

American Postal Workers Union, AFL-CIO

Memorandum

1300 L Street, NW
Washington, DC 20005



Telephone
(202) 842-4246

From the Office of *CJ*
Executive Vice President

November 30, 2001

TO:

SUBJECT:

Greg Bell

**Handbook - ELM Part 519 Administrative Leave
(Notification No. N19G2001132)**

Please find attached a copy of a letter dated 11/26/01 from Sandy Savoie, regarding the above reference matter. The following is a description of the issues involved in this notification:

**Enclosed proposed draft revisions to ELM,
Subchapter 519, concerning Administrative Leave.**

You are designated as the APWU contact person in this matter. Contact the USPS representative as soon as possible for discussion, if appropriate. Please provide notification of your review to me by 12/31/01, providing a copy to President Burrus. Your secretary should update the Notification Tracking Module in Step 4 CAS as necessary.

Attachment
CJG:ha
opeiu #2/afl-cio

cc: Bobby Donelson



LABOR RELATIONS



November 26, 2001



Mr. William Burrus
President
American Postal Workers
Union, AFL-CIO
1300 L Street, N.W.
Washington, DC 20005-4128

Dear Bill:

As a matter of general interest, enclosed is a draft of proposed revisions to the Employee and Labor Relations Manual (ELM), Subchapter 519, concerning Administrative Leave. A summary of the changes can be found on page one.

If you have any questions on this matter, please contact Sandy Savoie of my staff at (202) 268-3832.

Sincerely,

A handwritten signature in black ink, appearing to read "Doug A. Tulino".

Doug A. Tulino
Manager
Labor Relations Policies and Programs

Enclosure

Administrative Leave Changes

Effective immediately, the *Employee and Labor Relations Manual* (ELM) 519, Administrative Leave, is changed in these ways:

519, Administrative Leave, is resequenced and renumbered for easier searching, and references within are modified accordingly.

519.1, Definition, is modified by the removal of the note precluding administrative leave for the donation of organs, blood platelets, and bone marrow.

519.24, Adverse Action Investigation and Decision, is added to make explicit the policy for removal of an employee from duty status.

519.42, Bone Marrow, Stem Cell, Blood Platelet, and Organ Donations, is added to make provision for administrative leave for qualification and donation of bone marrow, stem cells, blood platelets, and organs.

519.46, Day of Death, is added to make explicit provisions for compensation on the day of an employee's death.

The resequenced and amplified text of ELM 519 is being published as an online incremental update in the online copy of the ELM located on the Postal Service Intranet (<http://blue.usps.gov>) and Internet (<http://www.usps.com>). The changes will also be incorporated into the next printed version of the ELM.

—Employee Resource Management, [date]

New Sequence of ELM 519 Sections

510 Leave

519 Administrative Leave

519.1 Definition

519.2 Special Conditions

519.21 Acts of God

519.22 Civil Disorders

519.23 Relocation

519.24 Adverse Action Investigation and Decision

519.3 Civil Participation

519.31 State and Local Civil Defense Programs

519.32 Voting or Registering to Vote

519.33 Funeral Services

519.4 Medical Events

519.41 Blood Donations

519.42 Bone Marrow, Stem Cell, Blood Platelet, and Organ Donations

519.43 Physical Examination for Entry Into Armed Forces

519.45 First-Aid Examination and Treatment for On-the-Job Injury or Illness

519.46 Day of Death

519.5 Special Events

519.51 Postal Service Invitation

519.52 Postmaster Organization Conventions

519.6 Nonbargaining Unit Personal Absence

New and Revised Sections in ELM 519

*Including
Sunday Premium
and night Differential*

519.1 **Definition**

Administrative leave is absence from duty authorized by appropriate postal officials without charge to annual or sick leave and without loss of pay.

* * * * *

519.24 **Adverse Action Investigation and Decision**

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During the time required for investigation and decision regarding an adverse action, management may place an employee in an off-duty, nonpay status, in accordance with ELM 651.3 or the applicable bargaining unit agreement. If these provisions are not applicable and it is necessary to remove the employee from a duty status, management may place the employee on administrative leave until the effective date of an adverse action or until the employee is returned to work, whichever comes first. Beginning on the effective date of an adverse action, the employee remains on the rolls but in a nonpay status during an appeal process. (See 651.66 and 651.67, and see applicable bargaining unit agreement to determine maximum allowable time.)

