by selecting a range of dates for which it would be applicable. As an example, a supervisor may select a range of April 1 through October 31, indicating that the employee will be required to provide medical documentation for all requests for unscheduled leave made through IVR or ACS during the selected time period.

In addition to a range of dates, a supervisor may also select specific dates to categorize an employee as Deems Desirable. For example, a supervisor may select June 1 and/or July 5. If the employee calls in on one of these days, the Deems Desirable function will be activated and the employee will be instructed to provide medical documentation for the absence.

Despite this new eMRS function, Deems Desirable does not supercede nor supplant the National Agreement—specifically Article 19, and through it, *ELM* Section 513.361, which states, in part, that medical documentation or other acceptable evidence of incapacity for work is not required for absences of three days or fewer unless:

> …the employee is on restricted sick leave (see 513.39) or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service… [and/or when] substantiation of the family relationship…[is]…requested.

The two most common disputes arise over the "restricted sick leave" and "desirable for the protection of the Postal Service" portions of Section 513.361. The *JCAM* provides the following overviews on these two issues:

> **Restricted Sick Leave.** Management may place an employee in "restricted sick leave" status, requiring medical documentation to support every application for sick leave, if: (a) management has "evidence indicating that an employee is abusing sick leave privileges"; or (b) if management reviews the employee's sick leave usage on an individual basis, first discusses the matter with the employee and otherwise follows the requirements of *ELM* Section 513.391.

Requests for medical documentation for "protection of the interests of the Postal Service":

> Numerous disputes have arisen over situations in which a supervisor has required an employee not in restricted sick leave status to provide medical documentation for an illness of three days or less. Generally, to challenge such a decision successfully the union should demonstrate that the supervisor acted arbitrarily, capriciously or unreasonably in requiring the employee to obtain medical documentation. The union should be prepared to show that the grievant has a good overall sick leave record and no record of abuse.

If an employee believes he or she has been incorrectly required to provide medical documentation as a result of being categorized as Deems Desirable, he or she should discuss the issue with a steward as soon as possible. Stewards will have to delve into this electronic world and review the various logs, records and other files associated with eRMS and Deems Desirable. Any information request should include all records, files and/or documentation used in association with eRMS/Deems Desirable as applicable to the employee. These reports include, but are not limited to, the Leave Usage Log List, the Removed Leave Log List and the Denied Leave Log List.

Additional references regarding whether requests for medical documentation were proper are: 1) Step IV—M-00704, 2) MRS—Medical Certification Section, and 3) *JCAM*—Article 10, Leave-Medical Certification, pages 10-12.

Stewards should be aware of this: Just because management has come up with a new computer system for handling unscheduled absences, it in no way alters the provisions of the National Agreement. ✉

Recent rulings on military leave

In a continuing effort to protect the interests of letter carriers, NALC has been reviewing several Merit Service Protection Board (MSPB) rulings against federal agencies, including the Postal Service. One of these most recent MSPB decisions directly affects letter carriers who served in the military reserves or National Guard prior to fiscal year 2002.

In a recent MSPB case, *Miller v. USPS* (March 7, 2007 *M-01604*), the board determined Miller would be eligible to receive remedy as a result of the Postal Service's miscalculation of Miller's military leave. If you are a letter carrier who has served in the reserves or guard, you too may be eligible.

Letter carriers serving in the Reserves or National Guard are granted 15 days paid military leave per year. However, the statute granting paid military leave to most federal employees (*5 USC 6323*) does not apply to the USPS. The USPS provides this military leave through *ELM* Sec. 517.41.

USPS regulations prior to 2002 (*ELM* 517.41) required that letter carriers be charged military leave for scheduled and non-scheduled days. As a result, if an employee's military service exceeded 15 calendar days, the employee had to take annual leave, sick leave or LWOP for the remainder of their military service. The Postal Service changed its rule in 2002 to mirror the regulations of *5 U.S.C. 6323,* which calculates 15 days as 15 work days.