* * * * *

519.42 **Bone Marrow, Stem Cell, Blood Platelet, and Organ Donations**

519.421 **Policy**

Career postal employees who wish to donate bone marrow, stem cells, blood platelets, or organs may be granted administrative leave, subject to the limitations in 519.422, with appropriate management approval. Administrative leave is *not* available to bone marrow or organ recipients.

* * * * *

519.422 **Time Limitations**

The maximum administrative leave that can be granted per leave year to cover qualification and donation is limited to the following:

- a. To a full-time career employee:
 - (1) For bone marrow, 3 days.
 - (2) For stem cells, 3 days.
 - (3) For blood platelets, 3 days.
 - (4) For organs, 14 days.
- b. To a part-time career employee:
 - (1) For bone marrow, 1 1/2 days.
 - (2) For stem cells, 1 1/2 days.
 - (3) For blood platelets, 1 1/2 days.
 - (4) For organs, 7 days.

* * * * *

519.46 Day of Death

If an employee dies during a scheduled work day, the balance of the full tour is charged to administrative leave. If the employee dies before a scheduled tour begins, the full tour is charged to administrative leave, provided the employee was in a pay status, either work hours or paid leave, on the last scheduled day before the day of death. When a scheduled tour overlaps a calendar day and begins at or near the previous day, a death occurring within 2 hours of the beginning of the tour is considered to be before the scheduled tour and the full tour is charged to administrative leave.

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°ALSO VA BAR
°°ALSO DC BAR
°°°MADARONLY

MEMORANDUM

Confidential Attorney-Client Communication and Attorney Work Product

TO: Greg Bell
Bobby Donelson

FROM: Mindy Holmes M

DATE: December 14, 2000

RE: Mailhandlers' Night Differential/Administrative Leave Arbitration

Good news on this case that the APWU intervened in concerning the payment of night differential to employees on administrative leave: Arbitrator Parkinson granted the grievance and ordered that the Postal Service pay employees night differential while they are on administrative leave. Arbitrator Parkinson implicitly accepted the unions' arguments in finding that, regardless of the reason an employee is placed on administrative leave, the employee is entitled to night differential pay he or she would have been eligible or entitled to had they not been placed on administrative leave.

Arbitrator Parkinson's conclusions appear to be based almost entirely on his acceptance of the unions' interpretation of "without loss of pay" as including night differential. He concludes that the payment of night differential for work "performed" which the Postal Service argued precluded night differential pay if the hours were not actually worked is simply the use of good syntax or a clarification of when (as in which hours) night differential is paid. Ultimately, he seems to conclude that it is inconsistent with "without loss of pay" to interpret "work performed" as having the meaning the Postal Service attributed to it, and rejects the Postal Service's primary defense. Fortunately, Arbitrator Parkinson also clarifies that whatever the reason for administrative leave, night differential is owed if it would have otherwise been worked. In fact, the arbitrator gives the example of the Postal Service using administrative leave to drag out the investigation of potential discipline while limiting its back pay liability as a reason why night differential should be paid. Unfortunately,

Mailhandlers' Night Differential/Administrative Leave Arbitration

December 14, 2000

Page 2

Arbitrator Parkinson did not directly reject the substance of the Postal Service's ridiculous argument that the Mailhandlers' failure to appeal this issue to arbitration from an earlier Step 4 denial in another case precludes them from raising the argument now. Instead, he simply notes that the defense was not one that was raised earlier and therefore could not be raised now.

As the APWU asked him to clarify, Arbitrator Parkinson did distinguish the make whole remedy for an improper placement on administrative leave (which already includes night differential pay) from this case where the requirement that the Postal Service compensate an employee "without loss of pay" for the time he or she is on administrative leave when the fact of the placement on administrative leave is not challenged includes the payment of night differential. Although we suggested that the arbitrator should make a finding on Sunday premium as well as night differential, he did not. Obviously, however, this is excellent precedent that Sunday premium should be paid on administrative leave.

A copy of the award is attached. Congratulations.

NATIONAL ARBITRATION PANEL

In the Matter of the Arbitration ()
between ()
UNITED STATES POSTAL SERVICE ()
and ()
NATIONAL POSTAL MAIL ()
HANDLERS UNION ()

Grievant: Doug Wright
Post Office: Kalamazoo, MI
Case Nos: J90M- 1 J-C 95047374
951001

BEFORE: Philip W. Parkinson, Arbitrator

APPEARANCES:

For the U.S. Postal Service: Jonathan Saperstein, Esq

For the Union: Bruce R. Lerner, Esq.
Robert Alexander, Esq.

APWU as Intervenor: Melinda Holmes, Esq.

Place of Hearing: Washington, D.C.

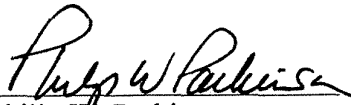
Dates of Hearing: May 3 1, June 19 and July 6, 2000

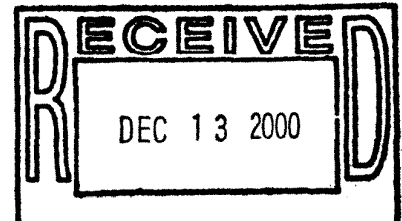
Record Closed: October 20, 2000

AWARD

The grievance is granted. The grievant shall be paid night differential for the period he was on administrative leave. Furthermore, in the future, employees placed on administrative leave shall be paid night differential if they would have otherwise been eligible/entitled to such differential had they not been placed on administrative leave.

Date of Award: December 8, 2000


Philip W. Parkinson



I. BACKGROUND

This grievance was presented on or about April 5, 1995 on behalf of Mr. Doug Wright, a Mail Handler employed at the Kalamazoo, Michigan Postal Facility of the United States Postal Service (hereafter referred to as the "Postal Service" or sometimes as the "USPS" or "Management"). The grievance was presented by Local 307 of the National Postal Mail Handlers Union (hereafter referred to as the "Union"). Subsequent to a denial of the grievance at Step One of the grievance procedure, the Union appealed it to Step Two on April 7, 1995. The Union set forth its reason for the appeal on the Standard Grievance Form as follows:

On above date (3/24/95) the grievant received his paycheck and was not paid for his night differential or Sunday premium. The grievant was placed on administrative leave on 3/6/95, but has yet to be given disciplinary action. The grievant is losing 70 hours of night differential and 32 hours of Sunday premium per pay period. This is a significant loss of pay."

As a result, it was alleged that the Postal Service violated Articles 5 & 16 of the parties' collective bargaining agreement' and Section 519.1 of the Employee and Labor Relations Manual ("ELM"). The Union requests, as a remedy, that the Postal Service cease and desist this violation as well as "pay and make whole at appropriate rates for night differential and Sunday premium from 3/6/95 until grievant's return to work." Thereafter, the parties met and discussed the Step Two Appeal on April 18, 1995. In its response denying the grievance, the Postal Service representative set forth its position thusly:

The grievant was placed on administrative leave on 3/6/96(sic) for his involvement in a possible altercation. The placement in Administrative Leave is continuing due to an ongoing investigation into the 3/6/95 incident.

¹ Agreement between National Postal Mailhandlers Union and United States Postal Service, November 20, 1990 -- November 20, 1993, as supplemented by the '93 extension, (Hereafter referred to as "The Agreement.")

The grievant is not entitled to the night differential Sunday premium pay as outlined in Section 241 and 242 of the F-21, Time and Attendance handbook. Management is in compliance with the F-21 wherein it states:

The regulations pertaining to the "Definition of Premium Hours,"(241.1) as well as the "Definition of Sunday Premium" (242.1) were then set forth. The Union submitted Additions and Corrections to the Step Two denial on April 24, 1995 and noted, among other things in its response, that "As of 4/21/95, the MDO had not even spoken to the grievant personally to hear his testimony or to let him explain his side of the story. Management is causing the grievant financial loss by not having the investigation in a timely manner." Thereafter, the grievance was appealed to Step Three by the Union on April 26, 1995 using the same rationale, and, on the same basis as it did at Step Two. The grievance was next discussed at Step Three by the parties and the Postal Service denied the grievance for the reason that the grievant "is only entitled to night differential and Sunday premium for work hours." The Step Three decision goes on to state that inasmuch as the grievant "was in a non-duty status, he is not entitled to the premium hours requested." Thereafter, the Union initially appealed the matter to regular regional arbitration, but subsequently, by letter dated June 27, 1996, notified the Postal Service that it was withdrawing the grievance from regional arbitration and referred it to Step Four of the grievance procedure. The Union defined the nature of the interpretive issue as "should an employee who is on Administrative Leave and in a non-duty status be entitled to night differential and Sunday premium pay?" Thereafter-, the parties met and discussed the grievance at the Fourth Step of their grievance procedure and the Postal Service representative agreed to remand the case to Step Three "for further processing or to be scheduled for arbitration, as appropriate." However, by letter dated October 15, 1998, the Union representative advised the Postal Service of a national settlement that required the Postal Service to pay Sunday premium to employees placed on