Background and basis for a challenge

In 2002, a Department of Justice employee (*Butterbaugh v. Department of Justice, M-01603*) appealed to MSPB seeking remedy for the past computation of paid military leave based on the new Office of Personnel Management (OPM) application of *5 USC 6323*. Butterbaugh claimed the agency's practice of charging military leave for non-workdays violated the Uniformed Services Employment and Reemployment Act of 1994 (USERRA), *38 USC 4301-4333* (2000) by denying a benefit of employment based on military service.

MSPB denied the Butterbaugh remedy petition, but Butterbaugh appealed to the United States Court of Appeals for the Federal Circuit. In 2003, the Circuit Court overturned the MSPB ruling and found Butterbaugh was indeed harmed and granted the appeal.

Following the Circuit Court ruling, USPS advised NALC that it is not subject to the Circuit Court ruling in *Butterbaugh* because it is exempt from *5 USC 6323*. NALC has continued to pursue a remedy.

In the very recent MSPB decision, *Miller v. USPS*, the USPS claim of exemption to *5 USC 6323* was found to be incorrect. The board ruled that indeed USPS is exempt from *5 USC 6323*. However, the board also found that because USPS has an internal rule which mirrors the law, USPS is also bound to that rule as if it was not exempt up to and including remedy.

Conclusion

Letter carriers who were charged military leave and used annual leave, sick leave or LWOP prior to 2002 could be successful in challenging the USPS position under USERRA utilizing *Miller v. USPS* and *Butterbaugh v. DOJ* in an MSPB complaint.

Further, MSPB is the correct venue for such a hearing, as stated by the Circuit Court. *Butterbaugh* points out the 15-day definition of paid military leave and recognizes USERRA as the remedy authority. *Miller* establishes that even if USPS is exempt from *5 USC 6323* it is still liable when it has established an internal rule similar to *5 USC 6323*.

To obtain relief under USERRA, an appellant must show that, as a result of the Postal Service's improper administration of military leave, he/she was forced to use annual leave, sick leave or LWOP in order to fulfill military duty.

In *Miller*, MSPB ruled the burden of proof is upon the appellant to demonstrate the exact harm incurred in order to receive remedy, but also that it is the obligation of the Postal Service to provide the necessary requested documents.

In order to demonstrate harm, letter carriers need to demonstrate: 1) military orders covering the time in question, and 2) the type of leave they were forced to take. These elements are minimum requirements for a letter carrier to prevail in the complaint. Your steward may be able to assist you in requesting this supporting documentation.

If you believe you were wrongly charged military leave prior to 2002, you may want to explore your options. ✉

Advance preparation for possible local negotiations

While we do not know what the outcome of national interest arbitration will be, and whether any changes will be made to Article 30, it's not too early to begin considering and preparing for possible local negotiations. In advance, branch officers should review their Local Memorandum of Understanding (LMOU) with an eye toward areas that need improvement. Your review may lead you to the conclusion that there is nothing to be gained from opening up negotiations with management. However, both management and the union are obligated to bargain over each of the 22 subject items listed in Article 30. This means that if one party raises such an item in negotiations, the other must negotiate over it in good faith.

With choice vacation period upon us, it's a good time to look at the leave provisions in your LMOU. A review of the old annual leave items in Article 30 is a good place to start. Remember that while the 22 items have been around a long time, there are no guarantees that changes won't happen with the advent of a new contract.

Item 4: *Covers formulation of local leave program.* Among the items that may be negotiated are: date of notification for making choice period selections; method for making choice selections; quota of carriers off during non-choice period; re-posting of cancellations; transferring with leave; military leave; FMLA leave; posting of scheduling.

Item 5: *Covers the duration of the choice vacation period which obviously varies from one geographical section of the country to another.* Although the normal period for much of the country is May through September, warm weather areas have much longer choice vacation periods. For those parts of the country that have a shorter period the branch's object should be to enable the greatest number of people to take off in the shortest period of time.

Item 6: *Covers the determination of the beginning day of an employee's vacation period.* Generally, the vacation period begins either on a Saturday or on a Monday.