administrative leave. A Fourth Step discussion was held on October 22, 1998, and the Postal Service on November 5, 1998 denied the request relative to night differential while on administrative leave. This Step Four denial, however, did not address the payment of Sunday premium. The case was then appealed to National level arbitration pursuant to the provisions of 15.2 “Step Four” of the parties’ Agreement on November 24, 1998. Subsequently, the undersigned arbitrator was appointed to hear and decide the matter. Accordingly, a hearing was held on May 31, June 9, and July 6, 2000 in Washington, DC. On the initial hearing day, the American Postal Workers Union (APWU) requested and was granted permission to intervene in this matter. The parties, including the APWU, were afforded full opportunity to present evidence, both oral and written, to cross-examine the witnesses who were sworn, and to argue their respective positions. Following the July 6, 2000 hearing, the parties elected to file post-hearing briefs. A stenographic transcript of the hearings was taken and provided to the arbitrator. Thereafter, briefs were received from the parties and the APWU, on or before October 20, 2000, at which time the record was deemed closed.

II. POSTION OF THE PARTIES

A. Postal Service

The Postal Service contends that employees are not entitled to night shift differential while on administrative leave. They refer to the Agreement and the ELM noting that they contain specific provisions defining entitlement to night shift differential. They allude to Section 8.7.A of the Agreement and point out that it states, “between the hours of 6:00 p.m. and **6:00** a.m. employees shall be paid additional compensation at the rate of ten percent (10%) of the base hourly straight time-rate for time worked.” They accentuate the words “time worked” in this

clause and also allude to Section 434.21 of the ELM noting that it states, “night differential is a premium which is paid to eligible employees for all work and paid training or travel time performed between 6:00 p.m. and 6:00 a.m.,” emphasizing the words, “all work” and “performed.” They stress that this language has, except for minor modifications, remained unchanged since the issuance of the ELM in 1978 as well as predating the first ELM. Furthermore, any exceptions to the rule that night shift differential is to be paid for work performed are expressly contained in Chapter 430 of the ELM. These include five situations, i.e. court leave, military leave, continuation of pay (“COP”) status, as well as the rescheduling of an employee to day work as a result of an on-the-job duty or compensable training where employees who are regularly scheduled to the night shift will receive “an equivalent amount of night time differential” even though they do not work. However, administrative leave is not mentioned in any of the provisions as an exception to the general policy of having to perform work during the night shift in order to be entitled to night shift differential.

Secondly, the Postal Service contends that the Payroll Department practice over the years supports the Postal Service’s decision. The parties’ Time and Attendance Manuals state what night differential is and when it is to be paid and this includes the words, “all work performed between 6:00 p.m. and 6:00 a.m.” The Postal Service referred to regional arbitration awards in support of its position and point out that regional arbitrators “have consistently recognized that employees are not entitled to night shift differential while on administrative leave.”

The Postal Service alleges that the Union arguments are without merit and its interpretation of the ELM in Section 5 19.1 “is mistaken.” They claim that the reference at Section 5 19.1, as interpreted by the Union regarding “without loss of pay,” is erroneous inasmuch as the Postal Service argues that “pay” refers to the employee’s daily or hourly basic

rate of pay and not to any additional premiums that an employee might have otherwise earned while working. Notably, they point out that the night shift differential is additional compensation that is paid at a percentage of an employee's base hourly straight time rate, referring to 8.7.A of the Agreement. The Postal Service emphasizes that reference to base pay is consistent to the compensation afforded employees who are on other types of leave, such as annual or sick leave, inasmuch as they do not receive night differential while on sick leave, but, rather, receive their basic rate of pay. They allude to a decision by a regional arbitrator who rejected the Union's interpretation of "without loss of pay with respect to night differential."² That arbitrator concluded that night differential is not a part of the employee's regular pay and that Section 5 19.1 of the ELM guarantees an employee's regular pay and not its total compensation. The Postal Service furthermore contends that the pre-settlement agreement in Case No. HIM-4K-C25503 in 1985 in which the Postal Service agreed to give Sunday premium pay to a group of employees who had been on administrative leave is misplaced. They contend that said settlement was only for that case inasmuch as the agreement was a pre-arbitration settlement and provided in part that it was "in full settlement of this case." Additionally, their argument is that this pre-arbitration settlement was only to resolve the individual grievance at issue, referring to the testimony of the Senior Labor Relations official, Mr. Frank Dyer, who drafted and executed the agreement for the Postal Service. They point out that the Union failed to cite this settlement in a subsequent Step Four grievance that raised the identical issue that the Union now claims the 1985 pre-arbitration settlement controls. They contend that by not so raising it would suggest that the Union itself did not believe the 1985 pre-arbitration settlement agreement provided guidance in interpreting the ELM. The Postal Service also argues that the 1985 settlement is distinguishable from the instant case on the basis of the facts inasmuch as it

² USPS and APWU, Case No. W7C-5M-C20848, Claude D. Ames, 3/5/93.

involved an act of God since employees were forced to leave their facility in the middle of their work shift. However, in this case, the grievant was placed on leave while an investigation was conducted into his alleged misconduct. The Postal Service concludes that the grievance should be denied inasmuch as the record evidence strongly supports the conclusion that neither the ELM in Section 519.1 or any other section of the ELM provides a basis for providing night shift differential to employees on administrative leave.

B. Union

The Union emphasizes that night shift differential must be paid during the periods of administrative leave inasmuch as such leave is defined in Section 5 19.1 as “absence from duty” authorized by appropriate Postal officials without annual or sick leave and without loss of pay. Thus, the Union argues that the ELM plainly protects employees from suffering a loss of pay while in such administrative leave and this would include night differential pay if, in the event the employee would have been entitled to such pay had he or she continued to work on his or her regularly scheduled tour. The ELM at Section 511 .1 specifically requires that the Postal Service’s leave policy be applied in a fair and equitable manner. They point out that if there exists a dispute involving any interpretive ambiguity in the language of the ELM then it must be resolved in an equitable manner such as National Arbitrator, Shayam Das concluded in a decision of his.³ The employee involved in the instant case lost approximately \$150.00 per pay period and this had a potentially punitive dimension because of such loss of pay. The Union notes that employees on military leave, court leave, as well as others, are entitled to night differential under the ELM at Section 434.222. However, by denying employees on

³ USPS and APWU and NPMHU (Intervenor) Q90C-6-Q-C94042619, 4/7/98.

administrative leave the night differential, it gives rise to inherent inequities. The Union alluded to the 1985 settlement of a grievance in which the employees on administrative leave were given Sunday premium and, therefore, contends that this clearly demonstrates the parties' mutual understanding that the phrase "without loss of pay" requires the Postal Service to include Sunday premium as part of administrative leave. Moreover, they argue that the settlement of such a grievance at the National level, without any disclaimer of precedential effect, would constitute important evidence of the parties' mutual interpretation of their Agreement. They allude to a decision by National Arbitrator Collins for this contention.⁴ The Union argues that this settlement does not contain any disclaimer or any indication that it was intended to be non-precedential and cites examples of Step Four agreements indicating how other National settlements state, in explicit terms, when they are intended not to be precedential. The Union also alluded to "quality of life" "quality of work life" coordinators who may be rescheduled to a different tour to serve in this position and note that a 1985 National level agreement provided them with night shift differential and/or Sunday pay if they would otherwise be entitled to it. Therefore, the parties' mutual understanding is that night differential is necessary to ensure that administrative leave is truly leave "without loss of pay."

The Union contends that the Postal Service's position simply does not withstand scrutiny with regard to their argument that night differential should be paid only for time worked or work performed except in certain circumstances that are enumerated in the ELM. They counter that night differential gets paid in a variety of circumstances where an employee is not on duty, including various circumstances that are not included in its own list of "exceptional circumstances." Section 434.222 which lists the circumstances does not, however, treat this list of exceptions as exclusive, nor does it specifically preclude or state that night differentials should

⁴ USPS and APWU, Case No. HIC-36-3, 4/4/86.

not be paid during an administrative leave. They reason that all of the circumstances share a fundamental similarity, i.e. that “the absence from work is based on the decision by a Postal Service official or is otherwise due to some circumstance outside the employee’s own control.” Furthermore the Union notes that there are times that night differential is paid to employees in circumstances not specifically described in the ELM such as pay for “guaranteed time,” as well as a component of back pay, pursuant to the ELM at Section 436.11. As to the Postal Service’s contention of a practice, they note that the practice in the Federal government, both before and after passage of the Postal Reorganization Act is contrary to the Postal Service’s position in this case. Thus, the Union concludes that the Postal Service never has limited the payment of night differential to the handful of circumstances specifically enumerated in the ELM at Section 434.222 or in the companion provisions of the F-21 Time and Attendance handbook. They argue that even if the arbitrator were to accept this management proposition, the administrative leave provision found in the ELM at Section 5 19.1 dictates such leave is without loss of pay and should be read to require payment of night differential while on administrative leave. The Postal Service easily could have drafted the ELM by including the terms leave without loss of base or basic pay rather than “without loss of pay.” Thus, using the general term “pay” it can and should be read to include night differential.