Item 7: *Covers whether employees, at their option, may request two selections during the choice vacation period in units of either 5 or 10 days.* You can simply state whether there will be two selections during the choice vacation period. Please note that if you do not negotiate specific language requiring that there be two selections, the Postal Service will undoubtedly allow only one.

Item 9: *Covers determination of the maximum number of employees who shall receive leave each week during the choice vacation period.* In trying to decide whether you wish to negotiate a percentage formula or an absolute number, consider what may be likely to happen to the size of the workforce in the individual post office where you are negotiating. If you believe the size of the workforce is on the decline, then negotiating an absolute number will probably be advantageous. If, however, the workforce is expanding, then a percentage formula will be to your advantage.

Item 10: *Covers the issuance of official notices to each employee of the vacation schedule approved for that employee.* It is recommended that you negotiate language requiring the Postal Service to give each employee a copy of Form 3971 approving his or her vacation schedule.

Item 11: *Covers the determination of the date and means of notifying employees of the beginning of the new leave year.* You may wish to include into your local memo Article 10, Section 4.A. Note, however, that this language provides that the employer must post on bulletin boards, etc., the beginning date of the leave year no later than November 1. You may wish to negotiate an earlier date.

Item 12: *Covers the procedures for submission of applications for annual leave during times other than the choice vacation period.* This item allows branches to negotiate procedures for obtaining leave during periods of the year that are not the choice vacation period. There are two general types of provisions that the branch should consider here—procedure for making non-choice period vacation selections and procedures for applying for incidental leave.

Item 20: *Covers the determination as to whether annual leave to attend union activities requested prior to determination of the choice vacation schedule is to be part of the total choice vacation plan.* It is important to note that "union activities" in this item differ from the "national and state conventions" referenced in Item 8. ✉

FMLA certification

This column has had several articles regarding Family Medical Leave Act (FMLA) certification. Below are excerpts from 29 CFR Part 825, which contains the implementing regulations of 29 USC 2601 *et seq*.

§825.305 When must an employee provide medical certification to support FMLA leave?

(a) An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider [HCP] of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by §825.301. An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

§825.306 How much information may be required in medical certifications of a serious health condition?

(a) DOL has developed an optional form (Form WH–380, as revised) for employees' (or their family members') use in obtaining medical certification, including second and third opinions, from [HCPs] that meets FMLA's certification requirements.... This optional form reflects certification requirements so as to permit the [HCP] to furnish appropriate medical information within his or her knowledge.

(b) Form WH–380, as revised, or another form containing the same basic information, may be used by the employer; however, no additional information may be required. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists.

§825.306(b) is very important because the WH-380 is optional. The USPS may not require an employee to use the WH-380 in lieu of NALC's forms because NALC's forms contain the same basic information. §825.306(b) makes another important point—the USPS may not require additional information from the employee. However, that limit must be read in conjunction with §825.307—that is, so long as the employee submits a complete certification signed by their HCP. A complete FMLA certification means that the HCP has provided information within his or her medical knowledge on the optional Form WH-380, NALC's forms, or another form containing the same basic information. The required entries can be found at §825.306(b) *et seq*.

§825.307 What may an employer do if it questions the adequacy of a medical certification?

(a) If an employee submits a complete certification signed by the [HCP], the employer may not request additional information from the employee's [HCP]. However, a [HCP] representing the employer may contact the employee's [HCP], **with the employee's permission,** for purposes of clarification and authenticity of the medical certification. (Emphasis added.)

§825.307(a) restates that if an employee submits a complete certification signed by their HCP, the USPS may not request additional information from the employee's HCP. It also states that you have the *option* to allow the USPS's HCP to contact your HCP and only for purposes of clarification and authentification of the medical certification at issue. It is strongly suggested that you not sign any form from the USPS that requests more information than is required by §825.306(b) *et seq*. It is also strongly suggested that you not sign an authorization form that releases your medical history/information and/or gives the USPS open-ended permission to have multiple contacts with your HCP. The USPS may not demand that you sign an authorization so that their HCP may contact your HCP. If you are suspicious of the USPS form, give it to your local union representative for review.