As a final argument, the Union points out that for the first time during the arbitration hearing the Postal Service took the position that because it denied a grievance in 1986 on this issue at Step Four and the Union did not appeal it to arbitration that the Union then agreed to this decision. They contend this argument is totally without merit and allude to a decision by National Arbitrator Shayam Das, as well as Benjamin Aaron, for the proposition that a party in National arbitration is barred from introducing new arguments that are fundamentally different

from its position in prior steps of the grievance procedure.⁵ This was never raised in the earlier stage of the grievance process and, therefore, the Postal Service is barred from relying on such an argument at this late stage of the proceedings. However, more importantly, this Step Four decision does not preclude the Union from challenging management's position in this arbitration. The failure to appeal a grievance is not, per se, acquiescence to the disposition of the issue on the basis of management's final answer so as to bar the issue from arbitration in a subsequent case. Elkouri & Elkouri, How Arbitration Works, p. 293. (5th. Ed. 1997). Finally, they argue that the Postal Service cannot demonstrate **that the** Union acquiesced in the Postal Service's position, thus concluding that there was a binding past practice. Here the practice has not been clear and consistent in accordance with the rules for constituting such a binding past practice, nor has it been long-standing and repeated. The Union concludes that the employee who is placed on administrative leave is entitled to receive a night differential pay that he or she would otherwise have received had he remained on duty and, therefore, the grievance filed by the Union should be sustained.

C. Intervenor – American Postal Workers Union (APWU)

The APWU supports the Union's position in this matter. The APWU, as Intervenor, points out that it wishes to make clear the point that this case does not concern Article 16 or general arbitrable make-whole remedies with regard to the successful challenges to discipline and/or administrative leave. In those cases, the parties do not dispute that a make whole remedy includes night differential pay, as well as other payments and premiums including, but not limited, to Sunday premium pay and overtime. They assert, for clarification purposes, that the issue before the arbitrator is what the grievant should have been paid while on administrative leave irrespective of the Postal Service's justification or lack thereof for placing the grievant on

⁵Case No. H4-NA-C72, 12/31/97 (Das), Case No. NC-E-1 13-59 (Aaron).

administrative leave initially. To this extent they argue that because the standard that employees do not suffer a loss of pay while on administrative leave, as well as the Postal Service's past grievance to pay differentials and premiums to employees on administrative leave, in addition to fairness and equity to employees who are kept on administrative leave for long periods of time and/or indefinitely, that this contemplates a requirement that the Postal Service pay night differential while an employee is on administrative leave. They ask that the Union's grievance be sustained by the arbitrator and that the Postal Service be directed to pay night differential to employees on administrative leave.

VI. RELEVANT CONTRACTUAL PROVISIONS

Article 8 Hours of Work

Section 8.7 Night Shift Differential

A. For time worked between the hours of 6:00 p.m. and 6:00 a.m. employees shall be paid additional compensation at the rate of ten percent (10%) of the base hourly straight time rate.

Article 19 Handbooks and Manuals

Section 19.1

Those parts of all handbooks, manuals and published regulations of the Postal Service, that directly relate to wages, hours of working conditions, as they apply to employees covered by this Agreement, shall contain nothing that conflicts with this Agreement, and shall be continued in effect except that the Employer shall have the right to make changes that are not inconsistent with this Agreement and that are fair, reasonable, and equitable. This includes, but is not limited to, the Postal Service Manual and the F-21 Timekeeper's Instructions.

Employee and Labor Relations Manual (ELM)

430 Basic and Special Pay Provisions

432.2 Rates of Pay

432.21 Basic Rate

The basic rate is the amount of annual, daily, or hourly salary provided by the applicable salary schedule for an employee's assigned position – excluding TCOLA, overtime, out-of-schedule overtime, Sunday premium, holiday-worked pay, and night differential. Basic daily and hourly rates are determined by dividing the basic annual rate (BAR) as shown in the table below. See also 432.24.

434.2 Night Differential

434.21 Policy

Night differential is a premium which is paid to eligible employees for all work and paid training or travel performed between 6:00 p.m. and 6:00 a.m. The following applies:

- a. Night differential is paid in addition to any other premiums earned by the employee (see 432.55).
- b. In no case can the total night differential hours exceed the total hours for the tour.
- c. Night differential does not apply if time between 6:00 p.m. and 6:00 a.m. is due only to late clocking out or early clocking in (see 432.464).

519 ADMINISTRATIVE LEAVE

519.1 Definition

Administrative leave is the absence from duty authorized by appropriate postal officials without charge to annual or sick leave and without loss of pay.

VI. OPINION

The issue to be decided in this matter is whether an employee placed on administrative leave is entitled to receive night differential that the employee would have otherwise received had he(she) been on duty. The facts in this grievance are essentially not in dispute. The grievant, a full time regular mail handler employed at the Kalamazoo, Michigan Processing and Distribution Center was placed on administrative leave pending an investigation concerning alleged misconduct on his part. Upon receiving his first paycheck he noticed that he had not received night shift differential or Sunday premium pay, but rather, he received his basic hourly rate of pay. As a result, a grievance was presented on his behalf by the Union on the basis that

the Postal Service violated the Agreement because the grievant was not being paid the night shift differential and Sunday premium. Thereafter, the question of night differential payment as contested in the instant grievance was ultimately appealed by the Union to National Arbitration. (See part I supra.) Both parties, as well as the APWU, submitted detailed arguments in their written briefs, arguing that the Agreement, including the ELM provisions, support their respective positions. The Union and the intervening party, the APWU, allege that an employee placed on administrative leave, in accordance with Section 519 of the ELM is entitled to this leave without loss of pay; therefore, inasmuch as the grievant would have been on duty during the hours included as night differential, he should have received this entitlement. On the other hand, the USPS contends that an employee must work in order to receive night shift differential unless it is otherwise specifically excepted in the ELM. They point out that the exceptions, as set forth in the ELM, do not include night differential payment while on administrative leave. These positions constitute the basic foundation of the multiple and detailed arguments presented.

At the outset it is a generally accepted principle that the *raison d'être* for including “shift differential pay” as part of a collective bargaining agreement is predicated on the basis of the particular hours of the shift (tour). Generally speaking, at least in the American labor climate and culture, most employees prefer a “day shift and/or tour” as their hours of work. However, many employers, including the Postal Service can not efficiently or effectively function solely during these “daylight” hours, which normally encompass a shift such as 8:00 a.m. to 4:00 p.m., 7 to 3, 9 to 5 or 6:00 a.m. to 2:00 p.m. Many industries, including service industries and some governmental agencies find it necessary to operate 24 hours a day. Thus, because hours of work after 6:00 p.m. are generally less desirable than the aforementioned “daylight hours”, employers have often times agreed to pay differentials and/or additional compensation for those employees working these night shift hours. The Postal Service is no exception and, its Policy/Rules, as set forth in the ELM, provides that “night differential is a premium which is paid to eligible employees for all work and paid training or travel time performed between 6:00 p.m. and 6:00 a.m.” Thus, the USPS reference for this additional compensation includes a twelve-hour window of time, which arguably generally entails the hours least desired by employees. However, be that as it may, and as the Union points out, employees often times bid into jobs that include scheduled shifts encompassing these scheduled hours because of the additional pay.

Also, this arbitrator is cognizant of the fact that some employees desire these “night” hours for personal and/or familial reasons.

In addressing the issue herein, suffice it to say that arbitrators are held to the direction and guidance of the parties’ collective bargaining agreement. Thus, the primary authority for the Postal Service’s position stems from Article 8.7, which provides that ten percent (10%) of the base hourly straight time rate shall be paid “For time worked between the hours of 6:00 p.m. and 6:00 a.m.” Additionally, they allude to the ELM, which is incorporated into the agreement via Article 19, at Section 434.2 which, in defining night differential, states that it is to be paid for all work performed during the designated hours. Despite this, however, there are instances that are enumerated at Section 430 of the ELM that include Court Leave, Military Leave, Continuation of Pay (COP) status and the rescheduling of an employee to day work as a result of an on the job injury or compensable training, in which night differential is paid to employees. It is, however, significant that the aforesaid specifically enumerated situations are such that they are not within the control of supervision/management. It is likewise notable that payment of night differential for administrative leave, although not listed, is likewise not excluded. The ELM provides for certain “Events and Procedures for Granting Administrative Leave” by postal officials. These are set forth at Section 519 of the ELM and include Acts of God, Civil Disorder, State and Local Civil Defense Programs, Voting or Registering to Vote, Blood Donations, Funeral Services relative to veterans or relatives who died in a combat zone, Postmaster Organizations, Physical Exams for Entry Into the Armed Forces, Relocation Leave and First Aid Examination and Treatment for On the Job Injury or Illness. If any of these scenarios occur and, for example, a Postmaster authorizes administrative leave for an “Act of God” then the ELM requires that this be “without charge to annual or sick leave and without loss of pay.” Therefore, because an employee who may fall into one of the above categories or, who may be placed on administrative leave for another reason, such as in the instant case, and has not actually performed work, the question/issue surfaces as to whether he should be paid the rate of pay that he or she would normally receive had the employee been on duty. It is my opinion that the intent of Section 519 of the ELM is clear in this regard, i.e., that an employee should be paid whatever the rate of pay he would have otherwise been paid had the employee not been placed on administrative leave. To read anything other than this into this clause so as to preclude an employee the rate of pay he would normally be paid on his regular tour of duty would mean that the clear and concise