§825.307(a)(2) states that an employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. The employer is permitted to designate the HCP to furnish the second opinion, but the selected HCP may not be employed on a regular basis by the employer. ✉

The OIG and stewards' rights

You're casing your route when your supervisor informs you that two gentlemen would like to speak to you in the back office. Upon entering the office, you are confronted by two agents from the Office of the Inspector General (OIG). They show you their official credentials and ask you to have a seat. They already have a letter carrier from your unit in the office looking very frightened. He has asked for union representation. As a shop steward, what rights do you have during and after the investigation? The simple answer is the same rights as in any other grievance.

Weingarten Rights still apply, including your right to a preinvestigative interview with the employee. That interview should be in private. It affords you the opportunity to gain some understanding about what the OIG wants to know and what answers the employee should be prepared to provide to them. Remember, if the OIG reads the employee his Miranda Rights, inform him that he should not provide any additional information to the OIG until he obtains legal counsel. After the reading of Miranda, any information the employee provides the OIG can be used against him in a court of law.

After completion of the interrogation by the OIG, the agents provide a report to management, which then issues the employee a notice of removal. Along with the right to interview witnesses, do you have the right to interview the OIG? It is the position of both the NALC and the USPS that where germane questions of the OIG exist, the steward has the right to interview the OIG agent. What about the OIG's notes? Again, the steward has to have a legitimate reason for the notes, but should have access to certain information. For example, if there is a dispute between the grievant and the OIG about what transpired during the investigatory meeting or to other material facts, the steward should be given a copy of the notes.

In a recent arbitration decision, Arbitrator Janice S. Irving (Case No. E01N-4E-D 07052585, C-28016) commented on the difference between the OIG's notes and the official memorandum. In that award Irving states:

> In reviewing the Memorandum of Investigation the evidence shows that the report was constructed in a manner that made the allegations appear as facts. Moreover, in reviewing the OIG Agent's raw notes compared to their submitted report there were serious deficiencies, which shows that they were very selective about what material to include and what material to exclude. The OIG Agent's report was very subjective on the part of the writer. This conclusion is based on the evidence found in the raw notes of the OIG Agent who detailed the Grievant as stating that, "I order pizza, probably I shouldn't have done, but I did." Comparing this statement to what was written in the OIG Agent's submitted report dated November 8, 2006, it shows the Grievant stating that...'there was nobody else that could take his son to the appointment and it was the last couple of days of his restriction.' Williams did acknowledge that he shouldn't have done this.... This evidence indicates that the phrase 'I shouldn't have done' was relating to the ordering of pizza, not an acknowledgment that the Grievant shouldn't have done this and 'this' was driving his son to the appointment at the Tacoma Mall Plaza. Further, this evidence indicates that the OIG Agent's submitted report was much more likely written to achieve a certain result.

You can see from the arbitrator's reaction that when a memorandum is written in a manner that takes things out of context simply to attempt to show guilt, an adverse inference may be drawn by the arbitrator. Even if you don't get the information or the interview, make sure that arguments are made to support your attempts. Arbitrators will often disallow evidence and testimony by the OIG when they fail to provide evidence and/or refuse to be interviewed. Those arguments you made at the beginning of the grievance procedure may be the difference between an employee getting his job back or not. ✉

Ready, set, negotiate

Local negotiations between NALC branches and USPS installations are set to begin October 1, pending ratification of the 2006-2011 collective bargaining agreement. The NALC Contract Administration Unit and the Education Department will provide NBA offices and branches with an updated *2007 Guide to Local Negotiations Under Article 30 of the National Agreement.*

The dates for **local negotiations calendar** are as follows:

Preparation for negotiations	now
Information demands	now
Notice of Intent to Negotiate sent	as soon as possible
Negotiating ground rules set	before October 1
Negotiations begin	Monday, October 1
Negotiations end	Tuesday, October 30
Impasse to USPS and NBA by	Wednesday, November 14
Impasse discussions begin	Wednesday, October 31
Impasse discussions end	Monday, January 13, 2008
Appeal to arbitration no later than	Sunday, February 3, 2008

For those letter carriers who are not familiar with local negotiations, a quick summary of the process follows. Since the start of full postal collective bargaining in 1971, most of letter carriers' contractual rights and benefits have been negotiated at the national level. However, some subjects have been left to the local parties to work out according to their own preferences and particular circumstances.

Article 30 lists 22 subject items that the parties negotiate locally. The parties are free to negotiate on other subjects as well, if they wish, so long as nothing in the local agreement is inconsistent or in conflict with provisions of the 2006 National Agreement. Both management and the union are obligated to bargain over each of the 22 subject items listed in Article 30. This means that if one party raises such an item in negotiations, the other must negotiate over it in good faith. Neither party is obligated to bargain over subjects outside the 22 items listed in Article 30. However, each side may—as a matter of voluntary choice—negotiate and make agreements about such subjects.

Management may claim in local negotiations that it "cannot" bargain over subjects outside the 22 items or that those items are "outside the scope of local implementation." That is plainly wrong, but it makes no practical difference whether management says that it cannot, or says that it will not, bargain over subjects outside the 22 items since, in either case, management may refuse to address those subjects in local negotiations.

In some cases, local management may take an aggressive approach in 2007 local negotiations and seek to use its impasse rights to make changes in the local memorandum. If it does, the branch will have to make a vigorous defense of provisions that management challenges. If management seeks to change or weaken a current local memo provision that is within the 22 items, the branch must bargain over the provision. It should consider offering its own proposal to strengthen or enlarge the provision.

Branches should also make sure to formulate a strategy to counter management claims that a local memo provision is an "unreasonable burden" on the Postal Service. Regardless of the difficulties management may face in proving "unreasonable burden" to an impasse arbitrator, no branch should rest on its laurels and simply hope that management will not use its limited right to impasse.

Rather, when management proposes to change an existing local memo provision against the branch's wishes, the branch must have a strategy to either defend the current language or bargain for new language. In all such cases, it will be management's burden to show that retaining an existing provision is an "unreasonable burden" on the Postal Service. The union is not required to show that retaining the provision is, in fact, not an "unreasonable burden" on the Postal Service.

Experienced NALC branch officers know that planning and preparation are the keys to effective local negotiations. NALC is ensuring that, as we head into local negotiations, branch officers will have the necessary tools for achieving the best possible LMOU. ✉

Sick leave documentation

In a letter dated August 3, 2007, the Postal Service clarified the requirements for sick leave documentation. Specifically, the Service acknowledged that *ELM* 513.364 does not require an employee to include his or her diagnosis in medical documentation whenever such documentation is required following a sick leave absence. Clarification was necessary because the relevant part of *ELM* 513.364 states:

> When employees are required to submit medical documentation, such documentation should be furnished by the employee's attending physician or other attending practitioner who is performing within the scope of his or her practice. The documentation should provide an explanation of the nature of the employee's illness or injury sufficient to indicate to management that the employee was (or will be) unable to perform his or her normal duties for the period of absence.

In the past, some supervisors have believed the language referring to "the nature of illness" gave the Service an unfettered right to require employees to provide personal medical information following a sick leave absence. As a result of this mistaken belief, the supervisors would then refuse to accept medical documentation that said an employee was "incapacitated for duty" unless it provided a diagnosis as well. Even worse, the supervisor would then, per *ELM* 513.365, charge the absence to annual leave, LWOP or AWOL based on an alleged "failure to furnish required documentation."

"There is no requirement for an employee to include a medical diagnosis in sick leave documentation."

However, any employer regulation requiring a diagnosis constitutes a medical inquiry. And the Rehabilitation Act places limits on an employer's right to make medical inquiries. Further, both courts and EEOC regulations have confirmed that the limit on medical inquiries applies to all employees, not just those who are disabled within the meaning of the Rehabilitation Act. Courts have held that medical certifications from physicians tend to reveal a disability when a diagnosis is disclosed. Therefore, an employer is required to show it is somehow vital to the business before it can require an employee's diagnosis to be included in medical documentation.