language of this clause would be disregarded. It would, in effect, also mean that when an employee is placed on administrative leave and in the event his tour of duty falls or fell within the designated night differential window of hours, then he would be on administrative leave with loss of pay.

Section 5 19.1 does not state that the employee shall be paid without loss of his base and/or regular pay, nor does it state without loss of his premium pay, but rather simply “without loss of pay.” Thus, whatever his “pay” would have otherwise been had he been on duty must be considered his “pay” for purposes of this provision. It is interesting to note that a person who is scheduled for a tour of duty during night differential hours would most likely not be taking/afforded administrative leave within such hours in a number of those instances falling within the umbrella of reasons for authorizing such leave. These would include, for example, leave for registering to vote, attending a veteran’s funeral or to donate blood, situations which normally occur or take place prior to 6:00 p.m. or after 6:00 a.m. In the instant case, the Postmaster took the initiative to place the grievant on administrative leave pending an investigation of his misconduct. Had the Postmaster instead issued disciplinary action at the outset and, if this action would have been ultimately overturned and the employee ordered to be made whole, it is undisputed that the employee would have received his night shift differential. However, by placing the employee on administrative leave would, if the Postal Service’s position is to be accepted, be a method by which the investigation could be prolonged prior to the issuing of discipline, thereby precluding the payment of night shift differential during the prolonged investigation in the event the discipline was ultimately overturned.

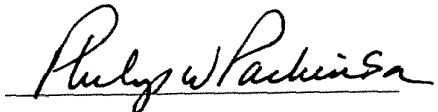
The Postal Service’s argument that the use of the phrase “for all work” and the word, “performed” strengthens their position, is well intentioned but misplaced. It is simply good grammatical structural phrasing of the sentence and/or writing of a basic contract clause to define a differential payment between certain hours of the day as being “for all work performed,” rather than stating, “for all work”. Secondly, the words could be included to preclude, in addition to further clarification set forth in the ELM, night differential payment for work performed that may be a part of an employee’s daily tour but that does not fall within the designated hours. For example, an employee could conceivably work only a portion of his tour after 6:00 p.m. Thus, the parties may have intended by this choice of words that this employee would receive the night differential only for those hours worked after 6:00 p.m. A more compelling reason why this

argument is misplaced, however, is as heretofore noted, that the administrative leave provisions mandate that an employee placed on such leave be placed there without loss of pay. The clear language, as well as equitable interpretation of this clause is that the employee must be paid the amount of pay that he otherwise would have received had he been on his regular scheduled tour of duty.

Finally, the Postal Service has argued that it has implemented the Administration Leave provision in this fashion for a number of years and it therefore constitutes a binding past practice and thus is illustrative of the intent of the parties. They point to a 1986 grievance in which they denied a grievance on this same issue at Step Four and emphasize that the Union did not appeal it further. However, in reviewing the grievance file, this type of argument was never included and/or raised in the Postal Service's arguments during the Steps of the grievance procedure prior to arbitration. A new argument presented for the initial time at this stage of the proceedings must be precluded. Such may perhaps appear harsh and/or unconventional, but nevertheless it is a standard evidentiary rule that has been upheld via National Postal Arbitration Awards and in numerous regional postal arbitration decisions. At any rate, this showing of an instance of denial of a night differential payment while on administrative leave is not, per se, albeit rendered at Step Four, sufficient to establish what is generally considered necessary to qualify as a binding past practice. The latter entails a consistent administration of a matter or a work method that can be shown to have been well known by both parties, and accepted by both parties for a long period of time. Such was not evidenced here.

AWARD

The grievance is granted. The grievant shall be paid night differential for the period he was on administrative leave. Furthermore, in the future, employees placed on administrative leave shall be paid night differential if they would have otherwise been eligible/entitled to such differential had they not been placed on administrative leave.


PHILIP W. PARKINSON

December 8, 2000
Washington, Pennsylvania