The Rehabilitation Act puts the burden of proof on the employer to show that there is a "business necessity" for such an inquiry. To meet this burden of proof, an employer must demonstrate that it has a reasonable belief, based on objective evidence, that an employee may not be able to perform the essential functions of his or her position or that the employee may pose a direct threat due to a medical condition.

In 2005, the Service revised *ELM* 865 (Return to Duty After Absence for Medical Reasons) and Publication 71 (Notice for Employees Requesting Leave for Conditions Covered by the FMLA) to make them comply with the Rehabilitation Act. Prior to the revisions, the Service automatically required employees to provide detailed medical documentation—including diagnosis—when returning to duty after medical absences of 21 days or more (or for certain medical conditions). You can read more about these revisions in the November 2005 Contract Talk (available at nalc.org).

Even though no revisions were made to *ELM* 513.364, the Service's compliance with the Rehabilitation Act is ensured through the August 3 letter (M-01629), which can be accessed on the NALC website. The letter's clarification of the limits on medical documentation applies directly to both *ELM* 513.361 (absences of three days or fewer) and *ELM* 513.362 (absences over three days).

For absences of three days or fewer, *ELM* 513.361 provides that the supervisor may consider the employee's statement sufficient to explain the absence or can require documentation if it is deemed desirable to protect the interests of the Postal Service. For absences that exceed three days, *ELM* 513.362 automatically requires employees to provide medical documentation or other evidence of incapacity for work. In both cases, when such documentation is required, it need only state that the employee was incapacitated—without providing a diagnosis. ✉

Preferences for veterans

By law, veterans who are disabled or who served on active duty in the Armed Forces during certain specified time periods or in military campaigns are entitled to preference over non-veterans in both hiring from competitive eligibility lists and in retention during reductions in force. Preference also entitles current Postal Service employees to other specific rights. In order for an employee to be entitled to preference, a veteran must meet the eligibility requirements in section 2108 of Title 5, United States Code. This means that:

- An honorable or general discharge is necessary.
- Military retirees at the rank of major, lieutenant commander or higher are not eligible for preference unless they are disabled veterans.
- Guard and Reserve active duty for training purposes does not qualify for preference.
- When applying for federal jobs, eligible veterans should claim preference on their application or resume. Applicants claiming 10-point preference must complete form SF-15, Application for 10-Point Veteran Preference. The SF-15 is available online at www.opm.gov/forms/pdf_fill/SF15.pdf.

Types of preference

Five-Point Preference—Five points are added to the passing examination score of a veteran who served:

- During the period December 7, 1941 to July 1, 1955; or
- For more than 180 consecutive days, any part of which occurred after January 31, 1955 and before October 15, 1976; or
- For more than 180 consecutive days, any part of which occurred during the period beginning September 11, 2001 and ending on the date prescribed by presidential proclamation or by law as the last day of Operation Iraqi Freedom; or
- During the Gulf War from August 2, 1990 through January 2, 1992; or
- In a campaign or expedition for which a campaign medal has been authorized, including El Salvador, Grenada, Haiti, Lebanon, Panama, Somalia, Southwest Asia, Bosnia and the Global War on Terrorism.
- Medal holders and Gulf War veterans who enlisted after September 7, 1980 or entered on active duty on or after October 14, 1982 must have served continuously for 24 months or the full period called or ordered to active duty. The service requirement does not apply to veterans with compensable service-connected disabilities, or to veterans separated for disability in the line of duty, or for hardship.

10-Point Preference—Ten points are added to the passing examination score of:

- A veteran who served any time and who (1) has a present service-connected disability or (2) is receiving compensation, disability retirement benefits, or pension from the military or the Department of Veterans Affairs. Individuals who received a Purple Heart qualify as disabled veterans.
- An unmarried spouse of certain deceased veterans, a spouse of a veteran unable to work because of a service-connected disability, and a mother of a veteran who died in service or who is permanently and totally disabled.

Article 16.9 provides preference eligible letter carriers special rights under the Veterans' Preference Act regarding separation and certain adverse actions. A preference-eligible employee may file both a grievance and an MSPB appeal on suspensions of more than 14 days, discharge or reduction-in-grade. A preference-eligible employee who exercises appeal rights under the Veterans' Preference Act thereby waives access to the grievance procedure beyond Step B when there is an MSPB appeal pending as of the date the grievance is scheduled for arbitration by the parties. Grievances concerning proposed removal actions which 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 for preference eligible employees.

For additional information concerning the Veterans' Preference Act, visit www.opm.gov/veterans/jobs.asp. ✉

Understanding TEs

With the ratification of the 2006-2011 National Agreement, numerous changes have taken place. One of the significant changes involves transitional employees (TEs). In the previous contract, Article 7, Section 1.B dealt with the supplemental workforce (casuals). That language was deleted from the 2006-2011 contract and replaced with new language related to TEs.

The new Article 7.1.B.1 deals with the number of TEs who may be employed in any period. Other than December, TEs shall not exceed 3.5 percent of the total number of career city carriers covered by the agreement. The 3.5 percent, which is a national cap, will be monitored for compliance at the national level.

However, within each district, the number of TEs who may be employed in a district under Article 7.1.B.2 may not exceed 6 percent of the total number of career city carriers (other than December). The 6 percent will also be monitored for compliance at the national level.

In addition to the 3.5 percent hiring limit set in Article 7.1.B.1, the parties also agreed to allow for the hiring of another category of TEs. Provisions for hiring this other category are found within the memorandum for the Flat Sorting System (FSS). That memo provides that, upon ratification of the contract, the employer is authorized to hire up to 8,000 TEs nationally during the implementation phase of the FSS. Union representatives need to be aware of the percentage that applies to these TEs. Of the TEs who are hired strictly for the FSS, they shall not exceed 8 percent of the career letter carriers in any given district.

Union representatives need to realize that these 8,000 TEs hired specifically for the FSS are completely different from the TEs hired under the 3.5 percent national cap. To differentiate between the two types of TEs, the parties have agreed that each type will have its own Designation Activity Code, which will be annotated on the PS Form 50.

The parties also agreed upon a Transitional Employee Employment Opportunities Memorandum. This memo provides that TEs completing 180 days of employment, and who are still on the rolls, may take the entrance exam for a career city letter carrier position. Each TE gets one opportunity to do this. To do so, TEs submit a request for testing to their personnel office. Tests will be provided no less than once each quarter. TE scores will be merged with the appropriate existing city letter carrier register. Eligible TEs who already have a passing test score on the city letter carrier register may take the exam again under this memorandum.

Protection for part-time flexible employees is provided via language in Article 7.1.B.3, which provides the following: 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 TEs working in the same work location and on the same tour—provided that the reporting guarantee for TEs is met.

TEs, as non-career employees, are hired for a limited period with a break in service as provided in Article 7.1.B.4. This provides that TEs shall be hired pursuant to such procedures as the employer may establish. They will be hired for a term not to exceed 360 calendar days for each appointment. TEs will have a break in service of at least five days between appointments.

Article 8, Section 4.B requires that management pay TEs overtime for all work over eight hours in a service day, and for over 40 hours in a service week. Article 8, Section 4.E requires management to pay penalty overtime to TEs for all work in excess of 10 hours in a service day or 56 hours in a service week. Any TE who is scheduled to work and reports to work is guaranteed four hours of work or pay pursuant to Article 8.8.D.

Article 9.7 covers the pay provision for TEs. It states that TEs will be hired at Grade 1, Step A. As of November 24, 2007, that salary is $39,211 annually, which equates to $19 per hour. They will also receive salary increases contained in Article 9.1, and the COLAs contained in Article 9.3.

The leave provisions for TEs are contained in the Transitional Employees—Additional Provisions Memorandum. TEs earn annual leave based on hours worked to a maximum of four hours per pay period. However, they do not earn sick leave. The MOU does allow TEs to use annual leave for sick leave purposes.

Union representatives should take special care to learn the contractual provisions that apply to transitional employees. Remember, TEs can be signed up as union members. ✉